

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.04.2019

Delivered on: 17.07.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.R.P(PD).No.2715 of 2017

and

CMP.No.12910 of 2017

1. V. Kamaraj

...Petitioner

2. V. Rajeshwari

Vs

Kalaimani

...Respondent

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India praying to set aside the order passed in I.A.No.377 of 2016 in O.S.No.190 of 2010 on the file of the Principal Sub Court, Krishnagiri.

For Petitioners : Mr. P.Mani
For Respondent : Mr. T.S.Baskaran

ORDER

The first defendant in O.S.No.190 of 2010 is the revision

petitioner before this Court.

2. This Civil Revision Petition is filed challenging the order passed by the Principal Subordinate Judge, Krishnagiri in an application filed by the defendant seeking to send Ex.B1 and B2 (Cell phone and CD) and direct the plaintiff to give her voice samples before the expert working in the Tamil Nadu Forensic Science Department at Chennai through court Commissioner by issuing a warrant of commission and to obtain the expert opinion regarding the disputed voice of the plaintiff in Ex.B1 and B2 and voice sample taken by the expert.

3. This application was numbered in I.A.No.377 of 2016. The following are the facts proceeding to the filing of the present Writ Petition and parties are arrayed in their same litigative status as in the suit.

4. The plaintiff had filed the suit O.S.No.190 of 2010 on the file of the Principal Subordinate Court, Krishnagiri for Specific Performance of an agreement of sale dated 31.12.2007 executed by the first defendant for himself and as power agent of defendants 2 to 4.

5. The plaintiff's case was that after the execution of the

agreement of sale under which she had agreed to purchase the suit property for a total sale consideration of Rs.8,50,000/-, she had paid an advance of Rs.7,50,000/- to the first defendant in the presence of witnesses. The terms of the agreement was that the balance sale consideration should be paid within a period of twenty four months from the date of the agreement of sale. It was the further case of the plaintiff that despite her several demands to the defendants to execute the agreement of sale, since the plaintiff was ready and willing to proceed further with the agreement of sale, the first defendant did not come forward to perform his part of the agreement.

6. Meanwhile, the first defendant had instigated one of his sisters one Vasugi to file a suit for partition. Accordingly, she had filed a suit O.S.No.88 of 2008 on the file of the Subordinate Court, Krishnagiri against the plaintiff, her husband K.Madesan and the defendants 1 to 4 and others for partition and separate possession of her 1/10 share in the suit properties and other properties.

7. The plaintiff would contend that even if the said G.Vasugi is entitled to a share in the properties equities can be worked out and the

suit property could be allotted to the share of the plaintiff.

8. Since stalemate continued, the plaintiff had issued a legal notice dated 11.12.2009, despite which the defendants 1 to 4 had neither sent any reply nor did they comply with the demands made in that notice. Hence, the plaintiff was constrained to file the suit in question.

9. The first defendant had filed the written statement and the respondent 2 to 4 had adopted the said written statement. It is the contention of the defendant that he had never agreed to sell the suit property to the plaintiff and the agreement of sale had come to be executed only in view of the fact that the first defendant was in an urgent need of a loan. The plaintiff had agreed to lend the said amount and as a security he wanted the first defendant to execute the agreement to sell his properties by way of security and pay loan interest at the rate of 36 per cent per annum on the loan amount.

10. The first defendant wanted a loan of Rs.7,50,000/- which the plaintiff and her husband had also agreed. However, after the execution of the agreement dated 31.12.2003, only a sum of

Rs.2,50,000/- was paid and the plaintiff had promised to pay the balance sum of Rs.5,00,000/- as soon as registration was done by raising money from third party sources. However, the plaintiff went back on the terms. Ultimately, it is the case of the first defendant that he had paid the entire sum of Rs.2,50,000/- and had been asking the plaintiff to handover the documents and also the agreement of sale. However the plaintiff was putting of the same under one pretext or the other. The defendant would further contend that the suit property is worth more than Rs.60,00,000/- and no sane person would agree to sell such a valuable property for a paltry sum of Rs.8,50,000/-. He had denied all the allegations other amounts in the complaint. The plaintiff had come forward with a fraudulent suit with a sole intention to knock away the property. In the written statement the first defendant would contend that he had recorded a conversation between the plaintiff, her husband and himself that would establish the true facts. Therefore the first defendant sought for dismissal of the suit for specific performance.

11. During the cross examination of the plaintiff, the first defendant had marked a cell phone and a CD as Exhibits B1 and B2

which was denied by the plaintiff. Therefore, in view of the denial, the first defendant had come forward with the application to take the voice sample of the plaintiff and compare with the voice in Exs. B1 and B2. The first defendant would contend that the expert opinion was essential for establishing his case that the document in question is not actually an agreement of sale but is only a security for the loan.

12. The said application was resisted by the plaintiff inter alia contending that the petition was bereft of details as to the date on which the conversation had taken place, the number of the cell phone in which the same was recorded and also the particulars of the conversation in the written statement.

13. The plaintiff would submit that the written statement was prepared as early as on 08.04.2011 and the first defendant had kept silent all along and now when the trial was over has come forward with this petition. He would contend that the cross examination of the plaintiff was itself spread over several hearings and the first defendant had also initiated criminal proceedings against the plaintiff. The said application was dismissed and the further appeal and revision also

turned to be futile. The petition to send for expert opinion has been taken only after evidence had been closed on the side of the defendants. The plaintiff would submit that the above application is filed only to protract the proceedings.

14. After a detailed enquiry the learned Principal District Judge, Krishnagiri proceeded to dismiss the said petition on the ground that the evidence was totally bereft of detail of the cell phone and CD and the said application was also highly belated. Challenging the said order, the first defendant has filed the above Civil Revision Petition.

15. Mr.P.Mani, learned counsel arguing on behalf of the revision petitioner would contend that even in his written statement the defendant had stated about the CD as well as the cell phone and therefore it cannot be stated that the application is an after thought. He would further contend that without marking the said document he cannot seek to have the same compared with the voice of the plaintiff which could be taken only on the directions of the Court. He would, in support of his contentions, rely upon the following judgements:

1. "Shafhi Mohammad Vs. State of Himachal [reported in

AIR 2018 SCC page 714J"

2. "Vikram Singh @ Vicky Walia and Another Vs. State of Punjab and Another reported in [2017 AIR (SC) 3227]"

16. Per contra, Mr.T.R.Baskaran appearing on behalf of the respondent would contend that it is no doubt true in the written statement the first defendant had made a mention about the cell phone and the CD but however no details regarding the date on which the conversation had been recorded, the place where it was recorded, the cell phone in which the same was recorded and how the information had been stored on the compact disc has been provided. These details are not found either in the written statement or in the application calling for expert opinion. In support of his arguments he would rely upon the following Judgments:

1. Anvar P.V. Vs. P.K.Basheer and another [reported in (2014) SCC Page 473 and

2. Saidai Sa.Duraisamy Vs. Stalin M.K. [reported in 2016-5-L.W. page 448]

17. Heard the counsel appearing for the parties on either sides

and perused the papers.

18. In the written statement filed by the first defendant on 08.04.2011 he would state as follows:

"Subsequently the plaintiff's husband gave false promises and gained time. The conversation between the 1st defendant and the plaintiff and her husband have been recorded by the 1st defendant and the same would established what really transpired between he 1st defendant and the plaintiff and her husband."

19. This written statement does not show any details with reference to the place of conversation, date of conversation and the manner in which the recording has been done.

20. In the application which has been filed in support of the I.A.No.377 of 2016, the first defendant would state as follows:

"I have produced cell phone and C.D. wherein the plaintiff while having conversation with me admitted that the sale agreement was taken by way of security for the loan availed by me. But while cross examining the plaintiff

who was examined as PW1 she had denied that she had any such conversation with me and it is further stated by her that the voice of the lady found in Ex.B1 and B2 was not that of her."

21. Therefore it is only during the cross examination that the plaintiff had come forward with a contention that the recording was done on cell phone which was later transcribed onto a compact disc. At the very first instant, namely, at the stage of filing of the written statement the first defendant had not given any such details. Even in the affidavit that has been filed in support of the petition the first defendant has not stated about the cell phone number from which the call had come and the cell phone number to which the call had been made.

22. In the Judgment relied upon by the revision petitioner namely **"Shafhi Mohammad Vs. State of Himachal [reported in AIR 2018 SCC page 714]"** the Hon'ble Supreme Court has held that the certificate as contemplated under section 65B of the Evidence Act is required only in cases where the electronic evidence is produced by

a person who is not in possession of the device from which the document is produced. In the instant case it is the first defendant who has produced the cell phone and CD by stating that it was the instrument in which the conversation had taken place between him and the first defendant. Therefore this Judgment would not come to the rescue of the first respondent revision petitioner.

23. In the Judgment "**Saidai Sa. Duraisamy Vs. Stalin Sa. Duraisamy [reported in 2016-5-L.W. page 448]**", this Court has discussed in detail the ingredients of section 65 B of the Evidence Act relating to admissibility of electronic record and gone on to held as follows :

14. It cannot be forgotten that when a statement has to be produced in evidence in terms of Section 65-B of the Indian Evidence Act, it should be accompanied by a certificate which should identify the electronic record containing the statement and describe the manner in which it was produced; furnish the particulars of the device involved in the production of the electronic record showing that the same was produced by a computer and showing compliance with the conditions of

Sub-section (2) of the Section 65-B of the Act"

24. The Hon'ble Supreme Court of India in the judgment **Anvar P.V. Vs. P.K. Basheer and Others [reported in (2014) 10 SCC page 473]** has held as follows:

"17. Only if the electronic record is duly produced in terms of Section 65-Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45A-opinion of Examiner of Electronic Evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65-B of the Evidence Act are not complied with, as the law now stands in India.

20. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65-A of the Evidence Act, read with Section 59 and 65-B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65-

B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Section 63 and 65 has to yield."

25. In the light of the above Judgments and considering the fact that in the written statement which is the earliest point at which reference to the recording has been made, no details of the instrument in which such a recording has been provided by the first defendant revision petitioner. Considering the fact that the suit is of the year 2010, the learned Principal Subordinate Judge, Krishnagiri is directed to dispose of the suit O.S.No.190 of 2010 as expeditiously as possible not later than three months from the date of receipt of a copy of this order.

26. In view of the above, this Court is of the considered view that order passed by the Principal Subordinate Judge does not require interference. Consequently, the Civil Revision Petition stands dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

17.07.2019

mrn

Index : Yes/No
Speaking order/non-speaking order

P.T.ASHA, J.,

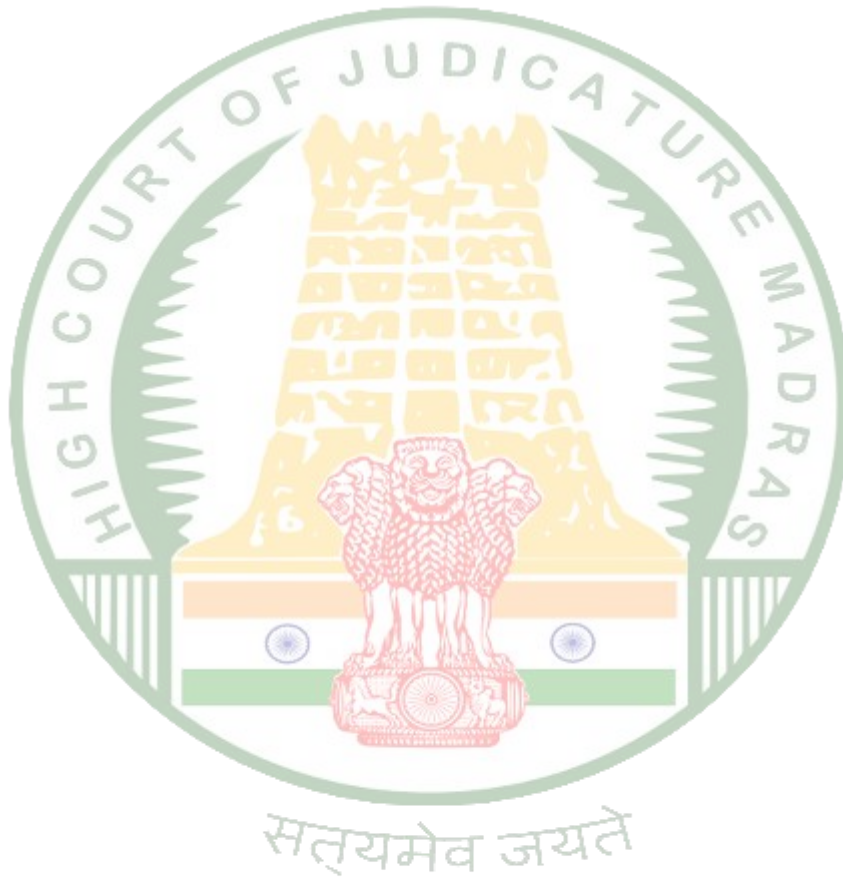
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Pre-Delivery order in
C.R.P(PD).No.2715 of 2017
and
CMP.No.12910 of 2017

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