

THE HIGH COURT FOR THE STATE OF TELANGANA::
AT HYDERABAD

CIVIL REVISION PETITION Nos.457 and 604 of 2019

Between:

Abdul Rafi @ Abdul Rawoof, S/o.Abdul
Rahman, Aged 71 years, Occ: Business,
R/o.Karne Village under Makthal Mandal,
At represent R/o.Makthal village and
Mandal.

..... Petitioner.

And

1. Venkataiah, died by L.Rs. 2 and 3 and
others.

..... Respondents.

Date of Judgment pronounced on : 19-06-2019

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

1. Whether Reporters of Local newspapers : Yes/No
May be allowed to see the judgments?
2. Whether the copies of judgment may be marked : Yes
to Law Reporters/Journals:
3. Whether The Lordship wishes to see the fair copy : Yes/No
Of the Judgment?

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CIVIL REVISION PETITION Nos.457 and 604 of 2019

%19-06-2019

Abdul Rafi @ Abdul Rawoof, S/o.Abdul Rahman, Aged 71 years, Occ: Business, R/o.Karne Village under Makthal Mandal, At represent R/o.Makthal village and Mandal.

..... Petitioner.

Versus

\$ Venkataiah, died by L.Rs. 2 and 3 and others.

.....Respondents.

< **GIST:**

> **HEAD NOTE:**

!Counsel for the Petitioner : Sri Karnam Ramesh

^Counsel for respondent-2&3 : Sri G.Narender Raj

? **Cases referred**

1. (2007) 5 SCC 730
2. (2013) 2 SCC 114
3. (2011) 4 SCC 240
4. AIR 1966 SCC 1457
5. (2000) 9 SCC 241
6. (2010) 4 SCC 491
7. (2010) 9 SCC 712
8. (2010) 8 SCC 423
9. 2017 (6) ALD 300
10. 2018 (5) ALD 396.
11. AIR 2003 SC 4548
12. AIR 1961 SC 1655
13. (2016) 1 SCC 670
14. 2016 (Suppl) Civil Court Cases 0163
15. 2001(3) SCC 1
16. (1998)3 ALT 96 (FB) = 1998 (3) ALD 478(FB)
17. (2006) 6 ALD 176 (DB)
18. (2000) 3 ALD 134 (DB)

THE HONOURABLE SRI JUSTICE M.S. RAMACHANDRA RAO**C.R.P.Nos.457 and 604 of 2019****COMMON ORDER:**

These two Revisions arise between the same parties out of the same suit and so they are being disposed of by this common order.

2. Petitioner is defendant in O.S.No.106 of 2008 on the file of the Junior Civil Judge at Narayanpet.

3. Respondent filed the suit against petitioner for recovery of possession of the suit schedule property, rectification of registered sale deed dt.03-08-2004 by deleting the word/figures 'Sy.No.335' and substituting the word/ figures as 'Sy.No.622' therein. His plea is that in the regd. sale deed executed in his favor by the petitioner, the 'Sy.No.622' had to be mentioned and not 'Sy.No.335'.

4. Written statement was filed by petitioner.

C.R.P.No.604 of 2019

5. I.A.No.92 of 2018 was filed by respondent seeking to mark photocopy of an agreement of sale dt.23-06-2004 allegedly executed by petitioner contending that prior to the execution of the registered sale deed dt.03-08-2004 in his favour (wherein survey number was incorrectly mentioned), there was an agreement of sale also executed by petitioner on 23-06-2004 mentioning the correct 'Sy.No.622' for the subject land; that the original of the said agreement of sale was

with the petitioner; and so he may be permitted to file photocopy of the same. He also alleged that he issued a notice to the petitioner to produce the original of agreement of sale and so the photocopy of the said agreement of sale may be received as secondary evidence.

6. In the written statement in para-3, petitioner had clearly denied that he had entered into any agreement of sale with the respondent. Petitioner also filed a counter-affidavit in the said I.A opposing the said application stating that he did not take back the original agreement of sale dt.23-06-2004. He also pointed out that the respondent did not plead in the plaint about the agreement of sale dt.23-06-2004 being taken back by petitioner and only in order to get wrongful gain he has falsely claimed that the original agreement of sale was taken back by the petitioner.

7. By order dt.10-04-2018, the Court below allowed the said application. It held that though petitioner had denied the said agreement of sale having been entered into prior to the execution of the registered sale deed on 03-08-2004 in favour of respondent, since the respondent mentioned about its existence, non-filing of the photocopy of the agreement of sale at the time of filing of the suit is not by itself a bar to the respondent to rely on the said document. It also recorded that even if respondent did not lay any foundation for reception of secondary evidence while preparing the plaint, since he had mentioned about the agreement of sale dt.23-06-2004, he is entitled to adduce secondary evidence of the same. It noted that

respondent had issued notice u/Sec.66 of the Evidence Act, 1872 on 02-04-2018 at the time of filing of said I.A. and sufficient time was not given to the petitioner to answer the notice and yet, the respondent can be allowed to produce secondary evidence of the photocopy of the agreement of sale.

8. Assailing the same, the C.R.P No.604 of 2019.

9. Counsel for the petitioner contended that when the existence and execution of the said agreement of sale was denied by the petitioner, and when the respondent did not lay any foundation for marking photocopy /secondary evidence of the said document, the Court below erred in permitting him to file it.

10. Counsel for the respondent refuted the above conditions and supported the order passed by the Court below. He contended that the said document was already admitted in evidence and at this stage, after oral evidence was also recorded regarding it, the order in the I.A cannot be set aside.

11. I have noted the contentions of the parties.

12. In **J.Yashoda Vs. K.Shobha Rani**¹, the Supreme Court held that secondary evidence, as a general rule, is admissible only in the absence of primary evidence; in order to enable a party to produce secondary evidence, it is necessary for the party to prove *existence of and execution* of the original document. Secondary evidence of the

¹ (2007) 5 SCC 730

contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section 65.

13. This principle was also reiterated in **U.Sree Vs. U.Srinivas**² and it was also held that foundation has to be laid by the person seeking to adduce secondary evidence.

14. In **H.Siddiqui Vs. A.Ramalingam**³, the Supreme Court held that in a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the Court to allow a party to adduce secondary evidence. It also observed that the Court has an obligation to decide the question of admissibility of a document in secondary evidence *before* making endorsement thereon. It relied on its earlier decisions in **Raman Catholic Mission Vs. State of Madras**⁴, **State of Rajasthan Vs. Khemraj**⁵, **LIC Vs. Ram Pal Singh Bisen**⁶ and **M.Chandra Vs. M.Thangamuthu**⁷.

15. In **Shalimar Chemical Works Limited Vs. Surendra Oil and Dal Mills**⁸ also the Supreme Court reiterated that a trial Court cannot mark as Exhibits photocopies of documents in the face of objection raised by the opposite party and it should have declined to take them

² (2013) 2 SCC 114

³ (2011) 4 SCC 240

⁴ AIR 1966 SCC 1457

⁵ (2000) 9 SCC 241

⁶ (2010) 4 SCC 491

⁷ (2010) 9 SCC 712

⁸ (2010) 8 SCC 423

on record as evidence and left it to the party who filed them to support its case by whatever means it proposed rather than leaving the issue of admissibility of those copies open and hanging, by marking them as Exhibits subject to objection of proof and admissibility.

16. The Court below, in the impugned order has itself recorded that petitioner had denied in the written statement itself the execution of the alleged agreement of sale dt.23-06-2004, photocopy of which was sought to be filed by the respondent, as secondary evidence. It has also recorded that no foundation was laid by the respondent for adducing secondary evidence. It has also recorded that notice under Section 66 C.P.C. was issued by respondent to petitioner on 02-04-2018, the same day on which I.A.No.92 of 2018 was filed and adequate time was not given to petitioner to respond to it.

17. In these circumstances, when the very *existence and execution* of the said agreement of sale is disputed by the petitioner, the Court below ought not to have permitted the respondent to adduce as secondary evidence, photocopy of the agreement of sale dt.23-06-2004, without the respondent establishing it's existence and execution and when the preconditions for adducing secondary evidence are not fulfilled by the respondent.

18. Therefore, the order dt.10-04-2018 in I.A.No.92 of 2018 in O.S.No.106 of 2008 cannot be sustained and it is accordingly set aside and C.R.P.No.604 of 2019 is allowed. No costs.

CRP No.457 of 2019

19. Petitioner filed on 22-11-2018, I.A.No.317 of 2018 under Order 13 Rule 3 C.P.C. for de-exhibiting the agreement of sale dt.23-06-2004.

20. In the affidavit filed in support of the said application, he contended that the Court had marked the said agreement of sale dt.23-056-2004 as Ex.A-5 subject to objection and the respondent was also partly cross-examined; that Ex.A-5 was inadmissible in evidence as per the Evidence Act, 1872; that P.W.1 died in the meantime before the petitioner could conclude the cross-examination; and so the document requires to be de-exhibited since it is a manipulated and a created document.

21. Counter-affidavit was filed by respondents, who are L.Rs. of the deceased sole plaintiff, opposing the said application. They contended that Ex.A-5 was marked subject to objections, and what type of objections can be raised is a matter to be looked into only at the time of arguments and it cannot be de-exhibited, once it has been marked. It is also contended that petitioner had waived the formal proof of Ex.A-5 and had acquiesced in it's marking.

22. Though it observed that *Ex.A-5 was marked subject to objection that the document did not fulfill conditions under Section 66 of the Evidence Act, 1872 and also as C.R.P. was preferred against the*

order passed in I.A.No.92 of 2018, by order dt.27-12-2018 the Court below dismissed the said application.

23. But later in the order it observed that the order passed by it in I.A.No.92 of 2018 had not been challenged and that it had attained finality.

24. This is not correct because the order passed by the lower Court on 10-04-2018 in I.A.No.92 of 2018 had been challenged in C.R.P.No.604 of 2019 and the same has been set aside by me today as mentioned above.

25. The case on hand is clearly one of those cases where the Court inadvertently and without application of mind admitted the document in question in evidence casually on 10-4-2018. Though the trial Court has to judicially determine the matter as soon as the document is tendered in evidence and before it is admitted and marked as an exhibit in the case, the trial Court failed to do so in the instant case.

26. Learned counsel for the respondents contended that applications for de-exhibition of documents are not maintainable.

27. This plea is without any merit because of Or.XIII Rule 3 CPC which states:

“3. Rejection of irrelevant or inadmissible documents:- The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.”

28. This Court in **A.P.Laly v. Gurram Rama Rao**⁹ and in **S.Ranga Murali Krishna Reddy v. S.Yerri Vara Prasad Reddy**¹⁰ has held that such applications are maintainable relying on Or.XIII R.3 CPC and the decision in **R.V.E.Venkatachala Gounder Vs. Arulmigu Visweswaraswamy and V.P.Temple and another**¹¹. In **R.V.E.Venkatachala Gounder** (11 supra), the Supreme Court held:

“19. Order 13 Rule 4 CPC provides for every document admitted in evidence in the suit being endorsed by or on behalf of the court, which endorsement signed or initialled by the Judge amounts to admission of the document in evidence. An objection to the admissibility of the document should be raised before such endorsement is made and the court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend the document being endorsed as admitted or not admitted in evidence. In the latter case, the document may be returned by the court to the person from whose custody it was produced.

20. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as “an exhibit”, an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised

⁹ 2017 (6) ALD 300

¹⁰ 2018 (5) ALD 396.

¹¹ AIR 2003 SC 4548

at any stage subsequent to the marking of the document as an exhibit.”

29. In the instant case, the petitioner had opposed the receipt of photo copy of the agreement of sale in his counter filed in I.A.92 of 2018 and so without deciding it, the Court below could not have *marked it subject to objection that the document did not fulfill conditions under Section 66 of the Evidence Act, 1872 and also as C.R.P. was preferred against the order passed in I.A.No.92 of 2018.* The Court below therefore ought not to have admitted it at all without deciding the objection raised by the petitioner.

30. Counsel for the respondent relied on the decision in **Javer Chand and others Vs. Pukhraj Surana**¹². In the said judgment, an unstamped document was marked as an exhibit without any objection being raised by the other side. The Supreme Court observed that under Section 36 of the Stamp Act, 1899, there is a bar to revisit the question of admissibility of the said document on the ground that it was not properly stamped at a later point of time. The said decision has no application in the instant case since the objection in the instant case does not relate to insufficiency of stamp duty. Also in the instant case, the petitioner had opposed the receipt of photo copy of the agreement of sale in his counter filed in I.A.92 of 2018.

¹² AIR 1961 SC 1655

31. Next, he cited the decision in **K.Mallesh Vs. K.Narender and others**¹³. The said decision consists of two paragraphs and does not clearly mention the facts of the case, though it states that question raised in the said case was with regard to admissibility of two documents and that admissibility, reliability and registrability of the documents shall be considered independently only at the time of hearing of the trial and not prior thereto. This decision is contrary to the view taken by the Supreme Court in **Shalimar Chemical Works Limited** (8 supra) and to Order XIII Rule.3.

32. The decision of the Division Bench of the Hyderabad High Court in **Tamilnadu Mercantile Bank Limited Vs. M/s.Sunitha Industries**¹⁴ also cited by the learned counsel for the respondent states that *if no objection was raised at the time of marking of Photostat copies of documents before the trial Court, and the trial Court received and admitted the documents in evidence assigning Exhibit number, it amounts to impliedly permitting the party to adduce secondary evidence though no specific order is passed permitting to adduce secondary evidence.* Since in the instant case, petitioner had specifically objected through counter-affidavit filed in I.A.No.92 of 2018 for receipt of the photocopy of the agreement of sale dt.23-06-2004 and the said objection was not decided by the trial Court which it ought to have done, its action cannot be sustained.

¹³ (2016) 1 SCC 670

¹⁴ 2016 (Suppl) Civil Court Cases 0163

33. No doubt, in **Bipin Shantilal Panchal Vs. State of Gujarat and another**¹⁵ the Supreme Court did make an observation that it is an archaic practice that during evidence collecting stage whenever any objection is raised regarding admissibility of any material in evidence, the Court does not proceed further without passing order on such objection; that it is not proper to do so; and the Court should merely take note of such objection and mark the objected document *tentatively* as an Exhibit in the case subject to such objections to be decided at the last stage in the final judgment. The said case arose under the N.D.P.S. Act and was not a civil proceeding where Order XIII Rule 3 C.P.C. would apply. This decision is also contrary to the decision of the Supreme Court in **Shalimar Chemical Works Limited** (8 supra).

34. We are now faced with a situation where there is a conflict between the decisions of co-equal bench decisions of the Supreme Court in **R.V.E. Venkatachala Gounder** (11 supra) (that objections to admissibility should be raised *before* the endorsement under Or.XIII R.4 is made and the Court is obliged to form its opinion on the said question and express it and that on such opinion would depend the document being endorsed as admitted or not) and **Shalimar Chemical Works Limited** (8 supra) (which states that a trial Court cannot mark as Exhibits photocopies of documents in the face of objection raised by the opposite party and it should have

¹⁵ 2001(3) SCC 1

declined to take them on record as evidence and left it to the party who filed them to support its case by whatever means it proposed *rather than leaving the issue of admissibility of those copies open and hanging, by marking them as Exhibits subject to objection of proof and admissibility*) on the one hand and **K.Mallesha** (13 supra) and **Bipin Shantilal Panchal** (15 supra) on the other hand which suggest that such objections have to be put off and decided only *after trial* at the hearing of the suit. What does one do in such circumstances?

35. In Ushodaya Enterprises Ltd. vs. Commissioner of Commercial Taxes, A.P., Hyderabad¹⁶, a Full Bench of this Court held :

“22. Without making inroads into the settled principles governing the binding force of a decision of the Supreme Court either by virtue of its precedential value or the mandate of Article 141, we can safely evolve the principle that in a case of conflict arising from the decisions of co-equal benches of the Supreme Court, the High Court is free to disregard the decision which is based on an obvious mistake of fact or the one which purports to follow the ratio of an earlier decision though such ratio is found to be non-existent. The High Court can legitimately decline to follow such decision and follow the earlier decision which is backed by reasoning-whether it is acceptable to the High Court or not, and which is free from any such apparent flaw. We are unable to persuade ourselves to subscribe to the view that the later decision should be automatically followed despite the fact that it rests on a conclusion based on an erroneous impression that an earlier decision took a

¹⁶ (1998)3 ALT 96 (FB) = 1998 (3) ALD 478(FB)

particular view which in fact it has not taken. By doing so, we are neither questioning the hierarchical superiority of the Supreme Court nor the higher wisdom of the Hon'ble Judges of the Supreme Court. We are preferring one decision to the other - both rendered by Division Benches, for obvious reasons so as to avoid an incongruity leading to travesty of justice."

36. Two Division benches of this Court in **Jonnalagadda Samrajyam vs. Registrar, The Special Court constituted under A.P. Land Grabbing (Prohibition) Act, 1982¹⁷** and in **Panduranga traders and others v. State Bank of India¹⁸** also followed the decision in **Ushodaya Enterprises Ltd** (16 Supra) and reiterated that in the event of any divergence between two judgments rendered by co-equal benches, the view, which stands to reason, shall have to be preferred over the other.

37. Since the legal position has been elaborately discussed **R.V.E.Venkatachala Gounder** (11 supra) and in **Shalimar Chemical Works Limited** (8 supra), I deem it appropriate to follow the said decisions instead of **K.Mallesha** (13 supra) and **Bipin Shantilal Panchal** (15 supra).

38. In view of the said decisions, I hold that the application for de-exhibiting Ex.A5 agreement of sale dt.23-6-2004 was rightly filed by petitioner and the Court below erred in dismissing it because objection to receipt of the said document was raised by the petitioner and without deciding it, the Court proceeded to receive and admit it in

¹⁷ (2006) 6 ALD 176 (DB)

¹⁸ (2000) 3 ALD 134 (DB)

evidence with the endorsement mentioned in para 22 above, which it ought not to have done.

39. Accordingly CRP No.457 of 2019 is also allowed. Consequently any evidence recorded after the order dt.10-4-2018 in I.A.No.92 of 2018 was passed shall be eschewed; and recording of the evidence from the said stage shall be done afresh without the agreement of sale dt.23-6-2004 (Ex.A5) being taken into account. No costs.

40. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 19-06-2019

Note: L.R. copy to be marked.

B/o.
Vsv