

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

Civil Revision Petition No.7595 of 2018

ORDER:

This Revision petition is filed assailing the order dated 19.11.2018 passed in I.A. No.114 of 2018 in O.S. No.306 of 2011 of the I Additional Senior Civil Judge at Warangal.

2. The petitioner herein is the defendant in the said suit.
3. The said suit was filed by the respondents herein against the petitioner for declaration of title to the plaint schedule property and for perpetual injunction restraining the petitioner from interfering in any manner with their alleged possession and enjoyment of the suit schedule property.
4. In the plaint, they contended that the suit land is self acquired property of the father of the petitioner by name Aga Rao, and he had executed a will deed dated 06.09.2001 bequeathing suit schedule property to the respondents and that Aga Rao died on 23.06.2005 and thereafter, the respondents inherited the property, but the petitioner managed the revenue authorities and got pattadar pass book and started interfering with the possession and enjoyment of the respondents.
5. Written statement was filed by the petitioner opposing the suit claim and contending that much prior to the execution of the alleged execution of the said will dated 06.09.2001, on 08.11.1992 there was a division of the family properties and a partition agreement was executed in writing in the presence of the father of the petitioner and the first respondent and elders, and under the terms of the said partition, the suit schedule property was

allotted to the petitioner. On the basis of the said partition agreement, pattadar pass book are said to have been issued to him. The very execution of the will dt. 06.09.2001, in favour of the first respondent, is denied and it is contended that it is a fabricated and concocted will.

6. After the respondents' evidence was closed, the matter was coming up for evidence of the petitioner.

7. He then filed I.A. No.114 of 2018 under Section 65 of the Evidence Act seeking permission of the Court to permit him to mark a document styled as memorandum of agreement of partition dt. 08.11.1992 as secondary evidence.

8. In the affidavit filed in support of the said application, it was contended that the original of the document dt. 08.11.1992 was initially in the custody of Aga Rao, during his life time, and thereafter, it was retained by the first respondent. He also contended that he served notice on 1st respondent under Order 12 Rule 8 CPC to produce the original of the agreement of the partition dated 08.11.1992, but he failed to do so. Therefore, he contended that he must be permitted to lead secondary evidence and to mark the Xerox copy of the same available with him.

9. Counter affidavit was filed by the first respondent opposing the said application. They denied that there was any such memorandum of agreement of partition dt. 08.11.1992 or that it was in their custody after the death of Aga Rao. They contended that there was no original deed of agreement dt. 08.11.1992. Therefore, there is no question of the respondent suppressing it.

10. By order dt. 19.11.2018, the Court below dismissed the said application holding that the burden is on the petitioner to prove that there was partition on 08.11.1992, as alleged, and it was reduced into writing, since the respondents were disputing that any such partition was affected and that there is no such document in existence. It observed that so far no material has been placed by the petitioner in respect of the partition that was effected on 08.11.1992. It held that since the petitioner intends to rely on the Photostat copy of the partition deed, he has to establish the existence of the original document first. It also observed that under Section 17 of the Registration Act, partition deed must be registered and must be executed on sufficient stamp paper.

11. Assailing the same, this Revision is filed.

12. Counsel for the petitioner contended that the Court below erred in holding that the Photostat copy of the memorandum of agreement of partition dt. 08.11.1992 cannot be received as a secondary evidence and the Court below was not correct in insisting that petitioner should first establish that there was such a partition agreement dt. 08.11.1992 and that the said document was executed on the said date. He places reliance on the judgment of this Court in **M.ARUNA Vs. TRILOK KUMAR SANGHI**¹ wherein this Court had held that even if there is a denial of the existence of the original document, much less custody of the document, the Court can still mark it and the such aspect can be gone into at an appropriate stage. It further observed that there may be cases where the opposite party may deny the very existence of the document or custody of the original for extraneous reasons and with an ulterior motive, and in every such case, necessarily the

¹ 2009 (3) ALD 553

Court cannot come to the conclusion that such secondary evidence is not genuine and not *bona fide*.

13. Counsel for the respondents refuted the said contention and relied upon the judgment of the Supreme Court in **J.YASHODA Vs. K.SHOBHA RANI**² wherein it categorically held that secondary evidence is admissible only in the absence of primary evidence, and the secondary evidence can be given in the absence of better evidence, which law requires to be given first, when a proper explanation of its absence is given. It also observed that Section 65 of the Evidence Act deals with the proof of the contents of the documents tendered in evidence and in order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. It noted that Section 65 permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned but the conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. It clarified that secondary evidence of the 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.

14. In view of the above decision, I am of the opinion that the view expressed in the citation in **M.ARUNA** (1 supra) that even if there is no denial of the existence of the original document, secondary evidence of the document can be taken and the aspect of the existence of the original document can be considered at an appropriate stage.

² (2007) 5 Supreme Court Cases 730

15. In the instant case, since the petitioner has not laid any foundation that there was a partition, as alleged by him, on 08.11.1992 between his father, first respondent and himself or that any such partition was reduced into writing, he could not have sought for receipt of the Photostat copy of the memorandum of agreement of partition dt. 08.11.1992 as secondary evidence.

16. Therefore, the Court below did not commit any error of jurisdiction in refusing to permit the petitioner to mark the Photostat copy of the memorandum of agreement of partition dt. 08.11.1992.

17. However, this does not preclude the petitioner from first adducing evidence about the factum of occurrence of alleged partition on 08.11.1992 and the said partition being reduced into writing and if such foundation is established, the Court below can, after hearing the respondents, consider receiving secondary evidence thereof, invoking Section 65.

18. In the result, with the above observations, this Revision Petition is dismissed. There shall be no order as to costs.

19. As a sequel, miscellaneous applications, if any, pending shall stand closed.

JUSTICE M.S. RAMACHANDRA RAO

Date: 07.03.2019
LSK