

C.R.P.(PD) No.411 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.03.2021

C O R A M

THE HON'BLE MRS. JUSTICE V.BHAVANI SUBBAROYAN

C.R.P.(PD) No.411 of 2021
and
C.M.P. No.3485 of 2021

K. Abhuthakir ... Petitioner

Vs.

G.K. Thangavel ... Respondent

Prayer: This Civil Revision Petition filed under Article 227 of the Constitution of India praying for to set aside the fair and decretal order dated 21.12.2020 made in I.A. No.2 of 2020 in O.S. No.175 of 2015 on the file of the IV Additional District and Sessions Court, Coimbatore.

WEB COPY

For Petitioner ... Mr.C. Prabakaran

For Respondent ... No Appearance

ORDER

The Civil Revision Petition has been filed under Article 227 of the Constitution of India praying for to set aside the fair and decreetal order dated 21.12.2020 made in I.A. No.2 of 2020 in O.S. No.175 of 2015 on the file of the IV Additional District and Sessions Court, Coimbatore.

2. The case of the petitioner is that the suit in O.S.No.175 of 2015 has been filed on the file of the District Judge, Coimbatore, by the plaintiff/petitioner herein for recovery of money based on the alleged mortgage. The mortgage deed was executed by the defendant/respondent herein in favour of the plaintiff/petitioner herein for borrowing the money. During the Trial, when the matter was posted for examination of the defendant side witness, the defendant/respondent herein has taken a specific stand that he did not borrow any money from the plaintiff/petitioner herein. One Eswari has borrowed money and she has given her title deed and the said title deed has been replaced by giving his title deed for which the plaintiff's brother i.e, Khader Hussain has given an undertaking by his own hand-writing in Rs.20/- stamp paper

dated 30.12.2013. The said original was not given to the defendant/respondent herein. Therefore, copy of the said undertaking is available with the defendant/respondent herein which was filed along with the written statement. In order to produce original to mark on the side of the defendant side, the said Khader Hussain who is the brother of the plaintiff/petitioner herein failed to produce original undertaking, in spite of the summons issued by the Court below. The plaintiff/petitioner herein and his brother colluded together with intention to prevent the defendant/respondent herein to produce original documents and evaded the service. The plaintiff and his brother managed to return the summons as if the said Khader Hussain is not available in the address mentioned in the undertaking letter dated 30.12.2013. As there is no alternative remedy, the defendant/respondent herein has filed I.A. 2 of 2020 in O.S. No.175 of 2015 under Section 151 CPC on its file seeking for to mark secondary evidence viz., xerox copy of the undertaking letter dated 30.12.2013 executed by plaintiff's brother Khader Hussain in the defendant's favour. The same was allowed by order dated 21.12.2020. Being aggrieved by the aforesaid order, the plaintiff/petitioner herein has filed the present Civil Revision Petition to set aside the same.

3. The learned counsel for the petitioner would submit that the xerox copy of the document cannot be allowed as evidence for any purpose to mark even as secondary evidence which is not emanated from the correct origin and the marking of xerox copy of the document is nothing but collecting the piece of unwanted evidences which does not have evidential value. Though the proof and relevancy of the document can be considered at the time of Trial, but the Xerox copy of the document cannot be marked at all, as does not arise from a proper origin. He further submitted that the defendant/respondent herein failed to follow the condition stipulated in the order 16 of CPC and the said application could not be maintainable in view of Sections 63, 65 and 66 of Indian Evidence Act. The xerox copy is no way connected and relevant to decide the present suit. Hence, the defendant/respondent herein cannot be allowed to mark the said document. Without considering the aforesaid aspects, the Court below has allowed the said interlocutory application stating that mere marking of document is not sufficient and it should be proved through by way of examining other evidences and copy was marked on the side of the petitioner/defendant

subject to the proof of relevancy. When the proposed document is not relevant to the suit, the Trial Court ought to have dismissed the application filed by the defendant/respondent herein. Hence, this Court may be pleased to set aside the order dated 21.12.2020 passed by the Court below.

4. Per contra, on the side of the defendant/respondent herein it was submitted before the Court below that original copy of the said undertaking is available with the petitioner's brother which xerox copy was filed along with the written statement. For marking of the original document, the defendant/respondent herein has filed an application and the Court below issued summon to produce the original undertaking. Despite that, he failed to produce the original undertaking and the summon was returned un-served. The petitioner and his brother colluded together with intention to prevent the defendant/respondent herein to produce the original documents and evaded the service. The said document is very much essential for the case as it only to prove case and marking of the secondary evidence is allowed as per Sections 63, 65 and

66 of the Indian evidence Act and after applying the mandatory provisions it can be marked as the secondary evidence. Therefore, he prayed that he is entitled to produce as the secondary evidence.

4. Heard, the learned counsel for petitioner and perused the material available on record.

5. Admittedly, the document is a xerox copy and by mere marking of document cannot be sufficient to hold that the document is proved and it is relevant. It is the duty of the party who produce the document to prove that the document is admissible and then only the lis can be decided. Originally, summon was issued to the plaintiff's brother and he has not turned out and the said summon was returned unserved. When collecting the evidence at the time of trial, any document marked by the parties, it can be received with the objection and it can be decided whether it is admissible one, genuine and relevant at the time of Judgment only and hence allowed the said application.

6. It is seen from the application filed by the defendant/ respondent herein under section 151 of CPC to permit the defendant/respondent to mark the xerox copy of the undertaking letter dated 30.12.2013 as secondary evidence executed by the petitioner's brother Khader Hussain in favour of the defendant/respondent herein. It is also seen that there is specific stand of the defendant/respondent herein that he did not borrow any money from the plaintiff/the petitioner herein as alleged and actually one Eswari borrowed money and she has given her title deed and the said title deed has been replaced by giving his title deed for which the respondent's brother i.e., Khader Hussain has given an undertaking by his own handwriting in Rs.20/- stamp paper dated 30.12.2013.

7. On going through the said averments, it is seen that originally defendant/respondent herein has filed an application for issuing of summons to produce the said document which has also been mentioned in the written statement filed before the Court below. The Court below also issued summon and the plaintiff's brother who is in possession of the said document, has not turned out with the same and in order to prove his case, he wanted the said person to produce the original. The Court below

also issued summon to the address which has been stated in the said undertaking. The brother of the petitioner has not received the said summon and evaded the service of summon. Hence, the defendant/respondent herein could not persuade the said person to bring the same before the Court and left the matter for default. Now he came up with the petition to mark the said xerox copy of the document which has also been filed along with the written statement on his side. The court below has also considered the aforesaid claim of the defendant/respondent herein and counter filed by the plaintiff/petitioner herein that the same cannot be marked and it cannot be relevant to the issue and therefore it cannot be allowed to mark the same as secondary evidence.

8. Admittedly, the defendant/respondent herein has tried at level his best to summon the said person, who is in possession of the original document but could not succeed. Hence, he preferred the Interlocutory application at least to mark Xerox copy available with him. The Court below after considering the submissions made by both parties, has allowed the said application on the ground that the mere marking of the said document is not sufficient to hold that the document is proved and it

is relevant and it is the duty of the party who produce the documents to prove that the document is admissible genuine and it is relevant to decide the lis at the time of trial. When objection is raised at the time of marking evidence regarding the admissibility of any such document, the trial Court can take note of such objection and mark the objected document as Exhibit subject to said objection and it can be decided at the time of trial. There is no illegality in adopting such stand by the trial Court wherein evidence can be verified that will not be put an end to the said issue regarding the admissibility of the said document and if the witnesses are examined regarding the said document, the clear picture regarding the validity of the said document and admissibility of the same comes out. The trial Court can determine the correctness of the said document and there is no error in arriving such finding when the same is received with the objection at the time of trial, the validity proof and relevancy can be decided by the Trial Court.

9. In view of the aforesaid observations, there is no illegality or infirmity in the order passed by the Trial Court. Hence, this Civil Revision Petition has no merits and it is liable to be dismissed.

V.BHAVANI SUBBAROYAN, J.,

lbm

10. In the result, this Civil Revision Petition stands dismissed. Consequently, connected miscellaneous petition is closed if any. There shall be no order as to costs.

02.03.2021

Lbm
Index: Yes/No.
Speaking/Non-Speaking order
Internet: Yes/No.

To:
The IV Additional District
and Sessions Court,
Coimbatore.

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