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C.R.P. (PD) .Nos.417 to 419 of 20



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.10.2021

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD).Nos.417 to 419 of 2017

and

C.M.P.No.1896 of 2017

The Managing Director,
Celebrity Corporate Club of City Center,
No.3, Anna Salai,
Chennai – 600 002.

.. Petitioner
(in all the cases)

Vs.

M/s. Art Ply and Veneers,
Represented by its Partner Mr.Mithesh,
No.168/463, Sydenhams Road,
Periyamet,
Chennai – 600 003.

.. Respondent
(in all the cases)

Common Prayer: These Civil Revision Petitions are filed under Article 227 of the Constitution of India against the fair and decretal orders dated 22.11.2016 passed in I.A.Nos.13071, 13545 & 13546 of 2016 in O.S.No.4864 of 2014 on the file of the XIII Assistant City Civil Court, Chennai.

In all the cases:

For Petitioner : Mr.A.Ilangovan

For Respondents : Mr.R.Karthikeyan



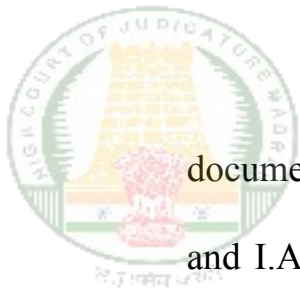
COMMON ORDER

(These matters are heard through “Video Conferencing/Hybrid Mode”).

These Civil Revision Petitions are filed against the fair and decretal orders dated 22.11.2016 passed in I.A.Nos.13071, 13545 & 13546 of 2016 in O.S.No.4864 of 2014 on the file of the XIII Assistant City Civil Court, Chennai.

2.The issues involved in all these Civil Revision Petitions are one and the same and hence, these Civil Revision Petitions are disposed of by this common order.

3.The petitioner is the defendant and the respondent / plaintiff filed the suit in O.S.No.4864 of 2014 against the petitioner for recovery of money. The petitioner filed written statement and is contesting the suit. Trial commenced. The partner of the plaintiff viz., Mithesh was examined as P.W.1. The counsel for the petitioner herein cross examined P.W.1. The evidence of respondent was closed and the suit was posted for evidence on behalf of the petitioner. The respondent, at that stage filed three applications viz., I.A.No.13071 of 2016 to condone the delay in filing the additional



documents, I.A.No.13545 of 2016 to re-open the case for further evidence and I.A.No.13546 of 2016 to recall P.W.1 for further evidence and to mark the documents filed on behalf of the plaintiff. According to respondent, the documents now sought to be marked were omitted to be filed along with plaint and the same were traced only now and the documents are vital to prove the case of the respondent and prayed for condonation of delay. In I.A.No.13546 of 2016, the respondent has sought to mark the document and recall P.W.1. The respondent filed two documents and hence, prayed to re-open the case in I.A.No.13545 of 2016.

4.The petitioner filed common counter affidavit and contended that P.W.1 was examined and cross examined and he admitted that the respondent firm was not registered before the competent authority and the Xerox copy of the Registration Certificate of the firm marked are cooked up document and xerox copy of the document cannot be marked. The respondent has come out with these applications only to fill up the lacuna and the same cannot be permitted.

5.The learned Judge considering the averments in the affidavit, counter affidavit, allowed all the three I.As, holding that merits of the case cannot be



decided at present. The Court is satisfied with the reasons given by the respondent and the respondent has right to mark the document and the same cannot be denied. The learned Judge permitted the respondent to mark the document subject to proof and relevancy of documents.

6. Against the said common order dated 22.11.2016 made in I.A.Nos.13071, 13545 & 13546 of 2016, the present Civil Revision Petitions are filed.

7. The learned counsel appearing for the petitioner contended that the learned Judge committed an irregularity in allowing the applications for condoning the delay in filing the additional documents, re-open the case and to recall P.W.1 for further evidence. The learned Judge failed to see that P.W.1 in cross examination admitted that firm was not registered and now the documents produced are cooked up documents for the purpose of the case. The learned Judge failed to see that P.W.1 was examined and cross examined on several dates and the respondent took several adjournments and subsequently, evidence on the side of the respondent was closed and the suit was posted for evidence of the petitioner. At that stage, the respondent filed three applications. The suit was filed in the year 2014 and if firm was



registered, the respondent ought to have filed the Registration Certificate along with the plaint. The said three applications are filed only to fill up lacuna and the respondent cannot be permitted to mark the xerox copy of the documents, which are not relevant to the issue in the suit. The learned Judge failed to properly appreciate the provisions of Order VII Rule 14 and Order XVIII Rule 17 of C.P.C. In support of his contention, the learned counsel relied on the following judgments and prayed for setting aside the common order passed in I.A.Nos.13071, 13545 & 13546 of 2016 and allowing the Civil Revision Petitions:

(i) The judgment of the Hon'ble Apex Court reported in **(2007) 5 SCC 730, (J.Yashoda Vs. K.Shobha Rani)**, wherein, the Hon'ble Apex Court, at paragraph Nos.7 to 9, has held as follows:

“...7. Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents.



8. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in [Section 63](#) is exhaustive as the Section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence.

9. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. [Section 65](#) deals with the proof of the contents of the documents tendered in evidence. 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. Under [Section 64](#), documents are to be provided by primary evidence. [Section 65](#), however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said



Section must be fulfilled before secondary evidence can be admitted. 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.”

(ii) The judgment of the Hon'ble Apex Court reported in **(2009) 4 SCC 410, (Vadiraj Naggapa Vernekar (D) Through Lrs. Vs. Sharad Chand Prabhakar Gogate)**, wherein, the Hon'ble Apex Court, at paragraph Nos.22, 25 & 29, has held as follows:

“... 22. In support of his submissions, Mr. Jadhav referred to a Single Bench decision of the Allahabad High Court in Sunder Theaters Vs. Allahabad Bank, Jhansi (AIR 1999 All. 14), where a similar question arose and the Court observed that the power of the Court under Order 18 Rule 17 CPC is discretionary and has to be exercised with the greatest care and only in exceptional circumstances. It was further observed that under the garb of this rule, the Court ought not to recall a witness at the instance of a party in order to fill up a lacuna in the evidence already led.



25. *In our view, though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said rule is to enable the Court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined.*

29. *It is now well settled that the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the Court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination.”*

(iii) The judgment of the Hon'ble Apex Court reported in **(2010) 8 SCC 423, [Shalimar Chemical Works Limited Vs. Surendra Oil and Dal Mills (Refineris) and others]**, wherein, the Hon'ble Apex Court, at paragraph



No.15, has held as follows:

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“...15. On a careful consideration of the whole matter, we feel that serious mistakes were committed in the case at all stages. The trial court should not have "marked" as exhibits the Xerox copies of the certificates of registration of trade mark in face of the objection raised by the defendants. It should have declined to take them on record as evidence and left the plaintiff 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. The appellant, therefore, had a legitimate grievance in appeal about the way the trial proceeded.”

(iv) The judgment of the Hon'ble Apex Court reported in **(2013) 14 SCC 1, [Bagai Construction Thr. Its Proprietor Mr.Lalit Bagai Vs. Gupta Building Material Store]**, wherein, the Hon'ble Apex Court, at paragraph Nos.11 & 12, has held as follows:

“...11. ... we are of the view that the plaintiff cannot be permitted to file such applications to fill



the lacunae in its pleadings and evidence led by him. As rightly observed by the trial Court, there is no acceptable reason or cause which has been shown by the plaintiff as to why these documents were not placed on record by the plaintiff during the entire trial.

...

12. After change of various provisions by way of amendment in the CPC, it is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. This Court has repeatedly held that courts should constantly endeavour to follow such a time schedule. If the same is not followed, the purpose of amending several provisions in the Code would get defeated. In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered. We are satisfied that the plaintiff has filed those two applications before the trial Court in order to overcome the lacunae in the plaint, pleadings and evidence.”



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8.Per contra, the learned counsel appearing for the respondent submitted that the respondent firm was a registered one and at the time of filing of the suit, the documents now sought to be marked were misplaced and could not be filed at the time of filing of the suit. Only after completion of evidence on behalf of the respondent, the documents were traced and applications are filed to permit the respondent to mark those documents by condoning the delay, by re-opening and recalling P.W.1. The respondent has given reason for not filing the documents along with the plaint. The suit has not reached the stage of marking the document after re-opening the evidence of respondent and at the time of marking the documents, the respondent will produce the original or produce the certified copy of the document as secondary evidence. The contention of the learned counsel appearing of the petitioner that xerox copy of the documents cannot be marked is premature and untenable. The petitioner has original documents and petitioner will file the original documents at the time of marking. The documents produced by the respondent cannot be rejected to be marked as exhibits. The Court has to mark the documents subject to objection and decide the admissibility and relevancy at the time of delivering judgments. In support of his contention, the learned counsel appearing for the respondent relied on the following



judgments and prayed for dismissal of the Civil Revision Petition.

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(i) The Full Bench judgment of the Hon'ble Apex Court reported in ***(2001) 3 SCC 1, [Bipin Shantilal Panchal Vs. State of Gujarat and another]***, wherein, the Hon'ble Apex Court, at paragraph No.14, has held as follows:

“...14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the judge or magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before



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proceeding further. For all other objections the procedure suggested above can be followed.)”

(ii) An order of this Court reported in **2006 (2) CTC 491, (S.Rathinaswamy and others Vs. S.Bhanumathi and others)**, wherein this Court at paragraph No.18, has held as follows:

“...18. The main object of Order 7, Rule 14(3), C.P.C., conferring the power upon the Court to receive the documents in genuine cases is to receive the documents if good cause is shown to the satisfaction of the Court for the non-production of the documents at the earlier stage. The Courts are expected to receive the documents and give an opportunity to the parties. The Revenue Records like Village Plan and Survey Numbers which were not within the knowledge of the Plaintiffs and whose authenticity cannot be doubted are to be received and the Court may grant permission to receive those documents. Case of the Plaintiffs is that there is no other Cremation Ground in Thenkarai Velankudi Village. Hence, the Village Plan is a document of vital importance. That document stated to be not traceable earlier. Permission may not be withheld



due to the delay in production. Similarly, the Survey Plans relating to the S.Nos.1, 15 and 16 are Public Documents, which are to be received in evidence to afford an opportunity to the Plaintiffs. The reason stated by the Plaintiffs that those plans were not traceable is genuine reason. In the circumstances of the case, this Court is of the view that the Trial Court ought to have exercised its discretion under Order 7, Rule 14(3), C.P.C. allowing the Plaintiff to produce the documents. The Court below has not taken note of the fact that the documents produced are the public documents/Revenue Records and the reasons stated by the Plaintiffs is that the Survey Plans were earlier not traceable.”

(iii) The judgment of the Hon'ble Apex Court reported in **(2009) 4 SCC 410, (Vadiraj Naggapa Vernekar (D) Through Lrs. Vs. Sharad Chand Prabhakar Gogate)**, referred to above, the learned counsel appearing for the respondent relied on paragraph Nos.16 & 17 of the said judgment relied on by the learned counsel appearing for the petitioner.

(iv) An order of this Court dated **30.08.2017** in **C.R.P.(PD).Nos.3309**



to 3312 of 2011 in the case of [Dharani Sugars and Chemicals Limited Vs. T.M.N.Engineering Industries], wherein this Court at paragraph Nos.12 to 15, has held as follows:

“...12. The contention of the learned counsel for the petitioner is that the respondent is that the respondent is now seeking to file the certified copy of the registration certificate in Form A of the respondent firm issued by the Registrar of Registration of Firms, Tiruchirapalli. This document was available to the respondent at the time of filing of the suit and when the evidence on behalf of the respondent was re-opened, PW1 was recalled and respondent was permitted to file additional document. The respondent did not avail the said opportunity and failed to produce the document now sought to be marked. The respondent has not given any reason for not producing the said document at the time of filing of the suit or earlier. It only amounts to filing up lacuna. These contentions are without any merits. The Court has discretionary power to re-open the evidence and to re-open any witness suo moto or on submission by a party. The discretionary power has to be exercised judicially, sparingly



and in exceptional cases. The Court has to consider whether re-opening of the evidence on behalf of the parties and permission to mark a document is necessary to decide the issue. The Court has power to reopen, recall and permit marking of documents, if the same is to clarify certain ambiguity in the evidence let in by the parties. Only when the intention of the party is to fill up lacuna, drag on the proceedings and is mala fide or it will cause great prejudice and prejudice to other party, the Court cannot allow the request of the party for re-opening and let in further evidence.

13. In the judgment reported in AIR 2009 (SC) 1604, cited supra, the Hon'ble Apex Court has held that the Court can exercise discretionary power to recall any witness to clear any ambiguity that may have arisen during the course of his examination and re-examination of a witness has a bearing on the ultimate decision of the suit.

14. From the judgment referred to by the learned counsel for the petitioner, it is seen that the Court has discretion to recall the witness but the said discretionary powers must be exercised



sparingly and cautiously and should not be exercised to allow the party to fill up lacuna. The courts have power to reopen, recall and permit further oral and documentary evidence if the same has a bearing to decide the issues in the suit. In the present case, the petitioner has raised the issue of registration of respondent firm as well as authority of person who has filed the suit on behalf of the respondent during cross examination and at the time of arguments. The respondent has already filed certificate of registration of respondent's firm, now the respondent seeks to file certified copy of the registration certificate to show the names of the partners. The respondent has stated that certified copy of registration certificate in Form 'A' maintained by Registrar of Firm, Tiruchirapalli showing the names of partners of the respondent is obtained and seek permission to mark the said document. This will not amount to filling up lacuna, as contended by the learned counsel for the petitioner. On the other hand, the names of the partners of respondent's firm, as contained in the document sought to be marked has a bearing to decide the issue in the suit.



15. The learned counsel for the respondent contended that the Court cannot consider the plea of the petitioner that respondent's firm is not a registered firm, without raising the issue in the written statement and relied on the judgment reported in AIR (29) 1942 MADRAS 634, cited supra. This judgment is not relevant to decide these Civil Revision Petitions. It is open to the respondent to raise this issue before the Trial Court.”

9.Heard the learned counsel appearing for the petitioner as well as the learned counsel appearing for the respondent and perused the entire materials on record.

10.The respondent has filed three applications under Order XVIII Rule 17 and Section 151 of C.P.C. to recall P.W.1 for further evidence and to mark the documents therein, under Section 151 of C.P.C. to re-open the case for further evidence and also filed an application under Order VII Rule 14(3) and Section 151 of C.P.C. to condone the delay in filing the documents mentioned thereon and mark the same as exhibits on behalf of the plaintiff. As per Order VII Rule 14(1), a plaintiff has to produce the documents on which he relies



on to prove his case. The plaintiff has to file the list of documents relied on by him along with the plaint. If certain document which the plaintiff relies on is not available with him at the time of filing of the suit, he has to file the list of documents along with plaint as per Order VII Rule 14(2) of C.P.C. When a plaintiff has not included the list of documents along with plaint in the documents relied on by him, he cannot file such document subsequently without leave of the Court as per Order VII Rule 14(3) of C.P.C. Additional document shown must be filed before commencement of cross examination, mainly in order to avoid filling up lacuna in the cross examination of witnesses. In the present case, the respondent has filed the said suit as a partnership firm represented by its partner one Mithesh. The respondent did not file the certificate of registration of respondent as partnership firm. The petitioner in the written statement did not take a plea that the respondent firm is not a registered partnership firm and the suit as framed is not maintainable. Without raising such a plea in the written statement, during cross examination of P.W.1, the counsel for petitioner has put questions with regard to registration of respondent as partnership firm. Whether a firm is registered as partnership firm or not, is a mixed question of fact and law. Without pleading, the defendant, petitioner herein is not entitled to raise the said plea during cross examination or during arguments. The counsel for petitioner



without taking such a plea, put questions with regard to registration of respondent firm to P.W.1 during cross examination. In such circumstances, the respondent has filed the present three applications. As per Order XVIII Rule 17, the Court has power to recall the witness on his own motion or on by application filed by any one of the parties to the suit. From the judgment relied on by both the learned counsel appearing for petitioner as well learned counsel appearing for respondent, the ratio in the judgements are as follows:

(i) Recalling a witness is the discretionary power of the Court. The discretionary power has to be exercised sparingly. A witness cannot be recalled to fill up lacuna in the evidence let in by the parties. Similarly the Court cannot permit a party to file additional document to fill up the lacuna.

(ii) The Court has power to reopen, recall and permit further oral and documentary evidence if the same has a bearing to decide the issue in the suit and necessary to decide the issue.

(iii) For clarification of certain ambiguity in the evidence let in by the parties, the Court can reopen, recall and permit marking documents.



(iv) Only when great prejudice to the other parties or intention of the party is to fill up lacuna or to drag on the proceedings.

11. In the present case, the learned counsel appearing for the petitioner has put certain questions with regard to non-registration of respondent firm. A reading of the written statement shows that petitioner has not taken such a stand in the written statement. In view of the same, the respondent is entitled to recall P.W.1 and produce additional document to prove that the respondent's firm is registered partnership firm. In view of the above, the order of the learned Judge allowing all the three applications is valid and legal.

12. The learned counsel appearing for the petitioner contended that the learned Judge erred in permitting the respondent to mark the xerox copies of the documents subject to proof and relevancy of the documents. According to learned counsel appearing for the petitioner, the xerox copies of the documents cannot be marked and it has to be rejected at the initial stage itself. The learned counsel appearing for the petitioner relied on two judgments of the Hon'ble Apex Court reported in *(2010) 8 SCC 423* and *(2007) 5 SCC 730*,



referred to above. In paragraph No.15 of the judgment of the Hon'ble Apex Court reported in **(2010) 8 SCC 423**, referred to above, the Hon'ble Apex Court has held that Trial Court should not have 'marked' as exhibits the xerox copy of the certificates of registration of trade mark in the face of objection raised by the defendants. The contention of the learned counsel appearing for the petitioner that the learned Judge erred in permitting the marking of xerox copy of the documents is rebutted by the learned counsel appearing for the respondent on the ground that stage of the marking document has not been reached in the suit and his contention is premature. The learned counsel appearing for the respondent further contended that at the time of marking the document, the respondent will produce either original or certified copies of the document and mark the certified copy of the document as secondary evidence by complying provisions of law. In view of the rival contentions, it is open to the petitioner to object the marking of documents as per the finding rendered in the judgment of the Hon'ble Apex Court reported in **(2010) 8 SCC 423**, referred to above. It is for the learned Judge to consider the nature of documents and objections raised by the petitioner, either to mark the documents with or without objections and subject to proof and relevancy or straight away reject marking of the documents.



13. With the above observations, all the Civil Revision Petitions are dismissed. Consequently, the connected Miscellaneous Petition is closed. No costs.

20.10.2021

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To

The learned XIII Assistant Judge,
City Civil Court,
Chennai.



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