



A.Nos.3446 & 3447 of 2023
in C.S. No.61 of 2008

ABDUL QUDDHOSE, J.

A.No.3446 of 2023 and A.No.3447 of 2023 have been filed seeking for the following reliefs :

a) To permit the applicant/3rd defendant to mark a photocopy of the agreements disclosed in the application through their witness during the course of trial.

b) To receive and permit the applicant/3rd defendant to mark the documents filed by the applicant/3rd defendant in the typed set filed along with the written statement.

2.A counter affidavit has been filed by the plaintiff objecting to the reception of the additional documents and for marking of the said documents as exhibits during the course of trial. The respondent/plaintiff would state that since the 3rd defendant has not disclosed the documents in the written statement, the question of receiving those documents at this stage when the trial is in the part heard stage will not arise. They would also state that the applicant has not satisfied the requirements of Section 65 of the Indian Evidence Act for allowing these applications.



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3. The learned counsel for the applicant/plaintiff drew the attention of this Court to the judgment of the Hon'ble Supreme Court of India in the case of ***Dhanpat vs. Sheo Ram (Deceased) through Legal representatives and others*** reported in ***(2020) 16 SCC 209*** and would submit that the Hon'ble Supreme Court in the said judgment has made it clear that the objections or admissibility will have to be adjudicated in the main suit and therefore, there is no prohibition for this Court to allow these applications subject to the condition that the documents are allowed to be received subject to its admission, proof and relevancy.

4. The learned counsel for the respondent would however reiterate that since the documents have not been lost even as per the applicant's own statement, Section 65 of the Indian Evidence Act will not be attracted.

5. However, as per Section 65 of the Indian Evidence Act, even in the cases where the possession of the document is with the third party, Section 65 of the Indian Evidence Act can be applied. Section 65(a) of the Indian Evidence reads as follows:

65. Cases in which secondary evidence relating to documents may be given.-- Secondary evidence may be given of the existence, condition, or contents of a document in the



following cases: --

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(a) When the original is shown or appears to be in the possession or power--

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it.

And when, after the notice mentioned in Section 66, such person does not produce it.

6.As seen from the aforesaid Section even in cases where the documents is in the custody of any person out of the reach of, or are not subject to the process of the Court, secondary evidence with regard to the said documents is permissible subject to the leave of this Court.

7.In the case in hand, applicant/3rd defendant has disclosed in the written statement about the typed set of documents which contains documents for which leave is sought for from this Court in these applications. This Court has also perused the documents filed along with the typed set of papers which have been filed along with the written statement. The documents disclosed in the written statement are very much available in the typed set of documents filed by the defendants along with the



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written statement. A copy of the typed set of documents was also served on the learned counsel for the plaintiff as early as on 23.06.2020, as seen from the endorsement made by the learned counsel for the plaintiff in the typed set of papers which were filed by the 3rd defendant along with the written statement. When Section 65 of the Indian Evidence Act also makes it very clear that if the documents are not in possession and custody of the defendant, leave can be granted by this Court, if the said documents are in the custody of any other person out of the reach of the defendant and they are not subject to the process of the Court. In the case in hand, according to the 3rd defendant only xerox copies of the documents were given to the 3rd defendant at the time of signing the agreements and therefore, the original documents are not in the custody of the 3rd defendant, but instead, in the custody of third parties. Therefore, Section 65 of the Indian Evidence Act gets attracted as foundation has been laid in the plaint for marking of additional documents. However, the said documents sought to be received by this Court and marked as Exhibits can be received and marked only subject to its admission, proof and relevancy. No prejudice will be caused to the plaintiff if the documents are allowed to be received and marked as Exhibits subject to its admission, proof and relevancy. The plaintiff is always having the liberty to cross-examine the 3rd defendant with regard to the veracity of the documents which are received by this Court and allowed to be marked as Exhibits. The judgment of the Hon'ble Supreme Court in the case of ***Dhanpat vs.***



Sheo Ram (Deceased) through Legal representatives and others reported in (2020)

16 SCC 209 relied upon by the learned counsel for the plaintiff has also made it very clear that the objections with regard to the admissibility and proof can be adjudicated in the main suit provided if sufficient foundation therefor has been laid in the pleadings or in the evidence. In the case on hand, the foundation has been made with regard to the documents in the pleadings made by the 3rd defendant in his written statement.

8. For the foregoing reasons, there are no merits in the objection raised by the respondent and therefore, these applications will have to be allowed as prayed for subject to the condition that the documents are allowed to be received and marked as Exhibits subject to its admission, proof and relevancy. In the result, these applications are allowed as prayed for and the documents mentioned in the affidavit filed in support of these applications are allowed to be received and marked as Exhibits subject to its admission, proof and relevancy.

15.11.2023

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