IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.08.2023

CORAM:

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

C.R.P.No.3705 of 2019
and
C.M.P.No.24363 of 2019

Thilaga Sulochana .. Petitioner

Vs.

1. Sampathkumar

Dwaragadas (Died)

2. Punjab National Bank,
   Oppanakara Street Branch,
   Coimbatore – 641 001.

3. Punjab National Bank,
   Ramnagar Branch,
   Coimbatore – 641 009.

4. Punjab & Sindh Bank,
   Oppanakara Street Branch,
   Coimbatore – 641 001.

5. Lakshmi Vilas Bank,
   Gondampalayam Branch,
   Coimbatore – 30.

6. Kotak Mahindra Bank,
Skanda Square, 727, Avinashi Road,
Coimbatore – 641 018.

7. Integrated Enterprise (India) Limited,
Depository Division,
1st Floor, Kences Tower,
No.1, Ramakrishna Street,
North Usman Road, T.Nagar,
Chennai – 17.

8. Karvy Consultants Limited,
Depositor Participant, 21, Avenue 4,
Street No.1, Banjara Hills,
Hyderabad – 34.

9. Kotak Securities Limited,
Bakhtawar, 1st Floor, Nariman Point,
Mumbai – 21.

10. Leela

11. Minor Harini
Represented by her Mother Guardian
Mrs.Leela,
D/o.Late Dwaragadas

12. Minor Bavadharani
Represented by her Mother Guardian
Mrs.Leela
D/o.Late Dwaragadas. .. Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and final order passed in I.A.No.1 of 2019 in O.S.No.654 of 2010 on the file of the V Additional District Judge, Coimbatore, dated 23.09.2019.

For Petitioner	:	Mr.C.Santhosh Kumar
For Respondents	:	Mr.P.Valliappan for Mr.Dheraj for R1, R10 to R12 Mr.P.J.Bency Switesingh Dhas for R9 Mr.M.L.Ganesh for R3 and R4 No appearance for R2,R5,R6,R7&R8

ORDER

O.S.No.654 of 2010 is a suit for partition filed by one Thilaga Sulochana. She claims that the properties belonged to her father one Balasubramanian.

2. Balasubramanian was a wealthy man and wealthy enough to be found in the radar of the Income Tax Department. During the financial year 2002-03, Balasubramanian was summoned by the Income Tax Department and a statement was recorded. This statement according to the plaintiff would help her in the suit for partition.

3. Balasubramanian passed away and after his death, his auditor one Alagirisamy gave a copy of the sworn statement given by the said Balasubramanian to the Income Tax Department through the plaintiff. The plaintiff had only a photostat copy of the same and therefore, she wanted to make it in evidence. The said document was received in evidence as Ex.A11. Protesting against the receipt of the said document in I.A.No.643 of 2013 in O.S.No.654 of 2010, dated 24.11.2013, a Civil Revision Petition was preferred to this Court. The Revision in C.R.P(PD)No.4719 of 2013 came to be allowed holding that xerox copies of the documents being secondary evidence in nature cannot be received in evidence. Finding that section 65 of the Indian Evidence Act, 1872 has to be applied, the petitioner took out summons in I.A.No.330 of 2018 to the office of the Assistant Director of Income Tax (Investigation), Unit-2, Coimbatore. The purpose of the summons was to produce the sworn statement recorded by the Deputy Director of Income Tax (Investigation). A reply was sent by the Income Tax Department on 10.06.2019 confirming the fact that one Sibichen.K.Mathew, Deputy

Director of Income Tax (Investigation) had recorded a statement from Balasubramanian under section 131(1A) of the Income Tax Act, 1961. However, the letter went on to add that all the records relating to Balasubramanian had been handed over to the jurisdictional Assessing Officer, namely, the Income Tax Officer, Ward IV(3), Coimbatore. Finding a dead end at this source, the petitioner took out other summons to the office of the Income Tax Officer, Non-corporate Ward 4(3), Coimbatore for the purpose of production of the sworn statement recorded under section 131 (1A) of the Income Tax Act.

4. The said Income Tax Officer has sent a reply stating that they do not have any assessment records or folders containing the sworn statement recorded from Balasubramanian. This is on account of the fact that the office has been newly created. Therefore, an application was filed in I.A.No.1 of 2019 seeking to recall DW1 and cross-examine him to mark Ex.A11 which had been "unmarked" by this Court in C.R.P.(PD)No.4719 of 2013. This was opposed by the first respondent

which was adopted by the respondents 11 and 12. According to them, since section 65(c) of the Indian Evidence Act alone permits the receipt of documents and as the steps taken by the petitioner do not fulfil the requirement of section 65 of the Indian Evidence Act, the same cannot be received in evidence. The learned V Additional District Judge was impressed to this argument and held that mere summoning and getting a reply from the Income Tax Department with the document is not sufficient. He would further add that the Income Tax Department should have stated in its letter that the original was either lost or destroyed and therefore, the application was dismissed to recall DW1. Aggrieved over the same, the present Civil Revision Petition has been presented.

5. Heard Mr.C.Santhosh Kumar, learned counsel for the petitioner and Mr.P.Valliappan for Mr.Dheraj, learned counsel for the respondents 1, 10, 11 and 12 and Mr.M.L.Ganesh, learned counsel for the respondents 3 and 4.

6. Evidence Act requires that the best evidence should be produced before the Court. In case, the best evidence is not available with the party, then efforts should be taken to produce the same from the custody of the person with whom it is available. Section 64 of the Indian Evidence Act demands that proof of documents must be only by way of primary evidence. Not wanting the procedural law to be strict towards secondary evidence, which is permissible, under certain circumstances, section 65 of the Indian Evidence Act was enacted.

7. Under Section 65 of the Indian Evidence Act, if a party shows that the original "is shown" or "appears to be in the possession or power of any person who does not produce the records even after a notice as required under Section 66 of the Act is issued", then such evidence can be produced before the Court. A bare reading of the provision shows that the Evidence Act does not demand that the document should either be lost or should have been destroyed by the person in whose possession the documents is available. The requirement is that steps must be taken to

summon the record and despite the service of summon, the party with whom the documents ought to be, does not part with the same.

8. A perusal of the letter dated 10.06.2019 issued by the Investigation Branch of the Income Tax Department makes it clear that Balasubramanian had given the statement to the Department under Section 131(1A) of the Income Tax Act. This shows two facts, namely, the statement given by Balasubramanian and the factum of recording it by the Department. Therefore, this letter confirms that such statement in fact was recorded and existed in the records of the Income Tax Department. Unfortunately for the petitioner, and fortunately for the respondents, the investigation team does not have it and it is available with the jurisdictional Assessing Officer. In order to exhaust that avenue also, the petitioner took out an application to the jurisdictional Assessing Officer. The jurisdictional Assessing Officer has sent a reply stating that those records are not available with them. This in my view would come within the scope of section 65(a) of the Indian Evidence Act. Apart from

the fact, the question of original having been destroyed or lost is within the scope of Section 65(c) of the Act, under Section 65(c) of the Indian Evidence Act, a further category exists namely "when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time". The entire section was the subject matter of interpretation in the case of ***J. Yashoda vs K. Shobha Rani*** **reported in** ***(2007) 5 SCC 730.*** The Supreme Court was pleased to hold that if a party exhausts all the attempts to produce the primary evidence and still is not in a position to produce the same, he is entitled to produce the secondary evidence.

9. At the time when C.R.P.(PD)No.4719 of 2013 was argued, Ex.A11 had been received in evidence. None of the steps contemplated under section 65 of the Indian Evidence Act had been followed by the petitioner. It was in those circumstances that this Court had held that the petitioner is not entitled to mark Ex.A11. The subsequent records, namely, the orders passed in I.A.No.330 of 2018 and the letter issued by

the Assistant Director, Income Tax (Investigation), Unit -2, Coimbatore and the Jurisdictional Assessing Officer, Non-corporate Ward 4(3), Coimbatore would all go to show that the petitioner took earnest steps to summon the original and unfortunately, was not successful in obtaining the original statement given by Balasubramanian to Sibichen.K.Mathew. Hence the petitioner having done all that he could, now seeks to mark Ex.A11 by reopening the evidence of DW1. The situation that existed at the time of passing of the order in C.R.P.(PD)No.4719 of 2013 does not exist any more. The petitioner is not marking the document in a casual manner, but after exhausting all the avenues under section 65 of the Indian Evidence Act. Therefore, I feel the order of the learned Judge requires interference.

10. Accordingly, the order passed in I.A.No.1 of 2019 in O.S.No.654 of 2010, dated 23.09.2019 by the learned V Additional District Judge, Coimbatore is set aside. This Civil Revision Petition is allowed. The learned trial Judge is requested to reopen the evidence of

DW1 to mark Ex.A11. I make it clear that the document shall be received, subject to relevancy in proof which shall be at the time of marking of evidence or at the time of pronouncement of judgment.

11. With the above observations, the Civil Revision Petition stands allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

30.08.2023

Index:Yes / No
Speaking Order :Yes / No
Neutral Citation:Yes / No

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To

The V Additional District Judge,
Coimbatore.

V.LAKSHMINARAYANAN, J.

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