



A.No.5794 of 2023
in
C.S.(Comm. Div.) No.115 of 2021

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ABDUL QUDDHOSE.J.,

M/s.PVR INOX Limited

... Applicant

Vs.

M/s.Sri Thenandal Films

... Respondent

This application has been filed to grant leave to mark the photocopy of the documents by way of secondary evidence.

2. A list has been annexed in Annexure - A to this application. The applicant is the plaintiff in the suit. Along with the plaint the applicant / plaintiff had filed documents which are xerox copies. The learned counsel for the applicant / plaintiff would now submit that the originals of the documents annexed along with the plaint are not traceable and under those circumstances, the applicant / plaintiff has filed this application, seeking leave of this Court to mark the photocopy of the documents which have been annexed in Annexure -A to this application.



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3. According to the applicant / plaintiff, earlier M/s.Sathyam Cinemas had a contractual relationship with the respondent / defendant. Thereafter, M/s.Sathyam Cinemas got amalgamated with PVR Ltd., pursuant to amalgamation order passed by the National Company Law Tribunal (NCLT). Once again PVR Ltd. got amalgamated with the present applicant by virtue of another amalgamation order passed by the NCLT. According to the applicant / plaintiff, in view of the mergers, the original documents which were annexed along with the plaint got misplaced and are not traceable. Under those circumstances, this present application has been filed, in view of the objections raised by the respondent / defendant during the course of trial for marking the documents which are annexed in the Annexure - A to this application.

4. A counter affidavit has also been filed by the respondent / defendant raising objections for allowing this application. According to them, the claim is hopelessly barred by limitation. Further, photocopy of the documents mentioned in Annexure - A to this application cannot be marked as exhibits in view of the statutory bar as prescribed under Sections 63 and 65 of the Indian Evidence Act.



5. The learned counsel for the applicant / plaintiff drew the attention of this Court to the Judgment of the Honourable Supreme Court in the case of ***Dhanpat VS. Sheo Ram (Deceased) through Legal Representatives and Others*** reported in ***2020 (16) SCC 209*** and would submit that in the said decision, the Honourable Supreme Court had followed the earlier decision of the Honourable Supreme Court in ***Bipin Shantilal Panchal Vs. State of Gujarat and Another*** reported in ***2001 (3) SCC 1***. After relying upon both the decisions, the learned counsel for the applicant / plaintiff would submit that proper procedure to be followed, while marking photocopies of the documents by way of secondary evidence, is to mark the said documents as exhibits leaving it open for the party raising objections with regard to the marking of those documents during the course of the arguments. In particular he referred to paragraph No.14 of the Judgment of the Honourable Supreme Court in ***Bipin Shantilal Panchal Vs. State of Gujarat and Another*** case referred to supra for the said proposition.

6. However, the learned counsel for the respondent / defendant would rely upon the following authorities in support of his contention that photocopies of the documents cannot be marked as exhibits by way of



secondary evidence. He would also rely upon Sections 63 and 65 of the Indian Evidence Act and would submit that it is not legally permissible to file photocopies of the documents by way of secondary evidence. In support of his contentions, he also relies upon the following authorities:

a) A judgment of the Honourable Supreme Court in the case of ***J.Yashoda Vs. K.Shobha Rani*** reported in **2007 (5) SCC 730**. Relying upon the said judgment, he would submit that the secondary evidence, as a general rule is admissible only in the absence of primary evidence. He has pleaded that 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;

b) A judgment of the Honourable Supreme Court in the case of ***Shalimar Chemical Works Limited Vs. Surendra Oil and Dal Mills (Refineries) and Others*** reported in **2010 (8) SCC 423**. Relying upon the said judgment, he would once again reiterate that photocopies of the documents cannot be marked as exhibits. He would submit that, as held in the said decision, the issue of admissibility of the documents to be marked as exhibits cannot be left open and hanging and the documents cannot be marked as exhibits subject to objection of proof and admissibility;



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c) A decision of the Honourable Supreme Court in the case of ***H.Siddiqui (Dead) By LRs. Vs. A.Ramalingam*** reported in ***2011 (4) SCC 240***. Relying upon the said decision, he would submit that the secondary evidence must be authenticated by the foundational evidence that the alleged copy is infact a true copy of the original. He would submit that in the case on hand, it is not so and therefore, xerox copies of the documents disclosed in Annexure-A along with this application cannot be marked as exhibits;

d) A decision of the Honourable Supreme Court in the case of ***Criminal Trials Guidelines Regarding Inadequacies and Deficiencies, In Re Vs. State of Andhra Pradesh and Others*** reported in ***2021 (10) SCC 598***. Relying upon the said decision, he would submit that it has been held in the said decision that the ratio laid down by the Honourable Supreme Court in ***Bipin Shantilal Panchal Vs. State of Gujarat and Another*** reported in ***2001 (3) SCC 1*** has been held to be bad in law and therefore, the said judgment relied upon by the learned counsel for the applicant / plaintiff does not support the case of the applicant / plaintiff.

Discussion:



7. Admittedly, the xerox copies of the documents which are disclosed in Annexure - A to this application were filed along with the plaint. The suit has been filed for recovery of money against the respondent / defendant. The plaintiff in this application has sought leave of this Court to mark the xerox copies of the documents as exhibits during the course of trial by giving the following reasons:

a) Due to the amalgamation orders passed earlier and the management of the Company having been changed, the originals of the documents have been misplaced / lost;

b) The plaintiff has filed xerox copies of the documents along with the plaint and the same is sought to be marked as exhibits in view of the fact that the originals are lost / misplaced;

c) The learned counsel for the defendant, during the course of the trial, had raised objections with regard to the marking of the xerox copies of the documents and only under those circumstances, the present application has been filed;

d) The documents sought to be marked as exhibits by way of secondary evidence are documents required to be marked to substantiate the suit claim.



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8. A written statement has also been filed by the defendant, rebutting the documents which were disclosed along with the plaint. Section 63 of the Indian Evidence Act, 1872 defines secondary evidence and it reads as follows:

"63. Secondary evidence. — *Secondary evidence means and includes —*

(1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed



was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original."

9. One of the illustrations given in the Section also makes it clear that a photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

10. The bone of contention of the learned counsel for the respondent /



defendant is that since the originals have not been compared, the xerox copies of the documents cannot be marked as exhibits by way of secondary evidence. The illustration makes it clear that if a photograph is original, the xerox copies of the photograph can be marked as exhibits through secondary evidence. The documents which are sought to be marked as exhibits by way of secondary evidence can be proved that it is the same as that of the originals, only after trial and not at this stage when the trial is yet to be completed.

11. Infact, as seen from Section 63 (2) of the Indian Evidence Act, copies made from the original by mechanical process which in themselves ensure the accuracy of the copy and copies compared with such copies can be received by way of secondary evidence. Hence, the documents for which leave is sought for from this Court, which have been disclosed in the Annexure - A to this application, which are xerox copies, which the applicant / plaintiff claims to be genuine one, can be let in as secondary evidence as the said documents have been made from the original by a mechanical process. Whether the said document is a genuine one or not, cannot be adjudicated in an interlocutory application, but can be



adjudicated only after the trial.

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12. The defendant is always having the liberty to raise all the objections either during the trial by cross examining the plaintiff's witness with regard to the veracity of those documents or during the course of his arguments before the Court.

13. Section 65 (c) of the Indian Evidence Act also makes it clear that secondary evidence can be given in respect of the documents when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it within a reasonable time. In the case on hand, an averment has been made in the affidavit filed in support of this application that due to the amalgamation orders passed by the NCLT, the originals of the documents disclosed in Annexure - A to this application are lost / misplaced and hence, Section 65 (c) gets attracted as sufficient cause has been shown by the applicant / plaintiff for getting leave of this Court to mark the documents disclosed in Annexure - A by way of secondary evidence.



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14. The Judgment of the Honourable Supreme Court relied upon by the learned counsel for the plaintiff which is a standard Judgment being followed in similar applications viz., ***Dhanpat VS. Sheo Ram (Deceased) through Legal Representatives and Others*** reported in ***2020 (16) SCC 209*** has followed the decision rendered by the Honourable Supreme Court in the Judgment of ***Bipin Shantilal Panchal Vs. State of Gujarat and Another*** reported in ***2001 (3) SCC 1***. As per the decision rendered by the Honourable Supreme Court in ***Dhanpat VS. Sheo Ram (Deceased) through Legal Representatives and Others*** referred to supra, it has been made clear that whenever an objection is raised during the 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 documents tentatively as an exhibit in the case subject to such objections to be decided at the last stage in a final judgment. Though, the learned counsel for the respondent / defendant would rely upon a judgment of the Honourable Supreme Court in the case of ***Criminal Trials Guidelines Regarding Inadequacies and Deficiencies, In Re Vs. State of Andhra Pradesh and Others*** reported in ***2021 (10) SCC 598*** to substantiate his argument that the Judgment rendered in ***Bipin Shantilal Panchal Vs. State of Gujarat and Another*** reported in



2001 (3) SCC 1 has been declared to be bad in law, the Judgment of the Honourable Supreme Court in the case of ***Dhanpat VS. Sheo Ram (Deceased) through Legal Representatives and Others*** reported in **2020 (16) SCC 209**, which is the standard decision with regard to the present issue has not been overruled in the decision reported in **2021 (10) SCC 598** i.e., ***Bipin Shantilal*** case. Further, the decision rendered in **2021 (10) SCC 598** pertains to criminal trial as the Honourable Supreme Court has framed guidelines with regard to criminal trials and the inadequacies and deficiencies with regard to criminal trials and explicitly it is disclosed that the petitioner is ***Criminal Trials Guidelines Regarding Inadequacies and Deficiencies, In Re***. In the case on hand, it is a civil suit and it is not a criminal trial which was in consideration by the Honourable Supreme Court in **2021 (10) SCC 598**. Therefore, the decision relied upon by the learned counsel for the respondent / defendant reported in **2021 (10) SCC 598** has no bearing to the facts of the present case. Further, as observed earlier, the decision rendered by the Honourable Supreme Court in ***Dhanpat VS. Sheo Ram (Deceased) through Legal Representatives and Others*** reported in **2020 (16) SCC 209** has not been overruled by any of the decision of the Honourable Supreme Court at a later date and it still holds good.



15. The learned counsel for the respondent / defendant had also relied upon other decisions viz.,

- a) ***Shalimar Chemical Works Limited Vs. Surendra Oil and Dal Mills (Refineries) and Others*** reported in **2010 (8) SCC 423**;
- b) ***J.Yashoda Vs. K.Shobha Rani*** reported in **2007 (5) SCC 730**;
- c) ***H.Siddiqui (Dead) By LRs. Vs. A.Ramalingam*** reported in **2011 (4) SCC 240**;

and the said judgments have no applicability to the facts of the instant case in view of the very clear law laid down by the Honourable Supreme Court in the case of ***Dhanpat VS. Sheo Ram (Deceased) through Legal Representatives and Others*** reported in **2020 (16) SCC 209** wherein it has been held that any objection with regard to the marking of the documents can be raised by any party objecting to the same at the last stage of the final judgment. Any objection raised during the course of trial with regard to the marking of documents can be recorded by the Court, but, however, the party who wants to mark those documents be allowed to mark it as exhibits subject to the objections recorded by the Court and subject to its admission, proof and relevancy.



16. In view of the settled law as laid down in the decision of the Honourable Supreme Court in ***Dhanpat VS. Sheo Ram (Deceased) through Legal Representatives and Others*** reported in ***2020 (16) SCC 209*** and that too when sufficient cause has been shown by the applicant / plaintiff for not producing the originals, this Court will have to allow the application as prayed for.

17. Accordingly, this application is allowed as prayed for by permitting the applicant / plaintiff to mark the xerox copies of the documents disclosed in Annexure - A to this application as exhibits by way of secondary evidence subject to its admission, proof and relevancy. Liberty is also granted to the respondent / defendant to raise all objections with regard to the marking of the documents and as and when any objection is raised, the same will have to be recorded by the learned Additional Master - IV and the documents can be marked subject to its admission, proof and relevancy.

17.11.2023

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