

S/L 23  
04.03.2024  
Court. No. 3  
*Suvayan/  
Sourav*

**CO 1056 of 2023**

**Ramanuj Singh  
Vs.  
Paulmech Infrastructure Private Limited**

*Mr. Anirban Majumder  
Ms. Piu Karmakar*

*...for the petitioner.*

1. The plaintiff/petitioner is represented by his learned Advocate.
2. None appears on behalf of the opposite party/defendant despite service.
3. At the very outset Mr. Majumder, learned Advocate for the plaintiff/petitioner submits before this Court that because of delayed receipt of certified copy of Order No. 66 dated 26.08.2022 as passed in Money Suit No. 01 of 2019 by the learned Judge, Commercial Court at Asansol, he is not in a position to file the supplementary affidavit as directed to be filed by this Court on 21.02.2024.
4. However, Mr. Majumder, learned Advocate for the plaintiff/revisionist with the leave of this Court files the certified copy of the aforementioned order which is taken on record and accordingly filing of supplementary affidavit by the petitioner in this revisional application is hereby dispensed with.
5. Heard Mr. Majumder, learned Advocate for the revisionist/plaintiff at length in support of the instant revisional application.

6. The instant revisional application is now taken up for passing appropriate order.

7. In this revisional application as filed under Article 227 of the Constitution of India the Order No. 74 dated 13.03.2023 as passed by learned Judge, Commercial Court at Asansol in Money Suit No. 1 of 2019 in connection with I.A. No. 10 of 2022 and I.A. No. 11 of 2022 has been impugned. By the said order learned Trial Court had refused to recall its earlier Order No. 66 dated 26.08.2022 (the certified copy which has been filed before this Court) and also refused to pass a direction upon the respondent to produce the original notice dated 28.03.2012 as issued by plaintiff's Advocate Shambu Nath Dutta, since deceased.

8. In course of his submission Mr. Majumder at the very outset draws attention of this Court to the affidavit-in-opposition as filed by the opposite party before this High Court in another proceeding being C.P. No. 248 of 2012 wherein the opposite party in his affidavit-in-opposition had admitted the receipt of the notice dated 28.03.2012 as issued by Shambu Nath Dutta (since deceased) the erstwhile learned Advocate of the plaintiff/revisionist. It is argued that before the learned Trial Court an application was filed for tendering the photocopy of the said notice dated 28.03.2012 for marking the same as exhibit since another printout/office copy of the said notice dated 28.03.2012 as issued by learned Advocate, Shambu Nath Dutta (since deceased) has either been lost or misplaced. It is submitted by Mr.

Majumder that learned Trial Court by Order No. 66 dated 26.08.2022 refused to pass any favourable order without considering the relevant provisions of the Evidence Act which is why the plaintiff/revisionist before the learned Trial Court by filing I.A. No. 10 of 2022 and I.A. No. 11 of 2022 had prayer for recall of the Order No. 66 dated 26.08.2022 as passed by the learned Trial Court and for a direction upon the respondent to produce the original statutory notice dated 28.03.2012 which is in custody of the defendant and which has been admitted by the defendant in his affidavit-in-opposition as filed by him before this Hon'ble Court in C.P. No. 248 of 2012.

9. Mr. Majumder, thus, submits that the instant revisional application may be allowed by setting aside the impugned Order No. 74 dated 13.03.2023 as well as the Order No. 66 dated 26.08.2022 and the I.A. No. 10 of 2022 and the I.A. No. 11 of 2022 as filed before the learned Trial Court in Money Suit No. 1 of 2019 may be allowed.

10. For effective disposal of the instant revisional application this Court proposes to peruse the relevant provisions of the Indian Evidence Act which deals with secondary evidence.

11. Section 65 of the Indian Evidence Act reads as under:

***“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:-***

- (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,*
- (b) *when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;*
- (c) *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 in reasonable time;*
- (d) *when the original is of such a nature as not be easily movable;*
- (e) *when the original is a public document within the meaning of Section 74;*
- (f) *when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India, to be given in evidence;*
- (g) *when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.*

*In cases (a), (c) and (d) any secondary evidence of the contents of the document is admissible.*

*In case (e) or (f) a certified copy of the document, but no other kind of secondary evidence, is admissible.*

*In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.”*

12. Section 66 of the Indian Evidence Act reads as under:

*“66. Rules as to notice to produce – Secondary evidence of the contents of the documents referred to in Section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whole possession or power the document is, or to his attorney or pleader, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:*

*Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it –*

- (1) when the document to be proved is itself a notice;*
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;*
- (3) when it appears or is proved that the adverse party has obtained*

***possession of the original by fraud or force;***

- (4) when the adverse party or his agent has the original in Court;***
- (5) when the adverse party or his agent has admitted the loss of the document;***
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.”***

13. On cumulative reading of the aforesaid two provisions of the Indian Evidence Act it appears to this Court that Sections 65 of the Evidence Act deals with the broad principles for adducing secondary evidence and Rule 66 of the said Act postulates for service of notice to produce documents of which secondary evidence is intended to be adduced by a party to the proceeding. On perusal of proviso – (1) of Section 66 it appears to this Court that rules regarding notice to produce document is not at all required when secondary evidence of a document is intended to be adduced in respect of a notice itself that is to say if a party to a proceeding intends to produce and/or tender a copy a of notice, there is no requirement for serving notice to produce document as enunciated in the provision of Section 66 of the Evidence Act.

14. In the case in hand the plaintiff/revisionist before the learned Trial Court made an endeavor to tender a photocopy of notice dated 28.03.2012 which according to the plaintiff/revisionist has already been receipted by the defendant and, therefore, he is not required to issue

notice to produce document upon the defendant if he has been able to show that such notice dated 28.03.2012 has been duly served upon the defendant.

15. On perusal of the entire materials as placed before this Court, it appears to this Court that sufficient materials have been placed before this Court as well as before the learned Trial Court that the defendant had admitted the receipt of notice dated 28.03.2012 though in a separate proceeding, therefore, the rule of issuing notice to produce document has become redundant and is, thus, not necessary.

16. Admittedly, before the learned Trial Court the plaintiff has been able to make out a case at least *prima facie* to substantiate that on account of the death of his learned Advocate, Sri Shambu Nath Dutta the copy of the notice dated 28.03.2012 has been lost or misplaced which is why the plaintiff intends to adduce secondary evidence by tendering a photocopy of the said notice dated 28.03.2012. It appears that while passing Order No. 66 dated 26.08.2022 as well as the impugned order dated 13.03.2023 in connection with I.A. No. 10 of 2022 learned Trial Court has failed to visualise the predicament of the plaintiff in producing the copy of the notice dated 28.03.2012 the receipt of which has been admitted by the defendant/opposite party herein in C.P. No. 248 of 2012 in his affidavit-in-opposition.

17. In further considered view of this Court, learned Trial Court has probably mislead himself in not understanding the difference between marking of a

document as an exhibit and the admissibility of the said document into evidence (which is to be assessed by the learned Trial Court at the conclusion of trial while assessing the evidence on record both oral and documentary).

18. In view of such, this Court is of the considered the plaintiff/petitioner before the learned Trial Court is successful in making out a case for tendering a photocopy of the notice dated 28.03.2012 as and by way of secondary evidence.

19. As a result, the instant revisional application succeeds. The Order No. 66 dated 26.08.2022 and the subsequent impugned Order No. 74 dated 13.03.2023 as passed by the learned Trial Court in connection with I.A. Nos. 10 and 11 of 2022 in Money Suit No. 1 of 2019 are hereby set aside. Learned Trial Court is hereby directed to give opportunity to the plaintiff to tender the photocopy of the notice dated 28.03.2012 into evidence without insisting for production of the copy of the said notice and thereafter to act in accordance with law.

20. It is, however, made clear that while disposing the instant revisional application this Court has not gone into merits as well as the legality and validity of the notice dated 28.03.2012 as issued by plaintiff's erstwhile learned Advocate, Shambu Nath Dutta (since deceased).

21. With the aforementioned observation, the instant civil revision being CO 1056 of 2023 is allowed and disposed of.

22. Parties to act on the server copies of this order.

23. Urgent photostat certified copies of this order, if applied for, be supplied to the parties upon compliance with all the necessary formalities.

**(Partha Sarathi Sen, J.)**