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C.R.P.(PD).No.299 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.07.2024

Coram

THE HON'BLE MR JUSTICE V. LAKSHMINARAYANAN

C.R.P.(PD).No.299 of 2023 &
C.M.P.No.2442 of 2023

1. Brooke Side Papers Inc.
236, West 27th Street,
Suite 1300 RE New York,
NY 10001 USA represented by its
authorized agent,
M/s. Fine Paper Source Private Ltd.
No.9, Baker Street, Chennai – 600 001.

2. M/s. Fine Paper Source Private Ltd.
No.9, Baker Street, Chennai – 600 001,
Represented by its Authorized Signatory ... Petitioners

-Versus-

1. M/s. Krishna Trading Company,
A/4/304/mahavir Vihar,
Mahavir Nagar Vapi Gujarat 396 191.

2. Mr. Balwant Shah ... Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the order dated 19.08.2020 passed in O.S.No.2137 of 2017 for reject the document on the file of the II Assistant City Civil Court at Chennai.



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For Petitioner : *Mr.Swaminathan*
for Mr.S.Namasivayam
For Respondents : *Mr.Dhruva*

ORDER

The plaintiffs are the civil revision petitioners. They presented O.S.No.2137 of 2017 on the file of the II Assistant City Civil Court at Chennai.

2. This suit seeks for recovery of money to the tune of US\$ 8215.16, equivalent to Indian rupees 5,60,471.16. The basis of the case is that the first defendant had placed an order on the plaintiffs for supply of papers. The second plaintiff is a power agent of the first plaintiff.

3. After service of summons, since the defendants did not enter appearance, the suit was decreed ex parte on 01.03.2018. Thereafter, the second defendant, who is the sole proprietor of the first defendant, filed an application to set aside the ex parte decree and the decree was also set aside.

4. After the suit was reopened, the plaintiffs produced the very same document that they had produced before the ex parte decree had been passed. At



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that stage, the defendants raised an objection that what had been produced was a photostat copy of the power of attorney and not the original. Therefore, it was argued by the defendants that the said document cannot be received in evidence. The second defendant had also pleaded that the power of attorney, having been executed abroad, would require stamp duty/adjudication by the stamp collector and that not having been fulfilled, no reliance can be placed upon the same.

5. The argument of the plaintiffs was that the document has already been received in evidence i.e., prior to the exparte decree and therefore, Section 36 of the Stamp Act will operate.

6. The learned Judge did not agree with the submission of the plaintiffs and refused to receive the deed of power of attorney, which had been previously marked as Ex.A7, against which the present revision.

7. This court ordered notice on 14.02.2023 and Mr.Dhruva entered appearance for the respondents/defendants.



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8. I have heard Mr.Swaminathan for Mr.S.Namasivayam for the petitioners and Mr.Dhruva for the respondents.

9. Mr.Swaminathan would contend that by virtue of the fact that the document had already been admitted in evidence, Section 36 of the Stamp Act will operate. He would plead that whether the document is properly stamped or not should have been adjudicated when it was presented for the first time in evidence before the court and that, not having been done, the plaintiff is entitled to the benefit of Section 36.

10. Mr.Dhruva would point out that the requisite stamp duty as required during the course of adjudication had not been paid. Therefore, the first available opportunity for the defendants to object to the said document would be when it was put for evidence after the ex parte decree was set aside and therefore, they are entitled to raise any objection.

11. I have carefully considered the arguments on either side and perused the records.



12. It is no doubt true that the document had been received in evidence as Ex.A7, on the strength of which the exparte decree was passed. The exparte decree being set aside restores the suit to the original position and the evidence that had been recorded prior to passing of the exparte decree cannot be relied upon by the plaintiffs. In fact, the evidence already recorded gets wiped out and that is the reason why the plaintiffs are yet again called upon to enter the witness box and depose afresh.

13. It is pertinent to point out that the document that had been filed as Ex.A7, during the time when the suit was proceeded exparte, is only a photostat copy of the power of attorney. A photostat copy is not entitled to the same treatment as that of original. It is only a secondary evidence in terms of section 65 of the Evidence Act and it cannot be received when the primary evidence is very much available with the plaintiff. Only when a primary evidence is not available and the conditions imposed under section 65 are complied, the court is entitled to receive the secondary evidence. Therefore, the argument that since the document has already been exhibited, the court cannot go back into the issue again does not appeal to me.

14. The exparte decree was set aside and the parties are called upon to let



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in fresh evidence. Therefore, at that stage, it is always open to the defendants to raise the objection that the secondary evidence of the power of attorney cannot be received. The solution to this objection can be very easily obtained by permitting the plaintiffs to produce the original of the power of attorney instead of the photostat copy which is sought to be marked, during the course of trial. In this regard, I respectfully apply the verdict of the Supreme Court in the case of *Malasiyan Airlines Systems BHD vs. STIC Travels Private Limited, (2001) 1 SCC 451, see paragraph 6.*

15. If the original is produced, it is always open to the Court to impound the said document and collect the difference between the stamp duty paid and the deficit stamp duty that the document should bear from the plaintiffs. If the plaintiffs feel that the document of the power of attorney should be in their custody, they can always file the original into the court and thereafter, move an application under Order XIII Rule 9 of CPC and substitute the same with the certified copy of the document so exhibited.

16. Mr.Dhruva would submit that if such course of action is adopted, the defendants would not have any objection to the same.



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17. In the light of the above discussion, while confirming the order of the learned Trial Judge, the following directions are given:

(a) The plaintiffs shall file the original of power attorney, the photostat copy of which has been filed as Ex.A7;

(b) The court shall thereafter impound the document and collect the deficit stamp duty from the plaintiffs;

(c) On payment of deficit stamp duty, the plaintiffs will be permitted to mark the original power of attorney before the court;

(d) After marking of the original of the power of attorney, it is open to the plaintiffs to file an application under Order XIII Rule 9 and seek for return of the original of the power of attorney and substitute the same with the certified copy obtained from the Court.

18. With the above directions, this civil revision petition is disposed of. No costs. Consequently, the connected miscellaneous petition is closed.

12.07.2024

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Index : yes / no
Neutral Citation : yes / no
Speaking / Non Speaking Order

To

The II Assistant City Civil Court at Chennai.



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V.LAKSHMINARAYANAN, J.

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