



A.Nos.6444 to 6446 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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RESERVED ON 13.02.2025	PRONOUNCED ON 10.03.2025
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CORAM :

THE HON'BLE MR.JUSTICE K.KUMARESH BABU

A.Nos.6444 to 6446 of 2024
in C.S.No.8 of 2021

Mr.Nithin Raja

... Applicant in all Applns

vs.

1.Mr.S.Padmasankar
2.Minor Samanth Balaji
3.Minor Abilesh
4.Mrs.A.Sri Devi

... Respondents in all Applns

For Applicants :Mr.P.Dinesh Kumar

For Respondent :Mr.Sriram Venkatavaradhan for DD1 to D4
Mr.M.Deivanandam for D5

COMMON ORDER

Application No.6444 of 2024 had been filed to reopen PW-1 in the Suit;

Application No.6445 of 2024 had been filed to recall PW-1 in the Suit and



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Application No.6446 of 2024 had been filed to permit the plaintiff to mark the xerox copy of the plaint document Nos.1, 5 and 6 as the secondary evidence to the Suit.

2. The learned counsel for the applicant would submit that the instant suit had been filed for partition and separate possession of his 1/5th share. He would submit that the first respondent herein is his biological father who had been allotted certain shares in the Hindu Undivided Family. The said allotment of shares had come through a family understanding between the family members. Being the biological son of the first respondent, the applicant is entitled for a share in the ancestral and Hindu Undivided Joint Family properties and business. To substantiate his right in the suit schedule properties, the applicant had filed various documents along with plaint. He would submit that most of the plaint documents were marked except for documents 1, 5 & 6 which are the minutes of the family meeting and Memorandum of Understanding entered between the family members. When the said documents were executed, the applicant's grand father being one of the distinct family member of the first respondent had taken the xerox copies of the family arrangement between the family members of the first respondent and the originals were retained by the



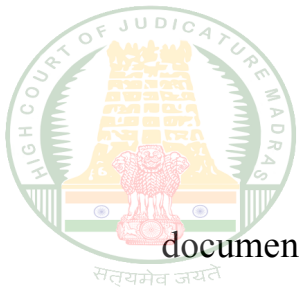
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members of the family of the first respondent.

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3.He would contend that the plaint documents Nos.1,5 & 6 would establish that the first respondent was allotted with Schedule -A mentioned share and Schedule-B property. He would submit that even though there was no specific denial of the specific document in the written statement, the defendants have objected to the marking of the said documents on the sole ground that they are photocopies. Hence, he had taken out an application in A.No.128 of 2024 which was dismissed as withdrawn giving liberty to the applicant to serve notice to the defendants as per the relevant provision of law. Hence the applicant counsel had issued a notice on 24.01.2024 calling upon the counsel for the defendants to produce the aforesaid documents. By reply dated 12.02.2024, the defendant counsel had indicated that they are not in possession of the said documents and that they do not admit the veracity, validity and the contentions of the alleged documents.

4.He would further contend that in spite of the applicants sincere efforts to trace the documents, the documents could not be traced and that the said



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documents would establish the claim of the applicant/ plaintiff to substantiate his case. Hence, he seeks permission of this Court to mark the xerox copies of the plaint documents No.1,5 & 6 as secondary evidence and as a consequences to permit the applicant to reopen and re examine himself as PW1. He would vehemently contend that the respondents are in possession of the documents and are denying the fact that the said documents are available with them. He would further contend that an attempt is being made by the respondents/ defendants to wriggle down the right of the applicant/ plaintiff by not allowing to mark the relevant documents. Hence, he seeks this Court's indulgence to grant permission to applicant/ plaintiff to mark xerox copies of the plaint document Nos.1, 5 & 6 as secondary evidence.

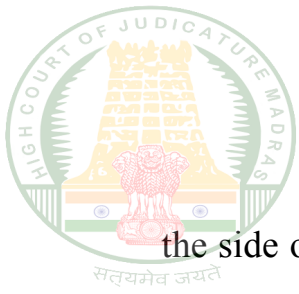
5.Countering his arguments, the learned counsel appearing on behalf of the respondent would contend that the defendants even in the written statement had claimed that the aforesaid documents would not have any bearing to the claim made by the plaintiff. He would further submit that the applicant had originally filed an application in A.No.128 of 2024 seeking permission of this court to mark the photocopies of the plaint documents Nos.1, 5, 6 & 16 as



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secondary evidence in the aforesaid suit. However the applicant had sought leave of this court to withdraw the same with liberty to the applicant/ plaintiff to serve notice on the respondent/ defendants in accordance with the relevant provisions of law by an order dated 10.01.2024.

6.The applicant had also issued a notice to their counsel who had been suitably replied to by the counsel for the respondent on 24.01.2024. However in the said notice, the applicant had called upon their counsel to produce the plaint document nos.1, 5 & 6 giving up his right in respect of document No.16, which was also originally sought for in the A.No.128 of 2024. He would further submit that pursuant to the order of this court dated 10.01.2024, the plaintiff had proceeded to depose and completed his examination in chief on 16.02.2024 and made himself available for cross examination. The cross examination of the plaintiff was completed on 15.03.2024 and thereafter, the suit was listed for further examination of plaintiff witnesses. But, however on 03.04.2024 the applicant/ plaintiff had represented that there is no further evidence and had also made an endorsement to that effect and thereupon the suit was adjourned for evidence on the side of the defendants. The DW1 was also examined in chief on



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the side of the defendants on 17.04.2024 and had been repeatedly adjourned for cross examination on the side of the applicant/ plaintiff at least on five occasions when this instant application had been filed.

7.In such a scenario, he would submit that present application is only a ruse to protract the proceedings and to coerce the respondent/ defendants to unjustly part with the suit schedule properties in the favour of the applicant/ plaintiff. Therefore, he would submit that the present application deserves to be dismissed.

8.He would further rely upon the judgement of the Hon'ble Apex Court reported in **2009 (4) SCC 410** and contend that an attempt is being made by the applicant/ plaintiff to fill up the lacunae in evidence of his witness who had already been recorded and therefore, the present application should be dismissed.

9.I have considered the rival submissions made by the learned counsels appearing on either side and had perused the materials available on record.



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10. The present application had been taken out to permit the applicant to mark a secondary evidence i.e., the photocopies of the plaint documents 1, 5 and 6 and to recall and reopen PW1. The applicant had initially approached this court in A.No.128 of 2024. In the said application, he had made an averment that the said documents were documents which was created prior to his birth and therefore he was unable to trace the original copy of the same.

11. In the present application he had made a categorical statement that the said documents are in possession of the first respondent herein. Be that as it may, he had sought liberty to withdraw the said application to work out his remedy as provided under law. He had also taken out a notice through his counsel to the counsel for the respondent/ defendants and had called upon them to produce the original of the plaint documents. Such notice had been given after a period of 2 weeks from the date of the order. The same had been replied to by the counsel for the respondents indicating that the documents are not in possession of the respondents.



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12. That apart the respondent/defendants had indicated that they do not accept the veracity and validity of the alleged documents. This reply was given by the counsel for the respondents on 12.02.2024. It is also pertinent to note that thereafter the suit came to be listed for recording of evidence before the learned Additional Master-IV and on 16.02.2024. The examination of PW1 in chief was completed and thereafter PW1 also subjected himself for the cross examination which came to be completed on 15.03.2024. After two hearings, the counsel for the plaintiff had represented no further evidence on the side of the plaintiff and also closed his evidence on 03.04.2024. On the next date of hearing namely 17.04.2024, DW1 had entered into box and had examined himself in chief. Thereafter, this suit was adjourned to 03.06.2024, 12.06.2024, 21.06.2024 and 04.07.2024 for cross examination of DW1 by the applicant/ plaintiff and had been adjourned repeatedly at the request of the applicant/ plaintiff. When the suit was taken up for hearing on 04.07.2024, it had been represented by the counsel for the plaintiff that an application to reopen, recall and to receive additional documents have been proposed to be filed by the applicant which was also objected to by the counsel for the defendants. The applicant had filed these instant applications on 04.11.2024 after a period of 4 months. It is also to be



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noted that the trial was directed to be completed within a period of 3 months failing which the status quo granted by this Court would be automatically vacated. The said order was passed by this Court on 30.11.2023. In spite of 15 months having been over the plaintiff claims to have not completed his evidence and is now seeking to recall and reopen his evidence that too after the Chief Examination of DW 1.

13. Section 66 of the Indian Evidence Act 1872, would envisage that secondary evidence of the contents to the documents referred to Section 65 (a) could be marked as a secondary evidence unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, to produce it as prescribed by law. Order 12 Rule 8 prescribes the form of notice to be sent. Even though it is the case of the applicant that the first respondent is in possession of the document, the first respondent had categorically denied the same and thereafter the plaintiff had proceeded to examine PW1 in full. A statement had been made by the applicant



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in his application that he had been attempting to trace the original after the reply from the counsel for the respondents, but no details had been given in the affidavit. As noticed Supra, in the earlier application he had indicated that since the documents were prior to his birth he was unable to trace but however in the present application he had claimed that the documents in xerox copies was handed over to the maternal grandfather who had claimed to be his guardian and that the document referred are with the family members of the first respondent. This conduct of the applicant does not agree well with this Court, as he having examined himself in full and having made an endorsement that no further evidences are required. This Court is of the view that the applicant/ plaintiff is attempting to fill up a lacunae that he had allowed to come into existence by his own conduct.

14.The judgement relied upon by the learned counsel for the respondent reported in **2009 (4) SCC 410** clearly lays down the law that Order 18 Rule 17 of CPC should be sparingly used and cannot be allowed to fill up a lacunae in the evidences of the witnesses who had already been examined. For better appreciation the relevant paragraph of the said judgement is extracted



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hereunder:-

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29.It is now well settled that the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination.

15. For the aforesaid reasons I do not find any merits in the application and accordingly these applications are dismissed. No order as to costs.

10.03.2025

Index : Yes / No
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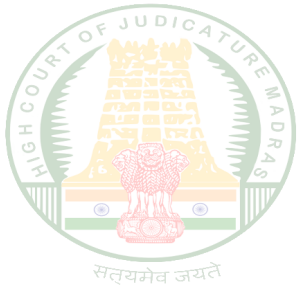
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K.KUMARESH BABU.J.,

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Pre-Delivery Judgment in
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