

(2013) 01 MAD CK 0274

In the Madras High Court

Case No : C.R.P. (PD) (MD) No's. 1486 and 1487 of 2012 and M.P (MD) No's. 2 and 3 of 2012 in C.R.P (PD) (MD) No. 1486 of 2012

M. Murugesan

APPELLANT

Vs

R. Rameswari and M. Amsa
R. Rameswari Vs M.
Murugesan and M. Amsa

RESPONDENT

Date of Decision : 04-01-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 10, Order 13 Rule 10(2)
Evidence Act, 1872 — Section 63

Citation : (2013) 1 LW 946

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : R. Vijayakumar, for the Appellant; M.P. Senthil for R. 1 and Mr. A.W.D. Thilak for R. 2, for the Respondent

Final Decision : Dismissed

Judgement

G. Rajasuria, J.—C.R.P(PD)(MD) No. 1486 of 2012 has been filed to get set aside the order dated 21.06.2012 passed in I.A.No. 1196 of 2011 in O.S. No. 60 of 2004 on the file of the Sub Court, Tuticorin. C.R.P(PD)(MD) No. 1487 of 2012 has been filed to get set aside the order dated 21.06.2012 passed in I.A.No. 1197 of 2011 in O.S.No. 60 of 2004 on the file of the Sub Court, Tuticorin.

2. Heard both sides.

3. A "resume" of facts absolutely necessary and germane for the disposal of both the Civil Revision Petitions would run thus:

The first respondent/plaintiff filed the suit seeking declaration and partition. Pending trial, LA. Nos. 1196 and 1197 of 2011 were filed by the first respondent/plaintiff for reopening the evidence on his side and to send for the documents from the Court of Judicial Magistrate No. 1, Tuticorin. The lower Court allowed both the applications.

4. Being aggrieved by and dissatisfied with the same, both the Civil Revision Petitions have been filed on various grounds.

5. The learned Counsel for the revision petitioner/first defendant placing reliance on the grounds of revision, would put forth and set forth his arguments thus:

The certified copy of the expert opinion is already available with the Court as the plaintiff himself filed it in Court in order to buttress and fortify her alleged plea of forgery committed by the revision petitioner/first defendant in executing the sale deed dated 30.04.1991. The law is clear on the point that a certified copy of a document could rightly be filed. In the event of the expert being summoned by the plaintiff and examined, the said certified copy could be marked through him and there is no necessity under the law that the original opinion given by the expert, now available with the criminal Court in connection with the criminal case, should be summoned for the purpose of getting that original marked and thereafter, to be replaced by a certified copy of it. As such, the learned Counsel for the revision petitioner/first defendant would pray for setting aside the orders passed by the lower Court in this regard.

6. Per contra, the learned Counsel for the first respondent/plaintiff by citing the decision of the Honourable Apex Court in Lakshmi and Another Vs. Chinnammal @ Rayyammal and Others, , would pyramid his arguments, which could succinctly and briefly be set out thus:

Trite, the proposition of law is that the original if available, should be produced before the Court and the secondary evidence could be adduced only in the absence of the original. Since the very original documents are available in the criminal Court, there is no embargo for the Court to send for the same. No doubt, the certified copy of the expert opinion was filed by the plaintiff, but at a later date, there should not be any objection for marking such documents and in view of the same and to be on the safer side, the plaintiff took steps and the lower Court also correctly ordered such summoning of the documents, warranting no interference in revision.

7. The point for consideration is as to whether the lower Court was justified in sending for the documents from the criminal Court?

The Point:

8. I would like to call up and recollect Rule 74 of the Civil Rules of Practice and Section 63 of the Indian Evidence Act, which are extracted hereunder for ready reference:

Rule 74 of the Civil Rules of Practice:

74. Production of records in the custody of a court.- (1) An application for the production of records in the custody of a court, shall specify the particular documents required to be produced. Unless it is made to appear to the court that the production of the original documents is necessary, the party shall be required

to obtain and file copies thereof and the original shall not be send for. If the court dispenses with the affidavit mentioned in rule 10(2) of Order XIII of the Code it shall record in writing the reasons for so doing.

(2) When a court finds it necessary to require the production of the records of another court, it shall address a letter of request as in Form No. 22 to the presiding judge of that court.

(3) Where the document to be sent for by a court either from its own records or from those of another court under rule 10 of Order XIII of the Code is an account book or other document not being a record (e.g., judgment, decree, written statement, etc.) which has to be in the custody of a court and belongs to a person other than a party at whose instance it is sent for the court may require the party to deposit in court before the letter of request is issued, such sum as it may consider necessary to meet the estimated cost of making a copy of the document when produced.

(4) When the letter of request is to be issued by the court itself acting on its own motion, it shall be open to the court to call upon either party to make the deposit as aforesaid.

(5) On the production of the document in compliance with the letter of request, the court shall cause a notice to be affixed to the notice board that the document has been received and that the parties may apply to the court for inspection of the same. The court shall not grant inspection to either party, unless it is satisfied that the application is made with the consent of the person to whom the document belongs. After the document has been admitted in evidence, the court shall unless it considers it necessary to retain the original, direct the parties to specify the portion or portions thereof on which they respectively rely, and require a copy to be made of the same at the expense of the party requiring such portion and shall thereafter with all convenient speed, return the original to the court from which it was received, retaining the copies as part of the record.

Section 63 of the Indian Evidence Act:

63. 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 ensure 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.

9. I would also like to refer to the decision of the Honourable Apex Court in Shalimar Chemical Works Ltd. Vs. Surendra Oil and Dal Mills (Refineries) and

Others, Certain excerpts from it, would run thus:

10....An objection to the admissibility of the document can be raised before such endorsement is made and the court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend, the document being endorsed, admitted or not admitted in evidence. In support of the submission he relied upon a decision of this Court in *R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple* where it was observed as follows: (SCC p. 764, para 20)

20.... The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court.

(emphasis in original)

15. On a careful consideration of the whole matter, we feel that serious mistakes were committed in the case at all stages. The trial court should not have

"marked" as exhibits the xerox copies of the certificates of registration of trade mark in face of the objection raised by the defendants. It should have declined to take them on record as evidence and left the plaintiff to support its case by whatever means it proposed rather than leaving the issue of admissibility of those copies open and hanging, by marking them as exhibits subject to objection of proof and admissibility. The appellant, therefore, had a legitimate grievance in appeal about the way the trial proceeded.

10. A cumulative reading of the above provisions of law and the precedent of the Honourable Apex Court, would unambiguously and unequivocally make the point clear that the best evidence has to be produced before the Court, but the law itself enables a Court to place reliance on a certified copy without summoning the original from one other Court. Here, admittedly, the opinion of the expert and the original documents concerned are in the criminal Court.

11. The learned Counsel for the revision petitioner/first defendant would appropriately and appositely, convincingly and correctly point up and show up that if those original documents are summoned by the civil Court from the criminal Court, then the first defendant who is facing the criminal case as accused, would face hurdles in the disposal of the case and consequently, the prolongation of the trial.

12. When the law itself envisages that a certified copy could be marked, there is no knowing of the fact as to why the plaintiff should insist upon the production of the original documents. If at all, any more certified copies of the original documents concerned should be obtained, the very plaintiff is at liberty to obtain those documents and also file them before the civil Court and after getting summoned the hand-writing expert, he could mark the relevant documents through him and if the expert raises any doubt about the certified copy containing his opinion, then the matter would be entirely different. The civil Court cannot doubt the certified copy issued by a criminal Court as of now.

13. As such, I am of the view that the order of the lower Court in sending for the original documents from the criminal Court has to be set aside and accordingly, it is set aside. However, the matter was reopened at the instance of the plaintiff and the same shall remain in tact and the plaintiff shall abide by the procedures as envisaged supra and the lower Court shall dispose of the matter as expeditiously as possible. The point is answered accordingly. In the result,

(i) C.R.P(PD)(MD) No. 1486 of 2012 is disposed of. Consequently, the connected Miscellaneous Petitions are closed.

(ii) C.R.P(PD)(MD) No. 1487 of 2012 is allowed.

(iii) There shall be no order as to costs in both the Civil Revision Petitions.