
(1971) 02 MAD CK 0055

In the Madras High Court

Case No : Civil Revision Petition No. 1940 of 1969

Muthu Venkatarama Reddiar

APPELLANT

Vs

Vardaraja Kounder

RESPONDENT

Date of Decision : 17-02-1971

Acts Referred:

Evidence Act, 1872 — Section 61, 62, 63, 65, 66

Citation : AIR 1971 Mad 471 : (1971) 84 LW 452 : (1971) 84 LW 432 : (1971) 2 MLJ 128

Hon'ble Judges : Raghavan, J

Bench : Single Bench

Judgement

1. The first defendant is the petitioner. The suit is for declaration of the plaintiff's title to the suit property and for recovery of possession under a sale deed dated 9-7-1965 executed by Sivaprakasa and an exchange deed Ex. A. 2. The first defendant resisted the suit on the ground that he is in possession of the western half of the suit property, originally under a usufructury mortgage dated 23-6-1962 and later an agreement of sale by Sivaprakasa in his favour dated 22-8-1964. The first defendant contended that the agreement of sale was reduced to writing on stamp papers supplied by the vendor Sivaprakasa, that one Ratnasabapathi Pillai wrote the said agreement, that one Ramalingam had attested it, that he purchased stamp papers in his name for completing the sale transaction, that he gave them to the vendor Sivaprakasa to get the sale deed written up on the stamp papers, that Sivaprakasa, instead of completing the sale transaction, sold the suit property to the plaintiff, and that, therefore, the plaintiff being a subsequent vendor has no title to the suit property.

2. The trial of the suit commenced and the first defendant examined himself as D.W. 1. In the course of his evidence, the first defendant referred to the agreement of sale, and, when he let in oral evidence regarding the contents of the said agreement the plaintiff raised an objection to the same. The learned District Munsif upheld the objection and passed an order dated 14-10-1969

refusing to allow the first defendant to let in oral evidence regarding the contents of the document. The present revision petition is filed by the first defendant against the said order of the learned District Munsif.

3. u/s 61 of the Evidence Act, the contents of documents may be proved either by primary or by secondary evidence. What is primary or by secondary evidence. What is primary and secondary evidence, is explained in Section 62 and Section 63 respectively. Section 64 provides for proof of the contents of documents only by primary evidence, by production of the documents themselves, except in case falling u/s 65 and 66. The result is that, when the primary evidence is not available, proof by secondary evidence is permissible. Under what circumstances secondary evidence is permissible, is contained in the seven cases enumerated in Section 65. We are here concerned with S. 65(a) which runs:-

"65. 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."

It is thus seen that secondary evidence of a document is permissible only when the party desirous of having such evidence admitted has proved that the document is not in his possession, that he had done what could be done to procure the production of the original document, that the original document is in possession or power of the person against whom the document is sought to be proved and that, though notice u/s 66 was issued to the person who is in possession of document to produce the document, he has ailed to do so. In order to avail the machinery under Sections 65 and 66 it is, therefore, necessary to establish that a document was executed, and that the said document is not with him but is in the possession or power of the person against whom the document is sought to be proved. In this connection reference may be made to three decisions which are material. In *Biswanath Agarwalla Vs. Sm. Dhapur Debi Jejodia and Others*, where, when the original document was not in possession of the plaintiff, when no finding was recorded that the defendant was in possession of the original document and when the plaintiff tendered certified copy of the document, the learned Judge held as follows:--

"In order to enable the plaintiff to tender the certified copy as a secondary evidence, it is enough for the plaintiff to prove that the original is not in possession and so far as he is concerned it is lost."

This decision is directly in point. In *Sudhakar Misra and Another Vs. Nilkantha Das and Others*, , the Patna High Court held that, where the original document is in possession or control of the party taking objection and where such a party fails to produce the original document, proviso 2 to Section 66 applies and notice to

the party to produce the original document is not necessary. On the facts of the case, the secondary evidence was held admissible. In *British Transport Co. Ltd. Vs. Suraj Bhan and Others*, the Allahabad High Court held that, the agreement having been upheld by the appellant company, secondary evidence to prove the contents of the document could be given in view of clause (ii) of the proviso to Section 66 read with Section 65(a) of the Evidence Act.

4. In the present case, the vendor who sold the property both to the plaintiff and the first defendant is common and he is not a party to the suit. The first defendant's case is that the agreement in question was given to the vendor. The vendor is subject to the process of the court below. But, he not being a party to the suit, the question for consideration is whether he is bound to produce the agreement in question. Technically speaking, in one sense every person summoned to produce a document is bound to produce the same. The plaintiff who purchased the same property from Sivaprakasa, does not evidently want the document to be produced in evidence which, when produced, may weaken his case. In the circumstances of the case, oral evidence as to the contents of the agreement could be given, when the first defendant issues notice u/s 66 to Sivaprakasa and he fails to produce the same. The order of the court below excluding oral evidence is wrong, and it is hereby set aside. The civil revision petition is allowed. There will be no order as to costs.

5. Revision allowed.