

**Petitioner Vs. Respondent**

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**Court :** Chennai

**Decided On :** Feb-10-2017

**Judge :** C.V. Karthikeyan

**Appeal No. :** A.No. 6853 of 2016 In CS. No. 215 of 2009

**Appellant :** Petitioner

**Respondent :** Respondent

**Judgement :**

**C.V. Karthikeyan, J.**

1. This application has been filed by the Plaintiff to permit them to adduce documents as mentioned in the Annexure-A to the Judges's Summons as secondary evidence.

2. In the affidavit filed in support of this application, it had been stated that the suit had been filed for groundless threat of legal proceedings and for other consequential reliefs against the respondents/ Defendants. It had been stated that at the time of filing of the suit, the Applicant had filed the copies of annual reports for the years 1985-86 and 1989-90, copies of the sales promotional material of LOTTEE CARAMILK and LOTTE ECLAIRS, copy of the article about Parrys Confectionery between 1914 and 1994 proving use of the marks Caramilk and Eclairs since 1980, copy of the extracts from Diary of Parrys Confectionery Limited

(1996), copy of the invoices bearing the mark CARAMILK and ECLAIRS and copies of the wrappers of Specimen of ITC's Candyman Choco Double Eclairs pouch containing broken éclair, specimen of Nutrine's Chocolate Eclairs Pouch containing broken éclair. It had been stated that the originals of the above documents had been retained at the Office of the Applicant situated at No.4/111, Mount Poonamallee Road, Manapakkam, Chennai-89. It had been further stated that Manapakkam was one of the most affected areas in Chennai City during the floods in December 2015 and the places were inundated twice during the floods.

3. It is the specific case of the Applicant that all the original documents, which had been in the custody of the Applicant, were destroyed during the floods in Chennai in December 2015. It had, therefore, been stated that consequently xerox copies of the documents may be taken on record as secondary evidence. It had been stated that denial would cause irreparable loss and hardship to the Applicant/Plaintiff.

4. In the counter affidavit filed on behalf of the respondents/ Defendants, it had been stated that the suit itself had been instituted in bad faith and is an abuse of process of law. Though it was not specifically denied that Manapakkam was one of the affected areas in the City of Chennai by the floods that took place in the year 2015, it was denied that the documents had been lost during the floods. It had been further stated that the Plaintiff Company also had offices at Murugesan Complex, 84, Greaves Road, Thousand Lights, Chennai and Head Office at 4/169, Rajiv Gandhi Salai, Kandanchavadi Bus Stop, Perungudi Taluk, Chennai. It had been further stated that the Applicant had also Office at New Delhi. It was, therefore, stated that it is very difficult to accept the case of the Applicant that the documents were destroyed during the floods and were kept at Manapakkam, Chennai premises in 2015. It had been further stated that it is unbelievable that the Applicant had only photocopies of annual reports and other promotional materials. It had been further stated that the Applicant should have filed the originals at the time of institution of the suit and that the Applicant is taking advantage of a natural disaster to escape from the procedures of the court. It had, therefore, been stated that the reasons advanced cannot be accepted by this court.

5. This court heard the learned counsel on either side.

6. The suit in CS.No.215 of 2009 had been to pass a judgement and decree against the Defendants:

a. granting declaration, declaring that the threats issued by the Defendants by legal notice dated 11.2.2009 against the Plaintiff's use of the trade marks CARAMILK, ECLAIRS, picture of broken eclairs are groundless, unjustifiable and such use by the Plaintiff is not in violation of the Defendants purported rights.

b. Granting permanent injunction, restraining the Defendants from in any manner either directly or indirectly infringing with the Plaintiff's use of the trade marks CARAMILK, ECLAIRS, picture of broken eclairs by issuing letters, circulars, notices, advertisements or otherwise which are unjustifiable, mala fide and groundless or in any other manner whatsoever.

c. granting declaration, declaring that the picture of broken eclairs is common to confectionery/chocolate trade and the Defendants cannot claim any monopoly in respect thereof;

d. directing the Defendants to pay to the Plaintiff a sum of Rs.10,05,000/- as liquidated damages on account of the interference with the Plaintiff's business by issuing groundless and unjustifiable threats thereby causing loss to the reputation and goodwill, business, image of the Plaintiff.

7. The Respondents/Defendants had filed their written statement and on consideration of the pleadings, this court had framed necessary issues and had called upon the parties to let in evidence. At that stage, this application has been filed, seeking permission to file xerox copies of the documents, which had been filed along with the suit and further requesting to take them on record as secondary evidence. In this connection, Section 65 of the Evidence Act, reads as follows:-

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 to be easily movable;

(e) When the original is a public document with 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 original consists 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 case (a), (c) and (d), any secondary evidence of the contents of the documents is admissible.

In case (b), the written admission 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.

8. In this case, it is the specific stand of the Applicant that the documents had been lost during the floods when they were retained at their Office at Manapakkam, Chennai. It is an admitted case that Manapakkam was affected by the floods during December 2015. It had been further stated that during the said floods, the documents had been destroyed and lost. This is a fact which is to the exclusive knowledge of the Applicant/ Plaintiff. Unless the Applicant/ Plaintiff establishes by acceptable evidence that the documents were actually stored at Manapakkam, Chennai, that the Office at Manapakkam, Chennai was affected by the floods and that there were loss of documents and materials of the Plaintiff in the said Office, the Applicant cannot seek to mark secondary evidence as a matter of right. Further, the Applicant should also satisfy the court as to why they did not produce the originals at the time of institution of the suit. A mere affidavit had been sworn in, stating that the documents were placed at Manapakkam and that they were lost.

9. The stand of the Respondents/ Defendants that taking advantage of the natural calamity cannot be a ground seeking to mark secondary evidence is justifiable. However, on that sole ground, the Applicant cannot be denied the opportunity to mark secondary evidence. For the present documents to be exhibited as admissible documents, they must first cross the stage of admissibility and the Applicant has to explain why the originals were not filed and that the originals were actually lost during the floods. There is nothing on record to show that the Applicant had informed the court that the original documents in relation to this suit were actually lost during the floods thereby affecting their case. Consequently, I hold that the documents can be taken on record, but only if the witness of the Plaintiff explains satisfactorily during his deposition the reasons why originals were not filed at the time of institution of the suit and that the originals were actually lost during the floods. It is only thereafter that these documents can be taken on record. The respondents/ Defendants can always cross examine the witness not only on the reasons advanced for not filing the originals, but also on the fact that

the originals were actually lost.

10. With the above observations, it is directed that the witness for the Applicant/ Plaintiff has to appear before the Additional Master IV on 15.2.2017 to adduce evidence on the above facts and after cross examination thereof, the matter has to be posted back before this court on 27.2.2017. Only on appreciation of that evidence, can this court decide whether the secondary evidence can be taken or not.

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