

Alice vs Moly

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Court : Kerala

Decided On : Feb-03-2022

Judge : Honourable Mr. Justice a. Badharudeen

Appeal No. : OP(C)/174/2022

Appellant : ALICE

Respondent : MOLY

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A. BADHARUDEEN
THURSDAY, THE 3RD DAY OF FEBRUARY 2022 / 14TH MAGHA,
1943 OP(C) NO. 173 OF 2022 AGAINST THE ORDERS IN
I.A.Nos.9/2020, 11/2020 & 12/2020 IN O.S. No.568/2013 OF PRINCIPAL
SUB COURT/COMMERCIAL COURT, THRISSUR ORIGINAL
PETITIONER/PETITIONER/PLAINTIFF: ALICE, AGED 60 YEARS,
W/O.LATE P.I. THOMAS, PAYOOR HOUSE, KOPPAM DESOM,
PALAKKAD-678 001. REPRESENTED BY POWER OF ATTORNEY
HOLDER, GLANSON THOMAS, S/O.LATE P.I.THOMAS, AGED 37
YEARS, PAYOOR HOUSE, KOPPAM DESOM, PALAKKAD-678 001.
BY ADVS. SRI.GEORGE VARGHESE(PERUMPALLIKUTTIYIL)

SRI.A.R.DILEEP SRI.P.J.JOE PAUL SRI.MANU SRINATH SRI.RAJAN
G. GEORGE SRI.NIMESH THOMAS
RESPONDENT/RESPONDENT/DEFENDANT: MOLY,
W/O.THEYILAKKADAN PAULSON, DIX VILLA, WEST HILL,
GOSAIKUNNU, KURIACHIRA, THRISSUR TALUK-680 006. THIS OP
(CIVIL) HAVING COME UP FOR ADMISSION ON 27.01.2022, ALONG
WITH OP(C).174/2022, THE COURT ON 03.02.2022, DELIVERED THE
FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A. BADHARUDEEN THURSDAY,
THE 3RD DAY OF FEBRUARY 2022 / 14TH MAGHA, 1943 OP(C) NO. 174 OF
2022 AGAINST THE ORDERS IN I.A.Nos.10/2020 & 13/2020 IN O.S.No.568/2013
OF PRINCIPAL SUB COURT/COMMERCIAL COURT, THRISSUR ORIGINAL
PETITIONER/PETITIONER/PLAINTIFF:

ALICE, AGED 60 YEARS, W/O.LATE P.I.THOMAS, PAYOOR HOUSE,
KOPPAM DESOM, PALAKKAD-678 001. REPRESENTED BY POWER
OF ATTORNEY HOLDER, GLANSON THOMAS, S/O LATE P.I.
THOMAS, AGED 37 YEARS, PAYOOR HOUSE, KOPPAM DESOM,
PALAKKAD-678 001. BY ADVS. SRI.GEORGE
VARGHESE(PERUMPALLIKUTTIYIL) SRI.P.J.JOE PAUL SRI.MANU
SRINATH SRI.A.R.DILEEP SRI.RAJAN G. GEORGE SRI.NIMESH
THOMAS

RESPONDENT/RESPONDENT/DEFENDANT: MOLY, W/O.THEYILIKKADAN
PAULSON, DIX VILLA, WEST HILL, GOSAIKUNNU, KURIACHIRA, THRISSUR
TALUK - 680 006. THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON
27.01.2022, ALONG WITH OP(C).173/2022, THE COURT ON 03.02.2022,
DELIVERED THE FOLLOWING: 'CR'

COMMON JUDGMENT

Orders in I.A.Nos.9/2020, 11/2020 and Principal Sub Judge, Thrissur are under challenge in O.P.(C) No.173/2022 filed by the plaintiff in the above suit.

2. Orders passed on the same day in I.A.Nos.10/2020 and 13/2020 in the same suit are under challenge in O.P.(C) No.174/2022 filed by the plaintiff.

3. The crux of the dispute in O.P.(C)

No.173/2022 is that while cross-examining PW3, the brother of the parties in this case, a photo copy of an alleged agreement executed between the petitioner and the respondent got marked as Ext.B1, when PW3 admitted, when confronted the same.

4. It is contended by the learned counsel for the petitioner that Ext.B1 was marked in evidence, despite strong objection raised by the learned counsel for the plaintiff. Copy of the deposition of PW3 is produced as Ext.P4 in this case. Initially, PW1 was cross-examined and, thereafter, he was re-examined. Then, PW3 was further cross-examined with permission of the court. Then, photocopy of the agreement dated 23.05.2021 shown to the witness and asked whether he had put signature in the copy of the agreement as a witness? He readily admitted without any hesitation and accordingly the same got marked as Ext.B1. Nothing available in the

deposition of PW3 to the effect t

hesitation to admit his signature in the so called agreement marked as Ext.B1. During re- examination, it was suggested that Ext.B1 is an agreement to sell the property of the plaintiff. That suggestion was admitted by PW3. When a leading question was asked as to whether PW3 did know such an agreement, PW3 answered in the negative.

5. Going by the deposition of PW3, it

could be gathered that Ext.B1 was marked without any objection, as PW3 admitted his signature in Ext.B1 as a witness to the same, when confronting the document while cross- examining him.

6. It was thereafter, I.A.No.9/2020 was filed to set aside the order passed by marking Ext.B1. The other side seriously opposed the contention. The court below after referring the evidence given by the PW3 in detail and

dismissed the same. Apart from that, I.A. No.11/2020 also filed to call for the original of Ext.B1. The learned Sub Judge dismissed the said application also, in view of the specific

contention raised by the respondent in the counter filed by the respondent stating that the original of the said agreement had been in possession of the plaintiff/petitioner herein. At this juncture, I.A.No.12/2020 was filed with prayer to send original of Ext.B1 document for handwriting expert. Since it was contended by the respondent that the original itself is in possession of the plaintiff/petitioner herein, the said application also was dismissed.

7. Here, as I have already pointed out

during cross-examination of PW3, who is none other the brother of the plaintiff as well as the defendant, a photocopy of another agreement bearing the signature of PW3 was shown and PW3 admitted it as one executed between the plaintiff and defendant and he put signature in the same as a witness. No objections seen raised in marking the document and the same was marked as Ext.B1. Now, the attempt of the petitioner is to eschew Ext.B1 from evidence. In this connection, the learned counsel for the

petitioner placed three decisions. In the decision in Smt.J.Yashoda v. Smt.K.Shobha Rani [2007 KHC 3494] in order to enable a party to produce secondary evidence, it is necessary for the party to prove existence and execution of the original document. Under Section 64 of the Evidence Act, documents are to be provided by primary evidence. Section 65, however permits

secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without

non production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section.

8. I have perused the above decision. In the said case, the Apex Court considered Exts.B1 to B8 in the above case got marked as

secondary evidence. The above ratio was held

when photocopies of documents were marked without compliance of Section 65. In fact, the

facts of the case dealt in J.Yashoda's case

(supra), is totally different from the facts of this case. Here, photocopy of the document not produced by the defendant as secondary evidence. At the time of cross-examination of PW3, who alleged to have signed in another agreement as a witness, was confronted with the photocopy of the document and on his admission, the same is marked as Ext.B1. Therefore, the ratio in J.Yashoda's case (supra) has no application to the facts of this case.

9. Another decision reported in Rakesh

Mohindra v. Anita Beri and Others [2015 KHC 4746] also has been highlighted to point out that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispensed with its proof, which is otherwise required to be done in accordance with law. Party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. The ratio of the

decision also has no application to the facts

of this case.

10. Another decision reported in State of Kerala v. Saidali [1999 KHC 390] also has been

placed by the learned counsel for the petitioner. In the said decision, in paragraph No.7, a Division Bench of this Court held that when documents are marked as exhibits without objection of a particular party, that party cannot raise the objection that the said document has not been admitted in evidence.

11. Here also, no objections seen raised or recorded by the learned Sub Judge while marking Ext.B1.

12. The crux of the argument mooted by the learned counsel for the petitioner is that foundation to lay secondary evidence is necessary before adducing secondary evidence. I am not disputing this legal position. However, the question herein are; i)whether foundation for adducing secondary evidence to be laid for confronting copy/copies of document/ documents while cross-examining a witness? ii) whether production of the document /documents before the court is/are necessary with notice to the other side, before confronting document/documents at the time of cross-examination of a witness?

13. In an early decision reported in Mohana T.M v. V.Kannan [AIR 1984 Madras 14 = 1984 KHC 1824], the Madras High Court considered the question after referring relevant provisions

regarding production of documents under order

7, 8 and 13 of the Code of Civil Procedure and it was held as under:

8. Thus it is seen from the provisions of

O.8 R.1 (2) and (6) O.8 R.8-A (1) and (3) and O.13, R.2 (2) C.P.C that at every stage at which the defendant is called upon to produce the documents, an exception is always made with reference to documents produced for the cross-examination of the plaintiff witnesses or the cross-examination of the witnesses of the other party or in answer to a case set up by the plaintiff subsequent to the filing of the suit with a view to refresh memory. In other words, the obligation to produce documents relied upon by the defendant at the stages contemplated under 8, R.1 (2), O.8 R.8-A

(1) and by both parties under O.13 R.1 C.P.C. has been done away with in all those cases with reference to documents produced for cross examination. That would mean that a defendant in the suit confronting, the plaintiff's witnesses, as in this case, need not disclose the document in the list or produce the document at an anterior point of time or even seek and obtain the leave of Court for tendering such a document in the course of the cross examination of the witness of the other side.

14. It is true that by way of amendment

brought into the Code of Civil Procedure by Act legal position as to production of documents before amendment was changed. But then also the procedure for confronting documents during cross-examination of a witness is the same. In this connection, another decision reported in *Bhima Jewellery and Diamonds Pvt. Ltd. v. Sandeep Kumar* [2020 (5) KLT 40] placed by the learned counsel for the petitioner also is relevant. In the said case, also this Court in paragraph No.21 held that when the whole purpose is to contradict a witness, it becomes unnecessary to expatiate that the element of surprise is crucial. Axiomatically, it will be incongruous to even suggest that a document or statement used for such must be produced earlier, since the witness certainly will then modulate his response to it by pre-preparation. The very object of S.145 the Indian Evidence Act would be lost by it.

15. Going by the ratio in the above decisions, it is held that it is not necessary

to lay foundation for adducing second

witness. Similarly, it is held that production of the document/documents in original or the copies thereof is/are not necessary before the court while confronting document/documents at the time of cross-examination of the witness.

16. Therefore, the petitioner herein cannot

strike down or eschew Ext.B1 from the evidence. However, the legal position is not in dispute on the point that documents or copies of documents marked by confronting the same to a witness during cross-examination shall be subjected to

other arguments regarding the nature and attending circumstances moulded in the documents. To put it otherwise the probative value of the said documents to be decided by the court concerned on weighing the whole matters before the court.

17. Therefore, I have no hesitation to hold that the Original Petition filed challenging I.A.Nos.9/2020, 11/2020 and 12/2020 in O.S. No.568/2013 on the file of the Principal Sub Judge, Thrissur is devoid of any merits as the same do not suffer from any perversity or arbitrariness. Therefore, O.P.(C) No.173/2022 is liable to be dismissed.

18. Coming to O.P.(C) No.174/2022, orders

in I.A.Nos.10/2020 and 13/2020 are under challenge. When PW4 was examined in this case, Ext.B2 got marked in the similar way of marking Ext.B1 during cross-examination of PW3. It was thereafter I.A.No.10/2020 was filed to recall PW4. The other side opposed the same and the learned Sub Judge dismissed the petition holding that PW4 was cross-examined at length and, therefore, the attempt of the plaintiff is to fill up the lacuna in evidence on understanding the case of the defendant after examining DW1 in this case. Accordingly, I.A.No.13/2020 filed to re-open the evidence also was dismissed.

19. In this matter, it is relevant to note that initially PW3 was examined and PW3 admitted Ext.B1 photocopy of another agreement as dealt in O.P.(C) No.173/2022. Thereafter,

when PW4 was examined, PW4 admitted another copy of agreement and the same got marked as Ext.B2. The deposition of PW4 is not produced before this Court to see the nature of evidence given by PW4. Going by the orders impugned, the learned Sub Judge observed that the attempt of the plaintiff is to fill up the lacuna in evidence by recalling PW4, after examination of DW1.

20. Having noticed the entire facts of the case, in the context of events narrated, I am of the view that the orders impugned in this Original Petition also do not suffer from any

perversity

or

arbitrariness

to

Constitution of India. For the said reasons, this Original Petition also must fail. It is made clear that the probative value of Ext.B2 is similar to Ext.B1 as I have already referred.

In the result, O.P.(C) Nos.173 and 174 of 2022 stand dismissed, without being admitted. Sd/- A.BADHARUDEEN, JUDGE. ww APPENDIX OF OP(C) 173/2022
PETITIONER'S EXHIBITS: EXHIBIT P1 A TRUE COPY OF PLAINT IN O.S.NO. PRINCIPAL SUB JUDGE, THRISSUR. EXHIBIT P2 A TRUE COPY OF WRITTEN STATEMENT IN O.S.NO.568/2013 ON THE FILE OF THE COURT OF PRINCIPAL SUB JUDGE, THRISSUR. EXHIBIT P3 A TRUE COPY OF EXT.B1 MARKED IN THE COURT BELOW. EXHIBIT P4 A TRUE COPY OF THE DEPOSITION OF PW3. EXHIBIT P5 A TRUE COPY OF OBJECTION IN I.A.9/20 IN O.S. NO.568/2013 ON THE FILE OF THE COURT OF PRINCIPAL SUB JUDGE, THRISSUR. EXHIBIT P6 A TRUE COPY OF OBJECTION IN I.A.9/20 IN O.S.NO.568/2013 ON THE FILE OF THE COURT OF PRINCIPAL SUB JUDGE, THRISSUR. EXHIBIT P7 A TRUE COPY OF ORDER DATED 14.12.2021 DISMISSING I.A.9/20 IN O.S.NO.568/2013 ON THE FILE OF THE COURT OF PRINCIPAL SUB JUDGE, THRISSUR. EXHIBIT P8 A TRUE COPY OF I.A.11/20 IN O.S.NO. PRINCIPAL SUB JUDGE, THRISSUR. EXHIBIT P9 A TRUE COPY OF OBJECTION IN I.A.11/20 IN O.S NO.568/2013 ON THE FILE OF THE COURT OF PRINCIPAL SUB JUDGE, THRISSUR. EXHIBIT P10 A TRUE COPY OF ORDER DATED 14.12.2021 IN I.A 11/2020 IN O.S NO.568/2013 ON THE FILE OF THE COURT OF PRINCIPAL SUB JUDGE, THRISSUR. EXHIBIT P11 A TRUE COPY OF I.A.NO.12/2020 IN O.S. NO.568/2013 ON THE FILE OF THE COURT OF PRINCIPAL SUB JUDGE, THRISSUR. EXHIBIT P12 A TRUE COPY OF OBJECTION IN I.A.NO. OF THE COURT OF PRINCIPAL SUB JUDGE, THRISSUR. EXHIBIT P13 A TRUE COPY OF ORDER DATED 14.12.2021

IN I.A. NO.12/2020 IN O.S.NO.568/2013 ON THE FILE OF THE COURT OF PRINCIPAL SUB JUDGE, THRISSUR. APPENDIX OF OP(C) 174/2022

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