

Munusamy Kounder Vs. Balu

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Court : Chennai

Decided On : Apr-10-2002

Reported in : (2002)2MLJ230

Judge : P.D. Dinakaran, J.

Acts : [Evidence Act, 1872](#) - Sections 63 and 66; Code of Civil Procedure (CPC) - Order 8, Rule 8A - Order 13, Rules 1(1) and 2 - Order 20, Rule 12

Appeal No. : C.R.P. Nos. 2808 and 1643 of 2001

Appellant : Munusamy Kounder;pattusamy Kounder

Respondent : Balu;munusamy Kounder

Advocate for Def. : S. Srinath, Adv. and ;R. Balakrishnan, Adv. in C.R.P. No. 1643 of 2001

Advocate for Pet/Ap. : R. Balakrishnan, Adv. in C.R.P. No. 2808 of 2001 and ;K. Kannan, Adv.

Disposition : C.M.P. dismissed

Judgement :

ORDER

P.D. Dinakaran, J.

1. Aggrieved by an order dated 14.6.2001 in I.A.No.1876 of 2000 permitting the respondent in C.R.P.No.2808 of 2001/1st defendant in O.S.No.64 of 1997, to file an additional written statement in O.S.No.64 of 1997 laid by the revision petitioner in C.R.P.No.2808 of 2001 for (i) declaration of title of the revision petitioner/plaintiff over the suit items; (ii) recovery of possession; (iii) past profits of Rs.12,000.00 against the defendant; (iv) future profits to be determined under Order 20 Rule 12 of the Code of Civil Procedure, the plaintiff in O.S.No.64 of 1997 had filed the above revision.

2. Admittedly, the revision petitioner in C.R.P.No.2808 of 2001/plaintiff in O.S.No.64 of 1997 and the second defendant are brothers and the respondent in C.R.P.No.2808 of 2001/first defendant in O.S.No.64 of 1997 is the son of the second defendant in O.S.No.64 of 1997.

3. The suit O.S.No.64 of 1997 filed by the revision petitioner in C.R.P.No.2808 of 2001 was resisted by the defendants therein on the ground that the revision petitioner in C.R.P.No.2808 of 2001/plaintiff had already executed a Will on 5.1.1997 in favour of the second defendant and simultaneously the plaintiff had also agreed to sell the properties to the defendants by an agreement dated 25.8.1986. While the first defendant in his written statement dated 22.9.1997 alleged that the said agreement of sale dated 25.8.1986 was executed by the plaintiff in favour of the first defendant, the second defendant in his written statement dated 16.6.1998 alleged that the agreement was executed in favour of the second defendant. Hence, to clarify the finding that the agreement dated 25.8.1986 was executed only in favour of the second defendant in O.S.No.64 of 1997, the respondent in C.R.P.No.2808 of 2001/first defendant in O.S.No.64 of 1997 sought permission in I.A.No.1876 of 2000 to file an additional written statement. However, the same was resisted by the revision petitioner in C.R.P.No.2808 of 2001/plaintiff in O.S.No.64 of 1997 on the ground that the respondent in C.R.P.No.2808 of 2001/first defendant in O.S.No.64 of 1997 proposed to project a new case deliberately. The learned Principal District Munsif, Villupuram, accepting the case of the respondent in C.R.P.No.2808 of 2001/first defendant in O.S.No.64 of 1997 permitted him to file an additional written statement. Hence, the revision petitioner/plaintiff had preferred the above revision

C.R.P.No.2808 of 2001.

4. In the meanwhile, the second defendant in O.S.No.64 of 1997 filed O.S.No.72 of 1998 based on the agreement dated 25.8.1996 seeking specific performance of the agreement. The second defendant in O.S.No.64 of 1998 (plaintiff in O.S.No.72 of 1998) finding that the case mainly rests on the agreement dated 25.8.1996, filed I.A.No.1189 of 2000 seeking permission to file a photocopy of the agreement dated 25.8.1996, marked as Ex.A1, alleging that the original is with the plaintiff in O.S.No.64 of 1997(defendant in O.S.No.72 of 1998). But the same was resisted by the plaintiff in O.S.No.64 of 1997 (defendant in O.S.No.72 of 1998) contending that photocopy of the agreement cannot be marked as evidence. The learned Principal District Munsif, Villupuram, by order dated 11.12.2000, accepting the case of the plaintiff in O.S.No.64 of 1997 (defendant in O.S.No.72 of 1998) refused to permit the second defendant in O.S.No.64 of 1997 (plaintiff in O.S.No.72 of 1998) to mark the photocopy of the agreement dated 25.8.1996. Hence, the second defendant in O.S.No.64 of 1997 (plaintiff in O.S.No.72 of 1998) preferred C.R.P.No.1643 of 2001.

5. In precise, the petitioner in C.R.P.No.2808 of 2001 (plaintiff in suit O.S.No.64 of 1997) is the respondent in C.R.P.No.1643 of 2001 filed by the plaintiff in O.S.No.72 of 1998, who is nonetheless the father of the respondent in C.R.P.No.2808 of 2001. In other words, the petitioner in C.R.P.No.2808 of 2001 is the respondent in C.R.P.No.1643 of 2001 and the petitioner in C.R.P.No.1643 of 2001 sails with his son, the respondent in C.R.P.No.2808 of 2001.

6.1. Mr. Kannan, learned counsel appearing for the petitioner in C.R.P.No.1643 of 2001, contends that refusing to permit the petitioner in C.R.P.No.1643 of 2001 (plaintiff in O.S.No.72 of 1998) to mark a photocopy of the agreement dated 25.8.1986 as a secondary evidence is illegal and arbitrary, as he is entitled to mark a photocopy of the agreement dated 25.8.1986 as a secondary evidence under Section 63 read with Section 66 Proviso (2) of the Evidence Act.

6.2. Mr. Kannan, learned counsel for the petitioner in C.R.P.No.1643 of 2001, relying on the decision in MOHAMMED ALI.S v. BASHEER AHAMED, etc. reported in 2001 (2) LW 642, contends that while deciding on the right to produce

the documents conferred either under Order 8 Rule 8A sub clause (1) or under Order 13 Rule 1(1) of the Civil Procedure Code, it is not permissible for the Court to go into the admissibility or otherwise of the documents in question, which are sought to be produced under Order 13 Rule 2 of the Civil Procedure Code.

6.3. Placing reliance on the ratio laid down by the Apex Court in *BIPIN SHANTILAL PANCHAL v. STATE OF GUJARAT* reported in (2001) 3 S.C.C. 1, Mr. Kannan, learned counsel for the petitioner in C.R.P.No.1643 of 2001 contends that the petitioner in C.R.P.No.2808 of 2001 (respondent in C.R.P.No.1643 of 2001) is always at liberty to raise objection against the admissibility of photocopy of the agreement dated 25.8.1986.

7.1. Per contra, Mr. R.Balakrishnan, learned counsel for the petitioner in C.R.P.No.2808 of 2001 and counsel for the respondent in C.R.P.No.1643 of 2001 contends that filing of an additional written statement raising a plea that the agreement dated 25.8.1986 was executed only in favour of the second defendant in O.S.No.64 of 1997, who is nonetheless the eviction petitioner, is purely an after thought, as defendants 1 and 2 in O.S.No.64 of 1997 have specifically pleaded that each of them had entered into an agreement dated 25.8.1986 executed in their name by the petitioner in C.R.P.No.2808 of 2001 and the respondent in C.R.P.No.1643 of 2001.

7.2. That apart, it is also contended that photocopy of the agreement dated 25.8.1986 is not admissible in evidence unless non-production of primary evidence is satisfactorily accounted for, as held in *ARULMIGU VISWESWARASWAMI & VEERARAGHAVA PERUMAL TEMPLES, ETC. TIRUPPUR v. R.V.E.VENKATACHALA GOUNDER & ANOTHER* reported in 1996 (1) LW 608.

7.3. In any event, placing reliance on the decision in *FOOD CORPORATION OF INDIA v. M/s. K.DURAI PANDIAN & SONS* reported in 1997 (2) LW 128, Mr. R.Balakrishnan, learned counsel for the petitioner in C.R.P.No.2808 of 2001 and counsel for the respondent in C.R.P.No.1643 of 2001, contends that the Court is bound to be more cautious that the photocopy of documents are not admissible and reliable when the original is not produced.

8. I have given careful consideration to the submissions of both sides.

9. It is apt to extract Sections 63 and 66 of the Indian [Evidence Act, 1872](#):

'Section: 63 - Secondary Evidence:

Secondary evidence means and includes:

- (1) certified copies given under the provision 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.

Section 66: Rules as to notice to produce:

Secondary evidence of the contents of the documents referred to in Section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his attorney or pleader, such notice to produce it as is prescribed by law, and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstance of the case:

PROVIDED that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:

- (1) when the document to be proved is itself a notice;
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;

- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (4) when the adverse party or his agent has the original in Court;
- (5) when the adverse party or his agent has admitted the loss of the document;
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the court.'

10. In ARULMIGU VISWESWARASWAMI & VEERARAGHAVA PERUMAL TEMPLES, ETC. TIRUPPUR v. R.V.E.VENKATACHALA GOUNDER & ANOTHER reported in 1996 (1) LW 608 it is held that photocopies of the documents are not admissible in evidence unless non-production of primary evidence is satisfactorily accounted for. Similarly in FOOD CORPORATION OF INDIA v. M/s. K. DURAIPANDIAN & SONS reported in 1997 (2) LW 128 it is held that when a photocopy of the document is sought to be marked, the Court is bound to be more cautious, as they are not admissible and reliable when original is not produced.

11. In the instant case, the petitioner in C.R.P.No.1643 of 2001 as well as the respondent in C.R.P.No.2808 of 2001 specifically contend that the original agreement dated 25.8.1986 is entrusted with the petitioner in C.R.P.No.2808 of 2001 (respondent in C.R.P.No.1643 of 2001). If that be so, in my considered opinion, it is too early to decide as to the admissibility of the photocopy of the agreement dated 25.8.1986, as it is alleged that the original agreement dated 25.8.1986 is with the petitioner in C.R.P.No.2808 of 2001 (respondent in C.R.P.No.1643 of 2001) himself, and therefore, non-production of the original before this Court cannot be a sufficient reason to permit the petitioner in C.R.P.No.1643 of 2001 as well as the respondent in C.R.P.No.2808 of 2001 to mark a photocopy of the agreement dated 25.8.1986. However, applying the ratio laid down by the Apex Court in BIPIN SHANTILAL PANCHAL case, referred supra, the petitioner in C.R.P.No.2808 of 2001 (respondent in C.R.P.No.1643 of 2001) is always at liberty to raise objection as to the admissibility of the photocopy of the agreement at appropriate stage of the trial, which will have two advantages.

First is that the time in the trial Court, during evidence-taking stage, would not be wasted on account of raising such objections and the Court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior court, when the same objection is recanvassed and reconsidered in appeal or revision against the final judgment of the trial Court, can determine the correctness of the view taken by the trial Court regarding that objection, without bothering to remit the case to the trial Court again for fresh disposal. This measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.

12. Therefore, if good and sufficient cause is shown by the petitioner C.R.P.No.1643 of 2001 as well as the respondent in C.R.P.No.2808 of 2001 for producing the photocopy of the agreement dated 25.8.1986, without prejudice to the right of the other side to raise his objection as to the admissibility or otherwise of the said photocopy of the agreement dated 25.8.1986, I do not find any valid reason for refusing the petitioner in C.R.P.No.1643 of 2001 as well as the respondent in C.R.P.No.2808 of 2001 to mark a photocopy of the said agreement dated 25.8.1986.

13. Accordingly, when the petitioner in C.R.P.No.1643 of 2001 as well as the respondent in C.R.P.No.2808 of 2001 come with an explanation that the petitioner in C.R.P.No.2808 of 2001 (respondent in C.R.P.No.1643 of 2001) is in possession of the original agreement dated 25.8.1986, the mere non production of the original document by itself cannot be a valid reason to refuse to permit the petitioner in C.R.P.No.1643 of 2001 as well as the respondent in C.R.P.No.2808 of 2001 to mark a photocopy of the agreement dated 25.8.1986, as the petitioner C.R.P.No.2808 of 2001 (respondent in C.R.P.No.1643 of 2001) is in no way prejudiced by permitting the petitioner to mark the document, as his right to object as to the admissibility of the said document is always protected under law. Moreover, while permitting the petitioner in C.R.P.No.1643 of 2001 as well as the respondent in C.R.P.No.2808 of 2001 to mark the photocopy copy of the agreement dated 25.8.1986, under Order 13 Rule 2 of the Civil Procedure Code, it is not permissible for the Court to go into the admissibility or otherwise of the document in question, as held in MOHAMMED ALI.S. v. BASHEER AHAMED

case, referred supra.

14. Once the petitioner C.R.P.No.1643 of 2001 as well as the respondent in C.R.P.No.2808 of 2001 are permitted to mark the photocopy of the agreement dated 25.8.1986, I do not find any valid objection in permitting the respondent in C.R.P.No.2808 of 2001 to raise an additional written statement that the agreement dated 25.8.1986 was executed by the petitioner in C.R.P.No.2808 of 2001 only in favour of the second defendant in the suit O.S.No.64 of 1997, who is nonetheless the father of the first defendant and the revision petitioner in C.R.P.No.1643 of 2001.

14. Therefore, in my considered opinion, the trial Court by order dated 14.6.2001 in I.A.No.1876 of 2000 as rightly overlooked the objection of the revision petitioner in C.R.P.No.2808 of 2001 and permitted the respondent therein to file an additional written statement. On the other hand, the trial Court had erred in refusing to permit the petitioner in C.R.P.No.1643 of 2001 as well as the respondent in C.R.P.No.2808 of 2001 to mark a photocopy of the document and consequently, C.R.P.No.2808 of 2001 is dismissed and C.R.P.No.1643 is allowed, making it clear that the permission granted to mark the photocopy of the agreement dated 25.8.1986, will not tantamount to admitting the photocopy of the document itself.

15. Hence, while dismissing C.R.P.No.2808 of 2001 and allowing C.R.P.No.1643 of 2001, there shall be a direction to the learned Principal District Munsif, Villupuram, to try both suits together, without being prejudiced by any of the observations made by this Court above, and decide the issue expeditiously, in any event within six months from the date of receipt of copy of this order. No costs. Consequently, C.M.P.No.9028 of 2001 is closed and C.M.P.No.15069 of 2001 is dismissed.