Manepalli Venkata Sreerama Murthy and Another Vs Garlapati Lakshmana Swamy

Court: Andhra Pradesh High Court

Date of Decision: June 16, 2010

Acts Referred: Evidence Act, 1872 â€" Section 45, 63, 65, 66

Citation: (2010) 5 ALD 476 : (2011) 1 CivCC 368

Hon'ble Judges: L. Narasimha Reddy, J

Bench: Single Bench

Advocate: P.R. Prasad, for the Appellant; M. Naga Raghu, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

L. Narasimha Reddy, J.
The respondent filed O.S. No. 107 of 2008 in the Court of VII Additional District and Sessions Judge (Fast

Track Court), Vijayawada, against the petitioners for the relief of specific performance of an agreement of sale, dated 13-01-2007, and for a

mandatory injunction for demolition of the structures, existing on the suit schedule property. The petitioners filed a written-statement, denying the

plaint allegations and opposing the suit. The trial Court framed the issues and the trial of the suit commenced.

2. The respondent sought to file the Photostat copy of the agreement of sale, dated 13-01-2007. It was pleaded that the original document was

handed over to an Advocate, by name, D.P. Ramakrishna, for preparation of notice, and for drafting the pleadings, and that in spite of repeated

requests, the said advocate did not return the original. The petitioners raised an objection for taking the xerox copy of the document, on record.

According to them, though there is no dispute as to the execution of the agreement of sale, and making of certain endorsements, there is a serious

dispute as regards the fourth endorsement. Both the parties placed reliance upon certain precedents. The trial Court overruled the objection raised

by the petitioners, through its order dated 18-11-2009, and accordingly paved the way for marking of the photostat copies of the agreement of

sale, and the endorsements made thereon. The order dated 18-11-2009 is challenged in this revision.

3. Sri P.R. Prasad, learned Counsel for the petitioners submits that the trial Court did not ensure compliance with the requirements under law,

before the so-called secondary evidence was taken on record. He contends that Section 66 of the Indian Evidence Act (for short "the Act"),

enables a party to adduce secondary evidence, only when a party, who, in the natural course of events, is supposed to have the custody of the

document in original, refuses to furnish the same, in spite of demand, and that an advocate engaged by a party cannot be said to be a person, to

have natural custody of the document, in relation to the suit transaction. He further submits that except stating that he issued the notice to the said

advocate, the respondent did not take any steps to summon him. Learned Counsel further contends that when there is a serious dispute as to the

genuinity of the fourth endorsement, on the document, it becomes just impossible for the Court, to verify the plea, by examining a photostat copy.

4. Sri M. Naga Raghu, learned Counsel for the respondent, on the other hand, submits that the petitioners do not dispute the factum of execution

of agreement of sale and the question as to whether the fourth endorsement is genuine or not, can be decided with reference to the evidence,

which, the parties may adduce. He contends that the trial Court referred to the relevant precedents, that have a bearing on the question, and that

no exception can be taken to the order under revision.

5. The respondent prayed for specific performance of agreement of sale, dated 13-01-2007 and ancillary reliefs, in the suit. It is stated that

subsequent to the execution of the agreement, as many as four endorsements were made, evidencing the receipt of part of sale consideration and

altering some of the conditions. Therefore, a perusal of the document becomes necessary for resolution of the dispute.

6. It is always desirable to adjudicate the matter on the basis of the original documents. Where, however, it becomes impossible for a party to

produce or secure the custody, of the original document, law provides for filing a secondary evidence. The circumstances under which a party can

adduce secondary evidence are provided for, under Sections 63, 65 and 66 of the Act. One such is, where the original of the document is in the

custody of a party, and in spite of notice being issued to him, he failed to produce the same before the Court or did not hand over the same to the

other party. Section 66 reads,

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 circumstances 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 provided 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.

7. From a perusal of the provision it is evident that, normally a notice to produce the original of a document is to be issued to the ""party"". However,

if one takes into account the language employed in Section 65, it is possible that secondary evidence can be adduced even where the person, in

whose custody the original is, not a party to the suit. Section 65(a) reads,

Section 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.

(See Sarkar on Evidence)

8. Renowned of the Treatise on the law of i.e. ""Sarkar on Evidence"", has this, to say, in the context.

In Section 66 the person in possession of the document has been referred to as ""party"" except in proviso (6) which speaks of the ""person in

possession""; whereas in Section 65 the word ""party"" has not been used though it refers to documents in the possession of parties as well as

strangers [see Clause (a)]. Obviously both sections refer to parties to suits as well as to strangers. Ordinarily the notice must be to the person in

whose possession or power the document is. (as to possession, see notes to Clause (a) Section 65 ante].

(See Sarkar on Evidence, Fifteenth Edition Reprint 2002 para 2, page 1109)

9. In this case, the person, who is said to be in possession of the original of the agreement of sale, is one Sri Ramakrishna, advocate, who is not a

party to the suit.

10. However, the mere statement by the respondent that a notice was issued to the said advocate for production of the original, and that he did not

comply with the request, does not suffice, to enable him to adduce secondary evidence. It becomes essential and necessary to secure his presence,

by taking the summons from the Court. The reason is that, if the person, who withholds the original of a document, is a party to the suit, an adverse

inference can be drawn against him, and he shall have to face the consequences, that flow from such inference. His silence itself would be an

acceptance of his being in possession of the document. However, in the case of a person, who is not a party, such inference cannot be drawn, at

all. Many a time, it may become doubtful, as to whether the so-called third party is in possession of the original. If the party, who intends to adduce

secondary evidence, is relieved of the obligation to summon such person, to prove the factum of the original being in the custody of such person,

the very rigor against the secondary evidence, contained in various provisions, including Section 65, may get diluted.

11. A party, who, either, is not in possession of the original, or is of the view that the scrutiny of the same would not be in his interest, may invent a

plea, that the original is in the possession of a person, who is not a party to the suit, and that in spite of notice being issued to him, the original was

not delivered. By adopting such device, he may thwart any attempt to send the document for comparison u/s 45 of the Evidence Act. In Bheri

Nageswara Rao Vs. Mavuri Veerabhadra Rao and Others, this Court took the view that the photostat copy of an original cannot be the subject-

matter of verification and scrutiny u/s 45 of the Evidence Act. Therefore, heavy burden rested upon the respondent to satisfy the Court, that the

original is in the custody of the person named by him to procure the presence of such person, in the Court. The trial Court ought to have insisted

upon examination of that person, to verify the correctness of the plea as to the custody of the document, with him.

12. It is true that this Court in Trilokchand Jain Vs. Gurrapu Rajamouli and Another, held that in case the party or person in whose possession the

original is said to be there, has not responded to a notice, secondary evidence can be permitted. It has already been observed that the nature of

burden as regards the issuance of notice for production of the original, substantially differs from a case, where such a person is a party to the suit,

and the one, where he is not a party. The trial Court did not bestow its attention to this aspect.

13. For the foregoing reasons, the revision is allowed, and the order under revision is set aside. The trial Court is directed to consider the matter

afresh. It is made clear that the petitioners shall be under obligation to take summons to the person in whose possession the original of the

document is said to be; and the trial Court shall form an opinion as to the admissibility of the secondary evidence, depending upon the nature of

evidence, which the person, who is said to be in the custody of the document may give.

14. There shall be no order as to costs.