

**IN THE COURT OF THE SENIOR CIVIL JUDGE AND JMFC,
PERIYAPATNA**

Dated: this the 1st day of January, 2018

Present

Sri Arjun S.Mallur, B.A.L, LL.B.,
Senior Civil Judge and JMFC

OS.No.127/2015

PLAINTIFFS : Nalluraiah & others

V/s

DEFENDANTS : K.K.Ananda & others

IA.Nos.IV & V

APPLICANT : Lokesh

(By Sri Raghunatha K.C., Adv.,)

V/s

OPPONENTS : K.K.Ananda & others

(D1 & D2- Sri C.K.Manjunath, Adv.,)

COMMON ORDERS ON IA.NOS.IV & V

I.A.Nos.IV & V are filed by the plaintiff under Sec.66 of Indian Evidence Act and under Sec.65(a) of Indian Evidence Act seeking a direction to the defendant No.1 to produce the original sale agreement dated: 04-10-2008 which is in his custody and upon failure of defendant No.1 to produce the said original sale agreement permit the plaintiff to produce xerox copy of the same by tendering it in evidence. It is contended

by the plaintiffs that they have sought for declaration that the registered sale deed dated: 16-04-2009 is null and void. Prior to the said sale deed there was in agreement of sale between the 3rd plaintiff and defendants No.2 to 5 and defendant No.1 dated: 04-10-2008 in which the 1st defendant had agreed to purchase the suit schedule property for a value consideration of Rs.8,85,000/- per acre. However while execution of the registered sale deed dated: 16-04-2009 1st defendant only made part payment promising to pay the balance sale consideration of Rs.13,51,250/- within six months of which he has subsequently backed out. It is further submitted that the plaintiffs issued a notice under Order 12 Rule 8 of CPC calling upon the defendants to produce the original agreement dated: 04-10-2008 which the 1st defendant has intentionally denied. It is submitted that in order to produce the xerox copy in evidence the prior requirement is issuance of notice seeking production of the original from the person who is believe to be in custody of the same and the plaintiffs having complied with the mandatory notice they may be permitted to produce the xerox copy in evidence. Hence the application.

2. Common statement of objections has been filed by the defendant No.1 categorically denying being in possession of any agreement of sale dated: 04-10-2008 contending that no such agreement was executed between him and the plaintiffs and other defendants and in fact there was an out-right sale of the suit schedule property to him by execution of the registered sale deed dated: 16-04-2009 and therefore requiring the 1st defendant to produce such document does not arise. It is further submitted by the defendant No.1 that xerox copy of the agreement has no evidentiary value and therefore production of the same in evidence does not arise. The 1st defendant has denied all other averments and sought for rejecting the application with costs.

3. Heard the arguments of learned counsels appearing for the plaintiffs and defendant No.1 and perused the records.

4. The point which arise for my consideration is-

“Whether the plaintiffs have made out grounds for production of xerox copy of the agreement of sale dated: 04-10-2008 in evidence and mark the same”?

5. My answer on the above point is in the “*Negative*” for the following

REASONS

6. The plaintiffs have filed the suit seeking for declaration that they are the absolute owners of the suit schedule property and for a further declaration that the registered sale deed dated: 16-04-2009 is null and void and not binding upon them and further direction to the defendant No.1 to vacate and hand over vacant possession of the suit schedule property to the plaintiffs. On service of summons the defendant No.1 has appeared before the court and filed detailed written statement denying the plaint averments in-toto raising several defences. Necessary issues have been framed. The plaintiff No.3 for himself and also on behalf of other plaintiffs has examined himself as PW.1 and has got marked documents at Ex.P1 to Ex.P9. When the case is set down for further examination of PW.1 the present application is filed.

7. Prior to filing of the present applications the plaintiffs issued notice under Order 12 Rule 8 of CPC calling upon the 1st defendant to produce the original agreement of sale dated: 04-10-2008. The said

application came to be filed on 11-07-2017 to which a reply was filed by the 1st defendant on 08-08-2017 denying being in possession of any agreement of sale dated: 04-10-2008. In fact in the reply to the said notice 1st defendant has categorically stated that there was no such agreement of sale between him and the plaintiffs and other defendants much less the alleged agreement of sale dated: 04-10-2008 and therefore production of the same does not arise. In fact it is also the contention of the 1st defendant in his written statement that no such agreement of sale exists whereas it was an out-right sale made in his favour. Having already been served with notice to produce the document to which suitable reply being caused the requirement of Sec.66 of Indian Evidence Act has been complied with.

8. This leaves with the next aspect to be considered whether plaintiffs be permitted to produce xerox copy of the agreement dated: 04-10-2008 to be tendered in evidence as secondary evidence. Sec.65 of Indian Evidence Act lays down the circumstances under which secondary evidence can be given with respect to existence, condition or contents of documents. For proper understanding of the mandate of Sec.65 of the Indian Evidence Act I deem it just and proper to reproduce the same which reads as under-

“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 to 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 originals is of such a nature as not to be easily movable;

e) when the original is a public document within 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 ¹[India] to be given in evidence;

g) when the originals consist 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 cases (a), (c) and (d), any secondary evidence of the contents of the document 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.”

For the purpose of this case reference has to be made with respect to Sec.65(a) of the act. Sec.65(a) can be invoked when the original is shown to be in possession or power of the person against whom the document is sought to be proved or of any person who is not subjected to or out of reach of the court or it is in possession of any person who is bound to produce it and he fails to do so even after delivery of the notice for production of the same as required under Sec.66 of Indian Evidence Act. As it could be seen from the contention of the plaintiffs it is specifically alleged that defendant No.1 is in possession of the original agreement dated: 04-10-2008. Against the said contention the 1st defendant specifically pleads that no such agreement dated: 04-10-2008 has ever come into existence therefore he being in possession of the same is an imagination of the plaintiffs. The defendant specifically denies any such agreement being in existence. When such is the contention the initial burden required to be discharge to the plaintiffs is at the first instance to prove that there existed an agreement of sale dated: 04-10-2008 which culminated in the execution registered sale deed dated: 16-04-2009. Unless and until the plaintiffs discharge the initial burden regarding the existence of the agreement of sale dated: 04-10-2008 Sec.65(a) of Indian

Evidence Act cannot be invoked. The learned counsel for the plaintiffs in support of his arguments relied upon a decision of Hon'ble Supreme Court reported in **AIR 1999 SC 1668 Nawab Singh V/s Inderjit Kaur** wherein it has been observed as under in the facts prevailing therein-

“The prayer has been rejected mainly on the ground that the copy of the rent note sought to be produced by the appellant was of doubtful veracity. The trial court was not justified in forming that opinion without affording the appellant an opportunity of adducing secondary evidence. The appellant has alleged the original rent to be in possession of the respondent. The case was covered by Clause(a) of Section 65 of the Indian Evidence Act, 1872.”

In the above cited decision the matter in issue involved was with respect to existence of a rent note dated: 23-09-1994 of which was not denied by the adverse party in his possession and in those circumstances production of copy of the said rent note was permitted as circumstances squarely fell within the ambit of Sec.65(a) of Indian Evidence Act. In the case on hand the 1st defendant has specifically denied existence of any agreement of sale dated: 04-10-2008. Therefore under such circumstances the above cited decision of Hon'ble Apex Court would not help the case of the plaintiffs. Therefore for the aforesaid reasons when the very existence of the document itself has been denied the plaintiffs cannot have recourse to secondary evidence as contemplated under Sec.65(a) of Indian Evidence Act. Hence for the aforesaid reasons I answer the point raised in the **“NEGATIVE”** and pass the following-

ORDER

IA.Nos.IV & V filed by the plaintiffs under Sec.66
& under Sec.65(a) of Indian Evidence Act are
REJECTED.

No order as to costs.

(Dictated to the stenographer directly on computer, same is corrected and
then pronounced by me in the open court on this the 1st day of January 2018)

(Arjun S.Mallur)
Senior Civil Judge & JMFC,
Periyapatna.

* * * * *