

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

Dated: this the 20th day of November, 2017

Present

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

OS.No.202/2015

PLAINTIFF : Sri. K.P.Sadashiva

V/s

DEFENDANT : Sri. K.P.Jagadisha

IA.No.II

**APPLICANT/
PLAINTIFF** : Sri. K.P.Sadashiva

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

V/s

**OPPONENT/
DEFENDANT** : Sri. K.P.Jagadisha

(By Sri N.G.Prasad, Adv.,)

ORDERS ON IA.NO.II

I.A.No.II is filed by the plaintiff under Sec.63 of Indian Evidence Act R/W Rules 82 & 84 of Karnataka Civil Rules of Practice R/W Sec.151 of CPC seeking permission to the plaintiff to tender in evidence and got marked the notarized copy of agreement of sale dated: 20-12-2012. It is contended that the original agreement of sale dated: 20-12-2012 is an

unregistered agreement of sale which has now been misplaced and inspite best efforts being made the plaintiff could not trace out the original and that he is producing notarized copy of the agreement of sale which may kindly be permitted to be tendered in evidence.

2. The defendant has filed objections to the application contending that the alleged unregistered agreement of sale dated: 20-12-2012 is a false and fabricated document only to suit the evil design of the plaintiff and that in this regard the defendant has registered an FIR before the jurisdictional police with respect to forgery and fabrication of a false document under Crime No.220/2014 in which the police have negligently filed 'B' Report which is under challenged. It is submitted that prior to filing the present application the plaintiff is required to issue mandatory notice under Order 12 Rule 8 of CPC but has not done so and therefore the application is not maintainable and sought for rejecting the application with costs.

3. Heard both sides and perused the records.

4. *"Whether the plaintiff has made out grounds for permitting production of secondary evidence by way of tendering the notarized copy of the agreement of sale dated: 20-12-2012 in evidence"?*

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

REASONS

6. The plaintiff has filed this suit for specific performance of the unregistered agreement of sale dated: 20-12-2012 directing defendant to execute the registered sale deed by receiving the balance sale

consideration. Upon service of summons the defendant has filed detailed written statement denying the plaint averment in toto specifically denying executing any unregistered agreement of sale dated: 20-12-2012 in favour of the plaintiff and specifically contending that the alleged unregistered agreement of sale dated: 20-12-2012 is a concocted, forged and fabricated document. Based on the pleadings relevant issues were framed. The plaintiff has partly examined himself and got deferred his further examination only for the purpose of production of original unregistered agreement of sale dated: 20-12-2012. Therefore the document dated: 20-12-2012 is the very base for the suit and being a suit document the plaintiff is required to produce the original of the same.

7. The plaintiff has invoked the provisions of Sec.63 of Indian Evidence Act. Sec.63 of Indian Evidence Act defines secondary evidence and includes the kinds of document of which secondary evidence can be permitted. It provides that secondary evidence can be adduced by production of certified copies, copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy and copies compared with such copies, copies made from or compared with the original, counterparts of documents as against the parties who did not execute them and lastly oral accounts of the contents of a document given by some person who has himself seen it. Sec.65 of Indian Evidence Act further enumerates the cases in which secondary evidence relating to the documents can be given. It provides that secondary evidence with respect to the existence, condition or contents of a document can be permitted only when the original is in the possession or power of the person against whom the document is sought to be proved or any person who is out of reach or not subjected to process of court or when any person legally bound to produce it fails to do so even after issue of notice as

contemplated under Sec.66. Secondly when the existence, conditions or contents of the original is admitted in writing by the person against whom it is proved. Thirdly when the original has been destroyed or lost. Fourthly when the original is of such nature that it cannot be easily moved. Fifthly when the original is a public document. Sixthly when the original is a document of which certified copy is permitted under law and lastly when the original consists of numerous accounts or other documents which cannot be conveniently examined in a court. Therefore secondary evidence with respect to existence, condition or content of a document can be permitted only on fulfillment of any of the conditions as described above. In the case on hand none of the conditions or complied by the plaintiff as enumerated under Sec.66 of Indian Evidence Act so as to permits production of notarized copy of agreement of sale dated: 20-12-2012 and prove to its existence and contents. In the case on hand the defendant has specifically denied existence of any such agreement of sale dated: 20-12-2012 and further specifically contends that the said agreement is a concocted, forged and fabricated document. The contention of the defendant attracts the second clause of 65 under which the existence, condition or contents of the original can be proved by way of secondary evidence only when they have been admitted by the defendant in writing. In the case on hand the defendant has specifically denied the agreement of sale dated: 20-12-2012 and under such circumstances production of notarized copy of the same cannot be permitted under law. The suit has been filed on 10-12-2015. The copy of the agreement of sale dated: 20-12-2015 has been notarized a day before on 09-12-2015. Notarization of a copy of a document has to be made only after comparing with the originals as required under the relevant rules. It appears that the document has been notarized without producing the original and that itself is sufficient to cast doubt on the veracity of the document.

8. The learned counsel for the defendant in the course of his argument vehemently contended that the defendant has initiated criminal proceedings against the plaintiff and several other persons for having fabricated and forged a false agreement of sale and they are still pending. He has produced certified copy of the statement made by the brother of the present plaintiff by name Poorvachari dated: 20-08-2016 wherein it has been stated that the original of the agreement executed by the defendant has been produced to the court through their advocate. On the one hand the plaintiff contends that the original has been misplaced but on the other hand his brother gives a statement to the police that the original is already tendered to the court. The learned counsel for the defendant in support of his arguments relied upon a decision of our Hon'ble High Court reported in **2010(4) KCCR 2757 B.N.Sampath Kumar V/s Rahimunissa Begum** wherein our Hon'ble High Court has held as under

"EVIDENCE ACT, 1872- Section 66- Procedure to be followed- Before getting a secondary evidence a foundation to lead it and circumstances as to why the primary evidence not let in a must- Not laying such foundation secondary evidence cannot be let in."

In the case on hand the plaintiff has failed to substantiate before the court as to why primary evidence could not be led and having not brought out any such circumstances he cannot be permitted to lead secondary evidence. The principle laid down by our Hon'ble High Court in the above cited decision applies in full force to the facts and circumstances of the case on hand. A mere statement on oath in the affidavit filed along with the application that the original has been misplaced itself not amount to a sufficient circumstance for allowing secondary evidence to be led. Moreover

as already mentioned above notarizing the copy of a document is to be only when after due comparison with the original is made. The document sought to be produced as secondary evidence having been notarized presumption is to be drawn that it has been notarized only after due comparison with the original and that it is to be presumed that the original was available at the time of notarizing the document. Therefore the contents of the affidavit filed in support of the application that the original has been misplaced cannot be accepted. In the result for the aforesaid reasons I answer the point raised in the "**NEGATIVE**" and pass the following

ORDER

I.A.No.II filed by the plaintiff under Sec.63 of Indian Evidence Act R/W Rules 82 & 84 of Karnataka Civil Rules of Practice R/W Sec.151 of CPC is hereby ***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 20th day of November 2017)

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

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