

**OS 69-2024**

**Orders on I.A. No.XVI**

The defendant has filed an application under Section 151 of CPC to reopen the case from the stage of further evidence of defendant to the stage of further chief of DW1.

2. The defendant by name Yashodha sworn to an affidavit, wherein she has stated that after execution of the sale agreement, the plaintiff never turned up by complying the conditions enumerated in the sale agreement. Hence, on 09-04-2009 she has issued registered notice to the residential address of the plaintiff and to the place where he was working and the notice issued to the plaintiff where he was worked at that time was served on him. To prove the said fact the marking of the acknowledgment is very much necessary, but the same is not produced at the time of marking the documents. Accordingly, prayed for allow the application.

3. The plaintiff filed detailed objections. In the objection, he denied the issuance of the notice by the defendant and also the service of notice to the plaintiff. It is further stated that the copy of the

letter issued through registered notice is produced along with list of documents and photo copies of the alleged documents and not original and are inadmissible in evidence. The plaintiff counsel in his objection objected to reopen the case. Recalling of DW1 for further chief-examination of irrelevant and inadmissible documents does not substantiate any grounds or contentions taken by the defendant. If the application is allowed, the plaintiff will be suffered irreparable loss and injury and the ends of justice will be defeated. The defendant has not made out any grounds to allow the application. Accordingly, prayed for dismissal of the application.

4. Heard the arguments. Perused the entire materials available on record.

5. The plaintiff filed the suit for specific performance of contract. The plaintiff led evidence and he was cross-examined by the defendant's counsel. The defendant also led her side of evidence and she was cross-examined by the plaintiff's counsel. When the matter is posted for further evidence of the defendant, she come up with the instant application for reopen of case to mark acknowledgment. In the affidavit filed by the defendant, she has not stated that the document

produced is photocopy of the original. What she has stated is that she has produced acknowledgment which was traced recently and the same is not produced earlier and now she intend to mark the said document. The tendering of document, marking of the document before the court, admissibility of the documents, whether relevant or irrelevant and reopening the case from the stage of further evidence to the stage of further chief-examination are all different. They cannot be combined together. At this structure, it is not proper to say that the documents produced are the xerox copies and not admissible in evidence. If the documents produced are the xerox, then definitely Section 63 and 65 of Indian Evidence Act applicable. If the documents are xerox, then the defendant has to fulfill the ingredients of Section 63 and 65(A) of Indian Evidence Act. The secondary evidence as a general rule is admissible only in the absence of the primary evidence. If the documents are photo copies of the original or certified copies of the original and copies made from or compared with original, then the secondary evidence can be led by producing the photo copies, but if they are not certified or not compared with original, then it cannot be marked during the course of evidence. Section 65 of

Evidence Act permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances enumerated in the said provision and the defendant is required to fulfill the conditions enumerated in the provision of Section 63 and 65(A) of Indian Evidence Act before marking those documents as secondary evidence. As stated above if the documents produced are only xerox copies, then definitely it cannot be marked, but if they are certified copies and obtained in the mechanical process by comparing with the original, then it can be marked. The defendant may produce the original at the time of marking the documents. The defendant never stated in her affidavit that the documents produced by her are xerox. She has stated that with due diligence she traced the acknowledgment and now she intends to produce the same. When such being the case, it is not proper to reject the application at this stage. The defendant in order to putforth her defence she can mark the documents if they fulfilled the ingredients of Section 60 to 65 of Evidence Act. If the application is rejected threshold at this stage, then the defendant may not able to produce or mark the acknowledgment or any other documents if they are original or certified copies. The plaintiff

is having right to cross-examine the DW1 on those documents. Whether those documents are admissible in evidence and whether they are relevant or irrelevant to decide the matter in issue will be dealt in the later stage and not at this stage. With these observations, I proceed to pass the following:

### **Order**

I.A. No.XVI filed by the defendant under section 151 of CPC is hereby allowed.

In the result matter is reopened for further chief of DW1.

Prl. Sr. C.J. & CJM, Udupi.

### **Order on I.A. No.XVII**

The defendant filed an application under Order 14 Rule 5(1) and Section 151 of CPC and prays the court to frame additional issue.

2. The defendant sought to frame the following issue as additional issue;

*“Whether the defendant proves that the suit filed by the plaintiff for decree of specific performance against the defendant is not maintainable, in view*

*of the notice of termination of Agreement issued by the defendant on dated 09-04-2009?”*

3. The defendant by name Yashodha sworn to an affidavit, wherein she has stated that she has taken contention in the written statement in page No.7 and 8 in para 25 to 27 that the notice was served on the plaintiff issued on dated 09-04-2009. The receipt of the registered notice issued by the post office at Hebri is produced. She has terminated the sale agreement by issuance of notice. Even after issuance of notice, the plaintiff never contacted her. Hence, in order to prove the above said contention, framing of additional issue is very much necessary. Accordingly prayed to allow the application.

4. The plaintiff filed objections, wherein he has stated that the application to frame additional issue as sought by the defendant is false, frivolous, vexatious and not maintainable either in law or on merits. The application is against to the provision of Order 14 Rule 5 of CPC. On careful reading of the written statement in page Nos.7 and 8 and para 25 and 27, nowhere it is pleaded that the suit for specific performance filed by the plaintiff is not maintainable in view of the alleged notice of termination issued by the defendant dated 09-04-

2009. The word “Termination of Agreement” is a new false contention now sought to be taken by the defendant in the above application to improve her false case. Under Order 14 of CPC, court is empowered to frame issues which would arise out of pleadings and documents of the parties. The alleged termination of Agreement notice is neither pleaded nor such notice is produced during defendant's evidence. Among other grounds prayed for dismissal of the application.

5. Heard arguments.

6. The point that arise for my consideration is;

*Whether the defendant has made out ground to frame additional issue as sought in the application?*

7. My answer to the above point is in the Affirmative for the following:

### **REASONS**

8. The plaintiff filed suit for specific performance of contract. The defendant resisted the said suit by filing written statement. The court has framed issues and both parties have led evidence and when the matter is set down for further evidence

of defendant, the defendant has come up with the instant application.

9. On plain reading of the para 25 to 27 of written statement together, wherein the defendant has stated that “ issued two registered notice to the plaintiff on 09-04-2009. Notice issued to the plaintiff to his working place is served on him. In spite of service of notice plaintiff has not complied the condition No.3 stipulated in the written agreement dated 07-12-2008 and accordingly, the advance payment of Rs.1,00,000/- was forfeited”.

10. Though the termination of agreement is not stated in the written statement, but she has stated that she forfeited the advance amount. The forfeiture of advance amount arise only when the agreement was terminated. Though the termination of agreement is not found out in the written statement, but on plain reading of para 25 to 27 of written statement, she contended that she had issued notice to the plaintiff and even after receipt of the notice, plaintiff has not come forward to fulfill the condition No.3 and accordingly, she forfeited the advance amount. The issues are to be framed based on the pleadings and the documents. The defendant has filed

application under Section 151 of CPC for recall of DW1 to produce some documents. During the course of cross-examination also she has taken contention that the plaintiff has not fulfilled the conditions and not performed his part of contract. If the issue is framed, then no injustice is caused to the plaintiff since the burden is on the defendant to prove the said issue. Merely if issue is framed, it does not mean that she has proved the issue. She has to lead evidence on the said issue and plaintiff is having right to cross-examine PW1 if any evidence is led by her on the above said issue. The pleadings is to be read as whole and court cannot pick and choose the word in the pleadings. On reading of entire pleadings and also the documents produced by the defendant make out a ground to frame additional issue as sought in the application. Hence, I proceed to pass the following:

### **ORDER**

I.A. No.XVII filed by the defendant under Order 14 Rule 5(1) and Section 151 of CPC is hereby allowed.

In the result frame the following additional issue:

*“Whether the defendant proves that the suit filed by the plaintiff for decree of*

*specific performance against the defendant is not maintainable, in view of the notice of termination of Agreement issued by the defendant on dated 09-04-2009?”*

Prl. Sr. C.J. & CJM, Udupi.

In the earlier occasion the plaintiff filed application under Order 14 Rule 5(1) and Section 151 of CPC to frame the additional issue. While framing the issue, this court instead of mentioning the plaintiff has mentioned the defendant in additional issue No.1. Infact the said word is not mentioned by the plaintiff in his application. But due to oversight this court has mentioned the word ‘defendant’ in additional issue No.1 instead of word ‘plaintiff’. In fact burden is on the plaintiff to prove that the agreement was being extended by parties orally under mutual consent. Hence, the said mistake is rectified in additional issue No.1. Accordingly, the same is rectified.

For further chief of DW1 call on 13-02-2025.

Prl. Sr. Civil Judge and CJM, Udupi.