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HIGH COURT OF ORISSA: CUTTACK

C.M.P No. 530 of 2022
(In the matter of an application under
Article 227 of the Constitution of India, 1950)

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Babita Satpathy @ Mishra ... ***Petitioner***
Mr. Manmaya Kumar Dash, Advocate

-versus-

Sitanshu Kumar Dash and others ... ***Opposite Parties***
Mr. Maheswar Mohanty,

Date of Hearing : 12.07.2022 : Date of Judgment: 03.08.2022

CORAM:
JUSTICE KRUSHNA RAM MOHAPATRA

JUDGMENT

KRUSHNA RAM MOHAPATRA, J.

1. This matter is taken up by virtual/physical mode.

2. Legality and sustainability of order dated 16th May, 2022 (Annexure-7) passed in CS No.2116 of 2016 is in question in this CMP, whereby learned Civil Judge (Senior Division), Bhubaneswar rejected an application filed by Defendant Nos. 1 and 4 (Petitioners herein) filed with a prayer to unmark and expunge Exts.2, 3, 5, 6, 7 and 8 marked on behalf of Plaintiffs/Opposite Party Nos. 1 and 2.

3. Short narration of facts necessary for proper adjudication of the case are that CS No.2116 of 2016 has been filed for allotment of 1/3rd share in favour of the Plaintiffs, declaration of registered gift deed dated 21st November, 2011 as void and no way affects the

right, title and interest and possession of the Plaintiffs and Defendant Nos. 5 to 8 as well as for permanent injunction. Along with other documents, PW-1 while leading evidence, exhibited documents, i.e., Exts. 2, 3, 5, 6, 7 and 8, which were marked with objection raised by Defendant Nos. 1 and 4 (present Petitioners). Subsequently, the Petitioners filed an application to unmark and expunge the aforesaid exhibits. The said petition being rejected vide Order under Annexure-7, is assailed in this CMP.

4. Mr. Dash, learned counsel for the Petitioners assailed the order on the ground that Exts. 2, 3, 5, 6, 7 and 8 are secondary evidence being certified copies of registered sale deeds, mortgage deeds as well as information sheet showing correlation of Settlement and Hal plots. It is his submission that no secondary evidence is admissible without laying foundation for producing the same. The Plaintiffs before exhibiting the aforesaid documents in evidence were required to lay foundation for leading such secondary evidence as required under Section 65 of the Evidence Act, 1872. That having not been done, the aforesaid exhibits are not admissible in evidence and are required to be expunged and unmarked. It is his submission that Order XIII Rule 3 CPC clearly envisages that the Court in its discretion at any stage of the suit can reject any document which it considers irrelevant or otherwise inadmissible, by recording grounds of said rejection. Thus, the Court is not powerless to reject/expunge a document at any stage of the suit, which is inadmissible in evidence. Learned trial Court, while adjudicating the petition failed to appreciate the same and rejected the petition on the ground that there

is no provision under CPC to unmark any document, which has already been marked as exhibit.

4.1 It is further submitted that the other ground of rejection was that since the documents, as aforesaid, have been marked with objection, admissibility of the same or otherwise can be considered and discussed in the judgment itself taking into consideration the arguments advanced and materials on record. It is his submission that such a finding is not sustainable in view of the settled position of law that no secondary evidence can be admitted without leading foundational evidence for the same. In support of his submission, he relied upon the decision in the case of ***Rakesh Mohindra Vs. Anita Beri and others***, reported in 2016 (I) OLR (SC) 277, wherein, the Hon'ble Supreme Court at Paragraph-23 discussed the ratio of ***M. Chandra Vs. M. Thangamuthu and another***, reported in (2010) 9 SCC 712 and at Paragraph-47 held as under:-

> *"47. We do not agree with the reasoning of the High Court. It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party."*

He also relied upon the case of ***Jagmail Singh and Another Vs. Karamjit Singh and Others***, reported in ***(2020) 5 SCC 178***, wherein it is held as under:-

> *"11. A perusal of Section 65 makes it clear that secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power against whom the document is sought to be produced, 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 notice mentioned in Section 66 such person does not produce it. It is a settled position of law that for secondary evidence to be admitted foundational evidence has to be given being the reasons as to why the original evidence has not been furnished."*

In the said case, the ratio decided in the case of ***Rakesh Mahindra (supra)*** has been followed. He further relied upon the decision of this Court in the case of ***Hadiani Debi @ Tiki Devi Vs. Kailash Panda and others***, reported in 97 (2004) CLT 545, in which this Court relying upon the case of ***Paramananda Sahu Vs. Babu Sahu & Others***, reported in 36 (1970) CLT 1211 held that without taking any step for production of original or laying the foundation for secondary evidence production of certified copy of itself is not admissible in evidence. He further relied upon the decision in the case of ***Ballav Devi @ Gajendra and others Vs. Babaji Charan Gajendra and others***, reported in 108 (2008) CLT 790 in which it is held that the trial Court should decide the question as to the admissibility of the documents marked as Exhibits (with objection) before commencement of argument and thereafter proceed with the case in accordance with law. He, therefore,

submitted that the impugned order is not sustainable in the eye of law and is liable to be set aside.

5. Mr. Mohanty, learned counsel for the Opposite Parties, on the other hand, submitted that there can be no confusion with regard to the law decided by this Court as well as the Hon'ble Supreme Court, as aforesaid. It is his contention that since the documents have been marked as exhibits with objection, the said objection can be taken care of at the time of hearing of the suit, if submission is made with regard to admissibility of the said document. *Prima facie*, it appears that Petitioners have objection to the mode of admission of aforesaid exhibits in evidence. As the learned trial Court has already observed in the impugned order that objection raised by Defendant Nos.1 and 4 regarding acceptance of the documents are still pending for consideration and will be taken care of at the stage of hearing, the Petitioners cannot raise any grievance to the same at this stage. Plaintiffs have to prove their case basing upon the materials available on record. In the event, the Defendants establish that exhibits as aforesaid are not admissible in evidence, consequences of the same will follow. Thus, learned trial Court has committed no error in holding that the contentions of the Petitioners shall be taken into consideration in the judgment itself. It is his submission that Hon'ble Supreme Court in the case of ***Bipin Shantilal Panchal Vs. State of Gujarat and another***, reported in (2001) 3 SCC 1 has held as under:-

> *"13. It is an archaic practice that during the evidence-collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such*

> *objection. But the fallout of the above practice is this: Suppose the trial court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or the revisional court, when the same question is recanvassed, could take a different view on the admissibility of that material in such cases the appellate court would be deprived of the benefit of that evidence, because that was not put on record by the trial court. In such a situation the higher court may have to send the case back to the trial court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or remoulded to give way for better substitutes which would help acceleration of trial proceedings."*

He also relied upon the decision of the Hon'ble Supreme Court in the case of ***R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami***, reported in AIR 2003 SC 4548, wherein, it is held as under:-

> *"**20.** The learned counsel for the defendant-respondent has relied on Roman Catholic Mission v. State of Madras [AIR 1966 SC 1457] in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the above said case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection*

> *should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court."*

It appears that the objection with regard to mode of admission of the document was raised, which is marked as exhibits by filing the instant petition. Since the learned trial Court has kept the objection open to be decided at the time of argument no prejudice will be caused to the Petitioners. Further, once a document has been exhibited with objection the same cannot be expunged from the evidence of the party unless circumstances thereto are established. In the instant case, the issue raised by the Petitioners is not a

ground to expunge a document already marked as exhibit. Hence, the impugned order warrants no interference.

6. Heard learned counsel for the parties; perused the materials as well as case laws placed before the Court. True it is that Exts. 2, 3, 5, 6, 7 and 8 are secondary evidence. Petitioners prayed for expunging and unmarking the documents on the ground of non-adherence to the due procedure of law to produce secondary evidence. Section 65 of the Evidence Act prescribes the procedure to lead secondary evidence. It is settled law that in order to produce secondary evidence, foundational evidence for the same has to be led by the party who seeks admission of secondary evidence. Whether the Plaintiffs have laid foundational evidence to adduce secondary evidence can be ascertained by assessing the evidence laid as well as materials on record. In the case of ***R.V.E. Venkatachala Gounder (supra)***, the Hon'ble Supreme Court has laid down the principles to deal with the admissibility of a document either with regard to the objection that document, which is sought to be proved, is inadmissible in evidence itself or an objection with regard to the mode of proof leading the same to be irregular or insufficient.

7. In the instant case, Petitioners appeared to have challenged the mode of admission of the document in evidence. Since objection has already been raised with regard to admissibility of the aforesaid exhibits, the same can be taken care of at the time of final adjudication of the suit. Observation of this Court in the case of ***Ballav Devi @ Gajendra (supra)*** that '*trial Court should*

decide the question as to admissibility of a documents marked exhibits with objection before commencement of argument and thereafter proceed with the matter in accordance with law', is not sacrosanct. It depends upon facts and circumstances of each case. But, ordinarily, dealing with the objections to the admissibility of a document at any stage before argument may lead to piecemeal trial, which is deprecated in the case of ***Bipin Shantilal Panchal (supra)***. It is held therein that *such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or remoulded to give way for better substitutes which would help acceleration of trial proceedings.* The objection raised by the Petitioners can also be considered in the final judgment itself, if raised at the stage of argument of the suit. The Hon'ble Supreme Court as well as this Court has settled the principles as to how secondary evidence is to be admitted in the aforesaid case laws. Thus, the same needs no reiteration. Whether the Plaintiffs have laid foundational evidence on facts for admission of secondary evidence, can be answered in the judgment itself taking note of the objection raised vis-à-vis material evidence available on record both oral and documentary. Hence, no piecemeal trial with regard to admissibility of certain documents, viz., Exts.2, 3, 5, 6, 7 and 8 is necessary at a pre-argument stage.

8. Order XIII Rule 3 CPC, which encapsulates rejection of irrelevant or inadmissible documents, is not applicable to the case at hand, as the documents have already been admitted in evidence. If objections raised by the Petitioners with regard to admissibility of

secondary evidence are accepted, the exhibits, as aforesaid, can be rejected in the judgment itself. Hence, the same requires no consideration at the pre-argument stage.

9. In view of the above, I find no infirmity in the impugned order under Annexure-7. Accordingly, the CMP being devoid of any merit stands dismissed.

(*KRUSHNA RAM MOHAPATRA)*
JUDGE

s.s.satapthy *High Court of Orissa, Cuttack*
3rd Aug., 2022