

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Reserved on: January 13, 2009

Date of Decision: January 28, 2009

CM(M) 1320/2004

ASHOK KUMAR GARG Petitioner
Through: Mr. G.L. Rawal, Senior Advocate
with Mr. Rajesh Rawal, Adv.

versus

ANIL KUMAR GUPTA Respondent
Through: Mr. Vikram Nandrajog, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

J U D G M E N T

MANMOHAN, J

1. The present petition has been filed under Article 227 of the Constitution of India for setting aside the orders dated 5th March, 2004, 31st May, 2004 and 20th September, 2004 passed by the Additional District Judge, Delhi. By virtue of the said orders, the petitioner/defendant's application for leading secondary evidence under Section 65 of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Act') was dismissed and subsequently, the defendant's evidence was closed and the matter was listed for final arguments.

2. The trial court had rejected the petitioner's application under Section 65 of the Act on the ground that the petitioner/defendant deliberately did not file the originals of the documents in the suit filed by the petitioner despite

being given several opportunities. The trial court was further of the view that the petitioner's case was not covered under Clause(c) of Section 65 of the Act. The relevant portion of the impugned order dated 15th March, 2004 is reproduced hereinbelow for ready reference:-

“4. An application for secondary evidence can be allowed only if it satisfies the terms of Section 65 of Evidence Act. In the present case, the application and grounds do not satisfy terms of Section 65 of Evidence Act. The documents which are sought to be proved has been categorically denied by the alleged executor. The defendant who claimed to be in possession of originals deliberately did not file the originals in the other Court taking several excuses. Once it was stated documents have been lost, then it was stated that documents have been found but have been mortgaged to raise loan and third time again the excuse was loss of documents. The case of defendant is also not covered under Clause 65(c) of Indian Evidence Act because the defendant had deliberately not produced the original documents despite giving opportunities and has been making excuses for not producing documents. The case of the defendant is not covered under any other provision of Section 65 of Indian Evidence Act. I, therefore, dismiss the application.”

3. Mr. Rawal, learned senior counsel for the petitioner submitted that the petitioner/defendant's case was that the respondent/plaintiff had sold the flat in question to the petitioner/defendant. He stated that to effectuate the sale, the respondent/plaintiff had executed the following documents:-

- “1. Agreement to sell dated 9.4.1995*
- 2. General Power of Attorney dated 8.5.1995.*
- 3. Indemnity Bond dated 8.5.1995.*
- 4. Special Power of Attorney dated 8.5.1995.*
- 5. Affidavit dated 8.5.1995.*
- 6. Receipt dated 8.5.1995.*
- 7. Will dated 8.5.1995.”*

4. Mr. Rawal submitted that Clause (c) of Section 65 of the Act was clearly attracted in the present case as the originals of the documents referred to hereinabove were lost when the petitioner had brought them to court for filing. He stated that the petitioner was a very unlucky person as in the initial suit filed by the petitioner against the respondent only photocopies of the above mentioned seven documents were filed, as even at that time, the said documents were lost and were not available to the petitioner. Subsequently, the said seven documents were traced out but they had to be mortgaged to a builder M/s Khurana & Associates and even after the mortgage was redeemed, the said seven documents were once again lost before they could be filed in Court.

5. Mr. Rawal further submitted that the question whether the above mentioned seven documents are false and fabricated as alleged by the respondent/plaintiff could be decided only at the time of evidence and it would be highly illegal and irregular if the petitioner was not given an opportunity to lead secondary evidence.

6. Mr. Vikram Nandrajog, learned counsel for the respondent/plaintiff justified the impugned order by pointing out that the respondent/plaintiff had never sold the flat in question to the petitioner/defendant and, therefore, the said seven documents were never executed. He stated that the petitioner and respondent were known to each other as they had shops in the same Hauz Qazi Market, Delhi and the respondent/plaintiff had, on a personal request of the petitioner/defendant, allowed the latter to reside in the said flat for a period of about six months. He further stated that when the respondent/plaintiff asked the petitioner/defendant to vacate the suit premises, the petitioner filed a suit for injunction in July, 1998 seeking

protection against dispossession. In the said Suit No. 392 of 1998, the petitioner claimed that he had purchased the flat in question from the respondent. In the said suit, the petitioner only filed photocopies of the alleged seven documents but did not file the originals on the ground that these had been misplaced/lost by him and for this purpose the petitioner placed on record a police report dated 25th January, 1996.

7. Mr. Vikram Nandrajog further stated that subsequently, the petitioner filed an application dated 1st December, 1999 under Order XIII Rule 2 read with Order XVIII Rule 17-A read with Section 151 CPC seeking permission of the court in Suit No. 392 of 1998 to file originals of the said seven documents on the ground that the said originals were found by him in his own house and even the earlier police complaint dated 25th January, 1996 had been withdrawn by him. The trial court allowed the petitioner's application and directed him to produce the original documents vide order dated 24th August, 2000. Thereafter the petitioner's suit was repeatedly adjourned to 17th November, 2000, 15th January, 2001 and 8th February, 2001, but the petitioner did not file the originals of the said documents. Infact, the trial court in its order dated 16th March, 2001 recorded the fact that the petitioner had not filed the original documents despite being given a last opportunity and as on the said date neither the plaintiff nor his counsel appeared, the trial court dismissed the petitioner's suit in default.

8. Mr. Nandrajog, stated that subsequently, on an application for restoration moved in Suit No. 392 of 1998, the trial court vide order dated 23rd August, 2001 restored the suit subject to the condition that the original documents would be produced on the very next day that means 24th August, 2001. The trial court further stated that if the original documents were not

produced on the next day, the suit shall be treated as dismissed in default. However, the petitioner again sought further time on 24th August, 2001 and 27th August, 2001 for filing of original documents. On 3rd September, 2001, the petitioner filed an application seeking extension of time to file original documents till 15th September, 2001 on the ground that the said documents had been mortgaged for raising a loan to meet the expenses incurred on account of his wife's illness. It was averred that the loan was to be repaid by 15th September, 2001 and as soon as the documents were released, the petitioner would file the said original before the trial court.

9. Mr. Nandrajog, stated that it was only thereafter, that the petitioner raised the present contention that though he had, on 24th August, 2002 brought the original documents to Tis Hazari Courts, Delhi for the purposes of filing the same in the suit filed by the respondent, but the bag allegedly containing the original documents was stolen when the petitioner went to urinal after parking his scooter. It was on this basis that the petitioner filed the present application under Section 151 CPC read with Section 65 of the Act in the subsequent suit filed by the respondent/plaintiff seeking possession and damages. Consequently, Mr. Nandrajog, submitted that petitioner should not be given an opportunity to lead secondary evidence.

10. Before I advert to the rival arguments, it would be relevant to refer Section 65 of the Act which reads as under:-

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;

(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 original 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 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 collections.

In cases (a), (c) and (d), any secondary evidence of the contents of the documents 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.”

(emphasis supplied)

11. On a reading of this Section, I am of the opinion that the secondary evidence is admissible when the party offering evidence of the contents of a document cannot, for any reason not arising from his own default or neglect,

produce the original document in reasonable time. If the party himself neglects or makes default in taking necessary steps to cause the production of the original then he is not entitled to give secondary evidence.

12. From the above mentioned facts, it would be apparent that the originals of the said seven documents were in possession of the petitioner at least from 27th November, 1999 till 24th August, 2002. Moreover, despite the fact that the trial court in the petitioner's Suit No. 392 of 1998 had been repeatedly directing the petitioner from 24th August, 2000 to file originals of the said seven documents, the petitioner did not comply with the said order and even allowed his suit to be dismissed in default.

13. During the course of arguments Mr. Rawal stated that the petitioner's suit was no longer relevant as in that suit petitioner had only prayed for stay of possession in accordance with law and as the respondent had subsequently filed a suit for possession, the petitioner's suit had lost its relevance. In my view, even if Mr. Rawal's submission is accepted, then also the order sheets of the said case are relevant as they show that non-production of the original documents was due to petitioner's default, neglect and failure to produce the same in a reasonable time. In fact, the petitioner's version that the originals of the documents were initially lost, subsequently discovered, then mortgaged and once again lost, do not inspire confidence as the petitioner despite being in possession of originals of the documents did not file the same in his suit despite pre-emptory directions by the trial court. I am of the opinion that as the sine-qua-non for attracting Section 65(c) of the Act is not fulfilled in the present case – as the non-production of the original documents was due to petitioner's default, neglect and failure – the petitioner's application to lead secondary evidence cannot be allowed. Consequently, I

dismiss the present petition with costs of Rs. 50,000/- and direct the trial court to finally dispose of the present case within six months from the date of this order.

MANMOHAN, J

January 28, 2009
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