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HIGH COURT OF DELHI AT NEW DELHI

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RSA 52/2007

Date of decision : 09th November, 2009

MUNNI BEGUM

..... Appellant

Through : Mr. Ravi Verma, Advocate

Versus

M.C.D.

..... Respondent

Through: Mr. Sanjeev Sabharwal,
Standing Counsel.
Mr. Pawan mathur Advocate
for DDA.

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CORAM:

HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not?
- (3) Whether the judgment should be reported in the Digest ?

J U D G M E N T

ARUNA SURESH, J. (Oral)

CM APPL.2606/2007 (delay in filing)

There is delay of 14 days in filing the appeal. For the reasons stated in the application, delay in filing the appeal is condoned. It stands allowed accordingly.

Signature Not Verified **RSA 52/2007**

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1. Impugned in the appeal is the judgment and decree of the Appellate Court dated 2.11.2006 whereby appeal filed by the appellant Munni Begum against the judgment and decree of the trial court dated 23.8.2005 was dismissed.
2. In brief, the facts of the case are that appellant filed a suit for permanent injunction against the respondents MCD and DDA seeking perpetual injunctions against them from dispossessing her from house No.B-4/501, Nand Nagri, Shahdara Delhi being the owner of the said house. MCD took a preliminary objection to the maintainability of the suit alleging that appellant is an encroacher on the Government land and has no right, title or interest in the suit property and that the suit is barred under Section 11 CPC as the appellant had earlier filed a suit bearing Suit No.143 of 1990 against the same respondents in respect of the same property, which was dismissed as withdrawn. MCD also disputed the Municipal number of the property in suit as

according to it, the alleged property number is false and fictitious.

3. The trial court, while deciding issue No.3, observed, that appellant had failed to establish her legal rights over the suit property as she failed to prove document Mark 'B' purported to have been issued by Slum & J.J. Department.
4. Following substantial question of law was formulated by this court vide order dated 27.2.2007, which reads:-

"Whether the Courts below erred in not reading mark 'B' the allotment letter in evidence?"

5. Mr. Ravi Verma, learned counsel for the appellant has submitted that the courts below erred in not taking into consideration the allotment letter Mark 'B' while appreciating the evidence of the parties, especially when the DDA did not even file its written statement controverting the claim of the appellant

that she was the owner of the property in suit and therefore, the judgment and decree of the trial court as well as that of the Appellate Court is illegal and is liable to be set aside.

6. Admittedly, the original allotment letter was never produced on record and proved in evidence by the appellant. The document placed on record is the photocopy of the allotment letter. Appellant never moved an application before the trial court for permission to lead secondary evidence to prove photocopy of the allotment letter for any cogent reason. The trial court dealt with the submissions made before it regarding admissibility of the document Mark 'B' in evidence in the following manner:-

".....It is stated that the document mark B has not been objected by the defendants and they have not raised any objection regarding the admissibility of this document. Therefore, the document mark B may be treated as secondary evidence as per the provisions of section 62/63/64 & 65 Evidence Act. This contention of the Ld. counsel for the plaintiff has no force as for leading the secondary evidence plaintiff has

to seek the permission of this court, which he has failed to do so. Even plaintiff has not examined police officials to prove the police report. And the Plan filed by the counsel for plaintiff are not help out this case as the facts are quite different. Plaintiff is not be executant of the document marked as Mark B, and the same has been allegedly issued by the Slum & JJ department. Plaintiff has not taken any steps to summon any witness from the concerned department.
....."

7. The Appellate Court while dealing with the admissibility of the document mark 'B' in evidence observed that the Civil court had discussed convincingly valid reasons for discarding document Mark 'B'. Till date, appellant has not filed any application seeking permission to lead secondary evidence. It is pertinent that the document Mark 'B' was not proved in evidence. It was on appreciation of evidence that, the courts below rightly held that the allotment letter mark 'B' was not proved in evidence.
8. Naturally, the Appellate Court as well as the Trial court discarded this document while deciding the

case on merits.

9. It is well established principle of law that where primary evidence is available, secondary evidence stands excluded. However, this principle of law has a flexibility if the opposite party has no objection to the admissibility of secondary evidence or the court permits the admission of secondary evidence. Though, DDA did not file its written statement but, at the same time it did not admit the authenticity of the document and, therefore, the courts below had to assess the evidentiary value of the document to decide the claim of the appellant as owner of the property in suit. Even the Municipal number of the property in suit is a disputed fact. Appellant failed to summon the relevant record either from DDA or from Slum & J.J. Department to prove that Mark 'B' was issued by the concerned department and the property in suit was allotted to her.
10. It is pointed out by learned counsel for the respondent that there is a dhalao(slope) in front of the property in suit and on the back side of the

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house there is a park and a street, which is apparent on examination of the Site Plan Ex.DW-1/1. There is no other house adjacent to the impugned property. Therefore, this property could not have been allotted to the appellant as claimed by her. Genuineness of the document Mark 'B' was also challenged. This allotment letter (Mark 'B') does not bear the signatures of the appellant herself. It does not bear the stamp of the DDA. Surprisingly, after the loss of document, the appellant did not obtain duplicate copy of the allotment letter which was the only document available with her to prove her ownership rights.

11. It is pertinent to mention here that appellant had earlier filed a suit No.143/1990, which she later on withdrew without seeking any permission to file fresh suit on the same cause of action.
12. It is worth pointing out here that appellant had sought an interim injunction against the respondents in the suit by way of an application Under Order 39 Rule 1 & 2 CPC. The said application

was dismissed by the trial court on the ground that original allotment letter was not produced and she did not obtain duplicate copy of the allotment letter, if it was misplaced in the year 1990. The Court also kept in mind the fact that she had withdrawn her earlier suit with no liberty to file fresh suit on the same cause of action. Appellant had challenged the said order in C.R.P. No.741/1993. The said Revision was dismissed by this court, observing that appellant had failed to produce original allotment letter. Despite having suffered this order, the appellant did not take any appropriate steps to get the duplicate allotment letter issued from the department nor she produced any evidence to prove that the property in suit was allotted to her.

13. True that the rule where the primary evidence is attainable, the secondary evidence stands excluded is not so rigid, especially in cases where no objection is made by the party against whom the secondary evidence is sought to be proved. Where, secondary evidence is admitted without their being a proper objection, it attains character of primary

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evidence and becomes admissible in evidence. In this case, the respondent/department never accepted or admitted the photocopy of the alleged allotment letter mark 'B'. Not only that, they did not admit the document. They also challenged its authenticity. Therefore, flexibility attached to the rule that where primary evidence is attainable, the secondary evidence stands excluded, is not available to the appellant. The appellant could have summoned the DDA record and from the original record she could have proved the copy of the document with the leave of the court. Primary evidence is always the best evidence and presumption of authenticity is attached to it.

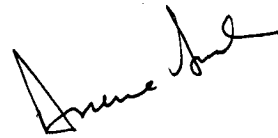
14. It is pointed out by the learned counsel for the respondents that DD Ex.PW-1/1 was recorded on 20.12.1990 whereas the suit was filed in December, 1991 i.e. after about one year of the loss of the document, that too, without obtaining the duplicate copy of the allotment letter. I find force in this submission. After recording DD Ex.PW-1/1 on 20.12.1990, appellant did not care to obtain copy of

the allotment letter if it was actually lost. Be that as it may, production of DD in evidence and its proof, in no manner makes allotment letter Mark 'B' admissible in evidence. This document at the best becomes relevant only for consideration if the appellant should be permitted to lead secondary evidence, original having been lost.

15. As discussed above, appellant did not make any endeavour to prove her title by way of secondary evidence. She had filed suit No.143/1990 in the Civil Suit and withdrew the same, probably for the same reason that the original allotment letter was not produced on the court record and she was advised to lodge a complaint to the police about the loss of document with the result, she got DD Ex.PW-1/1 recorded, to create an evidence that she had lost her allotment letter.
16. As discussed above, I am of the view that the courts below adopted the right approach while considering the admissibility of allotment letter Mark 'B' in evidence to decide the title of the appellant in the

suit property; the only base of her claim for permanent injunction.

17. Hence, I find no infirmity or illegality in the judgment and decree of the courts below. There is no merit in the appeal. Hence, it is accordingly dismissed.



**(ARUNA SURESH)
JUDGE**

NOVEMBER 09, 2009
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