

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

+ **CM(M) 1764-66/2005.**

Date of decision: 12th October, 2009

SHIR PREM CHANDRA JAIN (DECEASED)
REPRESENTED BY LR's SHRI BHARAT BHUSHAN JAIN,
ADVOCATE & OTHERS Petitioners

Through: Mr. V.K. Srivastava, Advocate.

Versus

SHRI SRI RAM (DECEASED)
REPRESENTED BY LR's SHRI SUNIL KUMAR ARORA
& OTHERS Respondents

Through: Mr. Yogindra Nath, Advocate for the
Respondent No.1.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. Whether 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 |

RAJIV SAHAI ENDLAW, J.

1. This petition under Article 227 of Constitution of India is preferred with respect to the order dated 8th July, 2005 dismissing the application, of the petitioner/plaintiff before the Trial Court, under Section 65 of the Indian Evidence Act for permission to lead secondary evidence with respect to a Will and a demarcation report by the Revenue Authorities of which certified copy is stated to have been filed. The Trial Court has dismissed the application for the reason that the petitioner had stated that the originals are not traceable; it was held that for Section 65 to be invoked, document has to be lost.

2. A practice appears to have developed in the Trial Courts of moving an application under Section 65 of the Evidence Act seeking permission of the courts to adduce secondary evidence. There does not appear to be any sanction therefor in law. Neither the

Evidence Act nor the CPC nor any other rules & regulations or statute requires the filing of such an application.

3. Section 61 of the Evidence Act provides for proof of documents either by primary or by secondary evidence. Section 64 provides that documents must be proved by primary evidence, except in cases “hereinafter mentioned” i.e. in Section 65 & Section 65 A and Section 65 B. Section 65 permits secondary evidence to be led in the contingencies mentioned therein. Thus a litigant without seeking any permission from the court if satisfies the ingredients of Section 65 of the Evidence Act i.e. of the existence of the contingency or situation when secondary evidence is permitted to be led is entitled to lead such evidence. Such evidence will have to be two fold. Firstly, as to the existence of the contingency or situation in which secondary evidence is permissible, viz that the original document is in possession or power of the person against whom it is sought to be proved etc. or that the existence, condition or contents of original have been proved to be admitted by person against whom it is sought to be proved or that the original has been lost or destroyed or when original is not moveable etc. i.e. of the various situations mentioned in Clause (a) to (g) of Section 65. Secondly, such evidence will have to be in proof of document as also prescribed in Section 65 r/w Section 63.

4. It is only after such evidence has been led can the court form an opinion whether the circumstances/situation in which it is permissible to lead secondary evidence exist or not. For instance, whether a document has been lost or destroyed is a question of fact. It is only after the person claiming so has been cross examined, can a decision be taken as to the existence and loss or destruction of the original.

5. The court, on an application seeking permission to lead secondary evidence, even if setting out reasons as contained in either of the clauses of Section 65, cannot take a decision on the correctness of the reasons. The application thus serves no purpose except delaying the proceedings. It is however often found that the courts allow or disallow the applications, without giving an opportunity to the parties for laying a foundation for reception or rejection of secondary evidence. Such procedure is impermissible in law. Factual controversies cannot be adjudicated on applications. That is however not to be understood as allowing a mini-trial on this aspect. The party seeking to prove document by secondary evidence is to lead evidence of the existence of circumstances/situations in

which secondary evidence is permissible, during leading its evidence, whether by way of examination of witnesses or cross examination of opponents witnesses, in the suit/other proceeding itself. It will be decided at the stage of disposal of suit only, whether case for leading secondary evidence has been made out or not and if so, whether document stands proved by secondary evidence.

6. As far as the reasoning given by the Trial Court in the present case is concerned, the trial court has understood the word “lost” in Section 65 as “irretrievably lost”; thus the plea of the petitioner of the document being “untraceable” has been held to be not a plea of “lost” and thus not covered by Section 65.

7. The meaning of lost in the Black’s Law Dictionary 6th Edition is “An article is lost when the owner has lost the possession or custody of it, involuntarily and by any means, but more particularly by accident or his own negligence or forgetfulness, and when he is ignorant of its whereabouts or cannot recover it by an ordinarily diligent search”.

8. This court in *Laiqan Begum Vs. Abdul Hamid* MANU/DE/0203/1979 held that “not traceable” or “lost”, both enable the invocation of secondary evidence under Section 65 of the Act. I am also of the opinion that for invocation of Section 65, it is not necessary to take a stand that the document is lost, so as never to be found. It is sufficient to prove that the document is not available at the relevant time and its whereabouts are unknown then.

9. Even, otherwise as far as the Will is concerned I find that even for the purposes of probate, Sections 237 & 238 of the Indian Succession Act permit the grant of probate of the contents of a lost or destroyed Will even, when the same is established by evidence.

10. The counsel for the respondents has contended that the reliance by the petitioner on the old demarcation report is misconceived and the demarcation can be carried out even now. However, this court, at this stage, is not concerned with the weight to be given to the evidence or the veracity of the evidence and it shall remain open to the respondents to take the requisite pleas before the Trial Court.

11. The order impugned in the aforesaid circumstances cannot be sustained and is set aside. The petitioner while leading his evidence would be free to prove the documents either through primary or through secondary evidence.

CM APPL. No.11132/2005 (u/S 151 CPC for stay) & CM A. No.4149/2006 (of petitioner u/O 11 Rule 1&2 CPC).

With the disposal of the main petition, all pending applications have become infructuous and are disposed of.

RAJIV SAHAI ENDLAW, J

**October 12, 2009
PP**