

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

+ **CM(M) 1208/2008**

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Date of decision: 15.12.2009

SANYOGTA PRAKASH

..... Petitioner

Through: Mr. Sanjiv Bahl with Mr. Ajay Shekhar, Advocates.

versus

DHIRA BALA MALHOTRA & ORS

..... Respondents

Through: Ms. Geeta Luthra, Sr. Advocate with Mr. A. Agrawal,
Advocate.

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 the Constitution of India has been preferred by the plaintiff in the suit from which this petition arises and against the order dated 28th May, 2008 dismissing the application of the petitioner under Section 65 of the Evidence Act. This court while issuing notice of this petition had stayed the further proceedings in the suit and the said order continues till date.

2. The petitioner/plaintiff has sued for specific performance of an agreement for sale of immovable property and for recovery of damages. The petitioner/plaintiff filed an application under Section 65 of the Indian Evidence

Act on the plea that the original agreement to sell had been handed over to the counsel earlier engaged by the petitioner/plaintiff; that the said counsel expired and a new counsel was engaged; that the new counsel upon inspection of the court record found that the original agreement to sell was not on record; that the original agreement had been handed over to the earlier counsel for filing in the court and upon the demise of the earlier advocate the petitioner was not aware of the whereabouts of the said documents. The petitioner/plaintiff in the circumstances, sought leave of the court to prove the copy of the original agreement by way of secondary evidence.

3. The trial court has *inter alia* held that the plaintiff has miserably failed to show that the original agreement existed at all and that the reasons stated in the application do not inspire confidence. The application was accordingly dismissed.

4. I have in ***Prem Chandra Jain Vs. Sri Ram*** MANU/DE/2860/2009 held that there is no need for filing an application under Section 65 of the Evidence Act for seeking permission to lead secondary evidence. The documents can be proved either by primary or by secondary evidence. Of course for proof of documents by secondary evidence the conditions laid down in Section 65 have to be satisfied. However, the said conditions can be satisfied only during the evidence and not by way of making an application. In the present case also the trial court has erred in without giving an opportunity to the petitioner to enter the witness box or lead any evidence, holding that the factual pleas of the petitioner of the existence of the original agreement to sell and of the same having been lost in the manner alleged are without any basis. All that is a matter of evidence and ought to have been left to be decided in evidence rather than being decided by way of an application.

5. The senior counsel for the respondent/defendant has however relied upon ***Ashok Kumar Garg Vs. Anil Kumar Gupta*** CM (M) No.1320/2004 decided on

28th January, 2009 in which another Single Judge of this Court dismissed a petition under Article 227 of the Constitution of India preferred to this Court against the order of the Trial Court dismissing the application under Section 65 of the Evidence Act. It was held that 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; 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. Though in that case also application was considered without recording evidence but I must state that the question as to whether such application lies or not did not fall for adjudication. The said judgment therefore cannot be said to be a judgment on the aspect as to how the admissibility of secondary evidence is to be adjudicated and whether it is to be done on an application or by recording evidence.

6. The senior counsel for the respondent also relied upon *Banarsi Dass Vs. Om Parkash* AIR 2005 Punjab & Haryana 200, *Baljit Kaur Vs. Mohinder Kaur* Volume CVII (1994-2) Punjab Law Reporter 488 where also applications under Section 65 of the Evidence Act were considered. However, again in neither of the said judgments was it discussed whether such an application lies and if so what is the procedure for adjudication therefor. The courts proceeded to decide the application treating the same as maintainable and on the findings, whether a case for leading secondary evidence was made out or not, disposed off the applications.

7. The aforesaid judgments do not persuade me to take a different view than what was taken by the undersigned in *Prem Chandra Jain* supra. In the opinion of this Court, the question whether circumstances / contingences in which it is permissible to lead secondary evidence exist or not is itself a question of fact requiring adjudication and which cannot be adjudicated by the court on an application. The CPC also in Section 141 provides that the procedure provided in

the Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction. The “proceedings” having been explained in the explanation as including proceedings under Order 9 of the CPC. Thus, when a party to a litigation avers that circumstances as mentioned in Section 65 exists and the other party controverts the same, without giving opportunity to adduce evidence it cannot be adjudicated, for instance, that the original is in possession or power of a person against whom it is sought to be proved or has been destroyed or lost or is of a nature that it is not easily movable etc. In the present case, it is the plea of the petitioner/plaintiff that the original agreement to sell exists; that it had been handed over by the petitioner/plaintiff to his earlier advocate; that only on inspection of the court file by the new advocate engaged by the petitioner/plaintiff was it learnt that the original agreement had not been filed by the earlier advocate on the file of the Court. Besides, evidence will also have to be led of the alleged photocopy being a true photocopy of the original if any, etc. All these pleas are of facts and it is not possible for this court to determine the truth thereof without allowing the petitioner/plaintiff to lead evidence. The respondent/ defendant would be entitled to cross examine the witness, if any examined by the petitioner/plaintiff, to prove that the original documents had been handed over to the earlier advocate and on engagement of a new advocate only it was discovered that the original is not on the court record. The Trial Court in the impugned order though holding that “secondary evidence can only be permitted where it is proved that the original had been lost” erred in, without giving an opportunity to the petitioner/plaintiff to lead evidence, holding that the petitioner/plaintiff had failed to show that the documents has been lost and that the reasons stated in the application do not repose any confidence. The same is not permissible under the procedure prescribed by law particularly in Section 141 of the CPC.

8. The senior counsel for the respondent/defendant has also contended that the suit has been pending for long. The Trial Court also appears to have been swayed by the fact that the suit is pending since 1978. However, the petitioner/plaintiff was only seeking leave to prove the document by secondary evidence and was not seeking leave to file any new document for the Trial Court to refer to Order 7 Rule 14 of the CPC. From a reading of the reply filed by the respondent/defendant to the application under Section 65 of the Evidence Act, it appears that a photocopy of the alleged agreement to sell stood filed on the record. Thus, it is not as if the photocopy of the alleged agreement to sell was being sought to be filed for the first time. In this view of the matter, the reliance placed by the senior counsel for the respondent/defendant on *Metalex Pipes Ltd. Vs. Spark Electrodes Pvt. Ltd.* 90 (2001) DLT 482 is not apposite. Similarly, the judgment of the Rajasthan High Court in *Jagdish Singh Co. Vs. Ranjeet Singh* X 1991 (3) Current Civil Cases 220 relates to the payment of stamp duty on photocopies of documents bearing deficit stamp and is not relevant. The senior counsel for the respondent/defendant also relied upon *Ramesh Chand Sachdeva Vs. Raj Kumar Manchanda* 153 (2008) DLT 191 and *Prem Shankar Gupta Vs. Delhi Development Authority* 147 (2008) DLT 517 on the scope of jurisdiction under Article 227 of the Constitution of India. However, the present is not the case where this Court is being called upon to reevaluate the assumptions and presumptions drawn by the Trial Court while refusing secondary evidence. This Court has found the Trial Court to have followed a procedure in the disposal of application under Section 65 of the Evidence Act and which procedure is not permissible in law. Thus, a case for interference is made out.

9. The order impugned thus does not stand the scrutiny of law and is liable to be set aside. The petitioner/plaintiff in his evidence, if lays the foundation for reception of secondary evidence of the alleged agreement to sell, will, at the time

of final arguments be entitled to urge that the agreement stands proved by secondary evidence. Equally, it will be open to the respondent/defendant to contend otherwise. Before that, this court cannot, merely on an application permit or decline secondary evidence. The application filed by the petitioner/plaintiff was thus misconceived.

10. However, from a reading of the order it is not very clear whether the copy of the agreement had been filed on record or not or was sought to be filed along with the application for the first time, though from the reply of the respondent/defendant to the application it appears that a photocopy was filed along with the suit. To avoid any further controversy and trial, it is directed that if the copy has not already been filed, the petitioner/plaintiff shall be entitled to file the same before the court within 15 days of today.

11. The petition is disposed off in terms of the above.

No order as to costs.

December 15, 2009
pp/gsr

RAJIV SAHAI ENDLAW
(JUDGE)