

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

Date of Reserve: July 28, 2010
Date of Order: 13th August, 2010

+ CM(M) No. 356/2010 & CM Appls. No. 4804-4805/2010 & 8190/2010

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13.08.2010

Ram Naresh Mudgal & Ors. ... Petitioners
Through: Mr. S.K. Dubey,

Versus

Munesh Chand Gupta ... Respondent
Through: Mr. Hem C. Vashisth, Advocate

JUSTICE SHIV NARAYAN DHINGRA

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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 judgment should be reported in Digest? | Yes. |

JUDGMENT

By present petition, the petitioners have assailed an order dated 25th August, 2009 passed by the learned Sr. Civil Judge whereby he allowed an application of the respondent (plaintiff before the trial Court) under Section 65 of Evidence Act seeking permission to lead secondary evidence. The respondent filed a suit for permanent injunction against the petitioners seeking a restraint on the petitioners from creating third party rights and in this suit respondent contended that the respondent had entered into an agreement to sell in respect of the suit property with the father of the petitioners however, the original documents like receipts and agreement to sell were illegally retained by father of the petitioners and after his death, passed on to the

petitioners and the petitioners failed to produce them on a notice under Order 12 of CPC in order to defeat the interest of the respondent therefore respondent be allowed to lead secondary evidence. The learned Senior Civil Judge observed that the documents sought to be proved by plaintiff (respondent herein) were necessary for proving the case and in absence of original documents secondary evidence could be given to the plaintiff to prove the existence/contents of the documents, no prejudice would be caused to the defendants. Therefore, secondary evidence was allowed to be led.

2. A perusal of notice under Order 12 Rule 8 CPC served by the respondent on petitioners would show that the respondent asked the petitioners to produce from their custody receipt dated 10.1.2004 agreement to sell dated 28.1.2004/7.2.2004. Another legal notice served by the respondent herein (plaintiff before the trial Court) would show that the respondent contended that he entered into an agreement to sell dated 28.1.2004 with Prem Narain, father of the petitioners. Prem Narain received part consideration out of total sale consideration of Rs.15 lac and also executed a receipt and delivered the possession of the premises. Nowhere in this notice it was stated that Prem Narain retained the original agreement or receipt of payment neither there seems to be any logic behind the contention that when a purchaser pays money for purchase of property he would hand over the original receipt of money also to the seller and would also hand over the documents of sale to the seller instead of retaining the same as a proof of his having made payment and having purchased the property. The contention of the petitioners before the

trial Court had been that no such documents were in possession of the petitioners, neither was there any occasion for the petitioners to have possessed the documents; the execution of documents itself was denied.

3. Section 65 of the Indian Evidence Act provides that the secondary evidence can be given of the existence of contents of the document in 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.

4. It is thus, mandatory that the person who seeks to prove secondary evidence has to show the existence of the documents and how documents came in possession of the opposite party. It cannot be believed that a person who is paying money shall not retain the receipt of payment of money or who is purchasing property on the basis of agreement to sell shall not retain the original agreement to sell with him and give it to opposite party. The respondent/plaintiff in the earlier notice had nowhere stated that these documents were given to the defendants (father of the defendants) nor in the notice under Order 12 Rule 8 CPC it was stated as to under what circumstances these documents came in possession of the defendants. Merely by saying that the defendants were in illegal possession of the documents, the possession of which should have been with the plaintiff, the plaintiff cannot show the existence of these documents. Unless the existence of documents is shown and proved the question of allowing secondary evidence does not arise. Self-serving statement made by a person is no proof of existence of documents. The respondent (plaintiff before the trial Court) has failed to show as to under what circumstances the original documents which should have been in his possession went in possession of the defendants. Merely saying that the agreement was executed and receipt was executed but they are in possession of respondent would not permit him to lead secondary evidence.

5. Under Section 63 of the Indian Evidence Act, secondary evidence means as under:

63. Secondary Evidence - Secondary evidence means and includes.

- 1. Certified copies given under the provisions hereinafter contained;*
- 2. Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy and copies compared with such copies;*
- 3. Copies made from or compared with the original;*
- 4. Counterparts of documents as against the parties who did not execute them;*
- 5. Oral accounts of the contents of a document given by some person who has himself seen it.*

6. It is not the case that respondent wanted to prove certain copies or copies made from original by mechanical process. The intention of the respondent is to prove by giving an oral account of the execution of an agreement to sell whereunder he claimed to have received possession of the property and claimed to have paid substantial consideration. I consider that proving of such documents by oral evidence cannot be permitted by Court since these documents should have been in possession of the plaintiff and if the plaintiff does not have possession no presumption can be drawn that the plaintiff had handed over these documents to defendants (father of the defendants) and he be permitted to prove orally the execution of an agreement to sell by father of the petitioners and payment of money and receipt of money by father of the petitioner.

The order dated 25th August, 2009 passed by the learned Sr. Civil Judge is patently an illegal order and is hereby set aside.

August 13, 2010
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SHIV NARAYAN DHINGRA, J.