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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: March 05, 2010

Date of Order: March 22, 2010

+ CM(M) 918/2009

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Mangat Ram

Through: Mr. Arun Birbal, Advocate

Versus

Ashok Kumar Sharma

Through: Mr. Anshuman Pandey, Advocate

22.03.2010

...Petitioner

...Respondent

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? No.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

JUDGMENT

1. By this petition under Article 227 of the Constitution of India, the petitioner has assailed an order dated 23rd April, 2009 whereby the petitioner was not allowed to lead secondary evidence to prove the originals of documents which were in the nature of power of attorney and agreement to sell.

2. It is submitted by counsel for the petitioner that the respondent was his son. The petitioner was owner of the property in question and has been residing in the property. The property was ancestral property. The petitioner allowed respondent, his eldest son, to reside with him while rest of the family was residing in another house. In the year 2004, the petitioner lost his wife and became dependent on the respondent for his daily needs. The respondent and his second wife started putting pressure on him to sell the property and give money to them so that the respondent could buy a plot in

Delhi. The petitioner refused to oblige. However, when petitioner found that respondent was trying to sell his property, he got published a notice in newspaper that he was the owner of the property and the people should desist from purchasing the property. He also filed the suit in question against his son seeking permanent injunction restraining his son from selling and alienating the property. The original documents of the property which were in his custody earlier, fell in hands of the respondent during his living with him. The petitioner wanted to prove his ownership of the property by virtue of secondary evidence. The petitioner served a notice on the respondent to produce the original documents relating to the title of the property. He moved the application under Section 63 of Evidence Act for permission to place on record the photocopies of the documents and to prove the documents by secondary evidence, which the trial court dismissed by impugned order.

3. A perusal of the order of trial court would show that the trial court denied permission to lead secondary evidence on the ground that the defendant in his reply to the notice had refused that he was in possession of the documents of title showing that the petitioner was the owner. The trial court observed that the plaintiff has prima facie failed to prove the averments made in the application and failed to prove the existence of the original documents, which could entitle him to lead secondary evidence.

4. It is argued by counsel for the petitioner that trial court wrongly observed in its order that the plaintiff failed to disclose in the plaint that the original documents were in possession of defendant whereas the plaintiff, in his plaint pleaded that the original documents of the property were in possession of the defendant. In the written statement, defendant denied

these averments in paras 8 and 9. In replication, the plaintiff re-asserted that the original documents were with the defendant. A perusal of record would show that these averments were there in the pleadings.

5. Secondary evidence can be led in the Court under Section 65 of the Indian Evidence Act when the original is shown in power and possession of the person against whom the document is sought to be proved. In the present case, defendant is the son of the petitioner and had been living with the petitioner in the same house and the petitioner after death of his wife has become dependent upon his son. The petitioner's averment that the original documents were in possession of the defendant was a plausible averment. The trial court in this case did not consider Section 65A of the Indian Evidence Act and did not exercise its jurisdiction that secondary evidence can be allowed in those cases where the originals appears to be in possession of power of the opposite party against whom the document is sought to be proved. Bare denial by the opposite party that it did not have the original document would not disentitle the plaintiff/ petitioner to prove his title by way of secondary evidence. The secondary evidence can be allowed if the documents appear to be in possession of the opposite party. It is a clear cut case where the Court should have considered that there was every likelihood of the petitioner's averments being correct and the petitioner, therefore, has a right to prove his ownership by way of secondary evidence. The evidentiary value and weight of the evidence led by the petitioner as secondary evidence would have to be decided by the trial Court after the entire evidence was over.

6. In the result, the present petition is allowed and the order of learned

trial court is hereby set aside. Petitioner/ plaintiff would be permitted by the trial court to lead secondary evidence qua his title over the suit property.

7. The petition stands disposed of with above directions.

March 22, 2010
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SHIV NARAYAN DHINGRA J.