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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CR No.2725 of 2014

Date of decision: May 19, 2015

Mahender Singh

.....Petitioner

Versus

Kaptan Singh another

.....Respondents

CORAM: HON'BLE MRS. JUSTICE SABINA

Present: Mr. Jagdish Rai, Advocate
for the petitioner.

Mr. Pankaj Maini, Advocate
for respondent No.1.

None for respondent No.2.

SABINA, J

Petitioner has filed this petition challenging the order dated 15.02.2014, whereby application moved by the respondent No.1 for permission to prove the agreement to sell and receipt by way of secondary evidence, was allowed.

Learned counsel for the petitioner has submitted that respondent No.1 has filed suit for specific performance of agreement to sell dated 19.06.1993 in the year 2011. Respondent No.1 has impleaded his brother as defendant No.2. Original agreement to sell in question and the receipt have not been produced on record. Rather respondent No.1 has filed the suit alleging that the original agreement to sell in question and the receipt were in possession of his brother Lilu Ram-defendant No.2. Respondent No.1 had failed to establish the

loss of documents in question. Trial Court had thus, erred in allowing the application moved by respondent No.1 to prove the agreement to sell in question and the receipt in question by way of secondary evidence.

Learned counsel for the respondent No.1, on the other hand has opposed the petition.

Respondent No.1-Kaptan Singh has filed suit for possession by way of specific performance of agreement to sell dated 19.06.1993. The case of the respondent No.1 is that the agreement to sell in question was executed by the petitioner in favour of respondent No.1 and his brother Lilu Ram. Original agreement to sell and receipt were in possession of defendant No.2 Lilu Ram. Respondent No.1 was always ready and willing to perform his part of the contract, but petitioner had failed to execute the sale-deed in favour of respondent No.1. Hence, the suit was filed by respondent No.1 in the year 2011. During the pendency of the suit, respondent No.1 moved an application for permission to prove the agreement to sell and receipt in question by way of secondary evidence. The said application was contested by the petitioner on the ground that the agreement and receipt in question had never been executed by the petitioner. Thus, the execution of the agreement to sell in question as well as the receipt in question were denied by the petitioner. The learned trial Court while allowing the application has presumed the existence of the agreement to sell and receipt in question on the ground that their photocopies

had been produced on record. However, the learned trial Court has failed to consider the fact that the loss of the original agreement to sell and receipt in question, had not been established by the respondent No.1. Respondent No.2-defendant No.2 is none other than the real brother of the plaintiff-respondent No.1. Merely, because respondent No.2 had denied the possession of the agreement and receipt in question, is no ground to presume that the original agreement and receipt in question had been lost. Plaintiff was required to establish that the original agreement and receipt in question had been lost. In that event, plaintiff-respondent No.1 could have been permitted to prove agreement and receipt in question by leading secondary evidence. In these circumstances, the learned trial Court fell in error while allowing the application for permission to prove the agreement and receipt in question by way of secondary evidence on presumptions.

Accordingly, this petition is allowed. Impugned order dated 15.02.2014, whereby application moved by respondent No.1 for permission to prove agreement and receipt in question by way of secondary evidence, is dismissed.

**(SABINA)
JUDGE**

May 19, 2015
m.singh