

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

Civil Revision No.2991 of 2012 (O&M)

Date of decision:09.03.2015

Anupam Jain wife of Shri Rakesh Jain, resident of House No.3057,
Sector 28-D, Chandigarh.

... Petitioner

versus

Smt. Kulwant Gupta wife of Shri Surinder Kumar, resident of House
No.272, Sector 16, Panchkula, and others.

.... Respondents

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. Ishan Gupta, Advocate,
 for Mr. Vikram Chaudhri, Senior Advocate,
 for the petitioner.

Mr. J.K. Chauhan, Advocate,
for respondents 1 and 2.

1. Whether reporters of local papers may be allowed to see the judgment ? **Yes.**
2. To be referred to the reporters or not ? **Yes.**
3. Whether the judgment should be reported in the digest ? **Yes.**

K.Kannan, J. (*Oral*)

1. The petition is against the rejection of a document tendered as secondary evidence before the trial court. This is a suit for specific performance and the plaintiff wanted to rely on the fact that the plaintiff was present on 03.05.2005 at the Sub Registrar, Barwala at 9 AM and the defendant had not come. The copy of affidavit prepared before the Sub-Registrar and got noted by him with an endorsement with the official seal was sought to be tendered

as evidence. It was objected by the respondent on a plea that the document was not referred to in the plaint and the document as secondary evidence cannot be brought. The court has accepted the objection and the plaintiff who could not produce the copy of the document is before this court on revision.

2. In the suit for specific performance, the proof of readiness and willingness is a most crucial issue and if the plaintiff wants to tender evidence and that he was so willing and that he was even present before the Sub-Registrar on the date when he was required to be present, I would take that to be the most crucial evidence. If there is an averment regarding the readiness and willingness, how that readiness is to be proved is invariably a matter of evidence. The fact that the plaintiff did not aver in the plaint that he had the affidavit of his presence noted and marked as very material, for, as I have already said that the proof of readiness and willingness is a matter of evidence. If the document contains an endorsement of the Sub Registrar with his seal, the copy produced with the seal must be received if the plaintiff states that the original was missing.

3. The learned counsel for the respondent relies on a judgment of the Supreme Court in **Smt. J. Yashoda Verus Smt. K. Shobha Rani-2007(1) RCR 466** that if the original itself is found to be inadmissible through failure of the party, who files it, to prove it

to be valid, the said party shall not be entitled to introduce secondary evidence of its contents. The plaintiff has tendered the affidavit along with the copy of the document said to be relied on by him where he has stated in para 4 of the affidavit as follows:-

“That the original affidavit was misplaced somewhere and could not be found despite best efforts put by the plaintiff.”

If the plaintiff states that the original is missing and he is, therefore, tendering a secondary evidence, then it means that he is attempting to lay a foundation of what is set forth under Section 65(c) of the Evidence Act. Section 65(c) reads as follows:-

“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.”

Indeed the practice of filing applications to tender to secondary evidence is archaic and sooner this practice is dropped, better it will be for expeditious disposal of trial. This court has examined this archaic practice and has exhorted trial court to come by an approach of allowing the foundation for affording the secondary evidence to be brought through evidence in court that will be subject to cross-examination. This point has been discussed by this court at least in three judgments viz., **Atma Nand (deceased) through LR Versus**

Ram Sarup (deceased) through his LRs-2012(1) PLR 440; S.P.

Arora Versus Satbir Singh-2010 (5) RCR 530 and Simarpal Singh

Versus Hakam Singh-2009(2) PLR 562. There is no provision

anywhere under the Evidence Act or under the Civil Procedure Code

that a loss of document must be a matter which must be set forth in

the plaint. If a document is lost and the person says that the

document was lost and it is not available despite his search, if there

is a plea already in the plaint, no further assertion is necessary. If

such an aspect of the loss of original is not in the pleadings, I will

not take that to be a serious lapse, for, the Civil Procedure Code

under Order 6 Rule 2 specifies what is required to be pleaded and

excepts clearly that matters of evidence need not be pleaded. Order

VI Rule 2 CPC is reproduced as follows:-

“Pleading to state material facts and not evidence.-

(1) Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.

(2) Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph.

(3) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.”

4. In this case, the plaintiff has undertaken an exercise of what is a prevalent practice here of filing an affidavit for tendering secondary evidence. I would allow the court to consider the secondary evidence even without such an affidavit seeking for production of secondary evidence in the light of the law laid down by this court.

5. Counsel for the respondent detained me considerably through judgments which are of such fundamental nature that a counsel would apprise himself better than attempting to inform the court of elementary proposition of law. While every judgment of the Supreme Court is the law down and, therefore, would require implicit obedience, it must be on an issue of what is appropriate to be stated. The reference to Yashoda (supra) is unnecessary since the judgment deals with a different situation for a different dispensation. The court was finding that there was no material on record to indicate that the original document was in the possession of the first respondent. It was a case where the plaintiff was attempting to show that the document was in the hands of the adversary and was giving an excuse for non-production of the original. The court was observing that without an appropriate basis, the secondary evidence could not have been tendered. If a man says that the document is

missing, it will be a travesty of logic to expect documentary evidence of proof or material to show that the document was missing. A document missing is a document unavailable and unavailable document cannot lend material proof other than the assertion made by a party. At a fundamental level, it ought to be understood that if a person states that a document is not available, he thereby makes a foundation for reception of secondary evidence. He shall be allowed to tender the same and the court shall exhibit it as documentary evidence. If the contention in defence were to be that the document could not have been lost or the plaintiff's assertion that it was lost was being stated falsely, only for the purpose of the case, nothing is lost to the defendant than to elicit in the cross-examination that his assertion of loss was false.

6. It is fundamental precept of law again as a matter of procedure that every document that is exhibited as evidence cannot be taken as proved as held in the judgments of the Supreme Court in **Sait Tarajee Khimchand Versus Yelamarti Satyam-1972(4) SCC 562; LIC of India Versus Ram Pal Singh Bisen-2010(4) SCC 491.**

A document even exhibited or marked will be subject to a challenge in the cross-examination and it shall be the duty of the trial court to render a finding at the time when it delivers the judgment whether the justification for the production of secondary evidence was properly laid and whether an assertion made by the plaintiff could

stand the test of cross-examination. If the court ever finds that the plaintiff is unable to support the plea of the loss and had exposed his own version to be false in the cross-examination, the court will eschew the document from consideration, no matter that the document was exhibited as evidence in court. These observations are the immediate legal consequence of the principle that even a document which is exhibited cannot secure immunity from attack in the cross-examination.

7. If the defendant's version were to be therefore that the copy produced before the court was not shown to be the true copy from the original through a process which can guarantee correctness of reproduction from the original or that the fact of loss of the original was itself not established and the examination had exposed the falsity of the plaintiff, the court would still be not justified in rejecting the document. It will be not necessary for the trial court to carry parallel proceedings on the admissibility of the document by an elaborate interim order. In yet another case before the Supreme Court in **Bipin Shantilal Panchal Versus State of Gujarat-AIR 2001 (SC) 1158**, the Supreme Court was holding that the practice of stopping the trial or inviting the court to give a ruling on the admissibility of documents must be stopped by the court. The judgment was in the context of a criminal trial but it ought to be applied to civil trials, as well. The Supreme Court was laying down

a new paradigm that except in cases where the document is inadmissible for insufficiency of stamp under section 35 of the Evidence Stamp Act, every other objection must be taken note of by the trial court, record the same and receive any document which is objected, subject to objections and render a finding regarding the admissibility of the document at the time when it delivers the judgment. This was again in the context of laying down a procedure for the whole of India to follow and adopt new practices which are exigent.

8. It is a daily experience that the trial court's time is not best spent by purposeful course of trial and half the time is spent on needless objections, painful cross-examination, irrelevant evidence on objections. It is time that we should move on and evolve strategies for quick disposals. If there are objections, they must be taken on board and dealt with by the Judge in his final judgment and not pass orders which are get challenged in higher forums and stalled endlessly. A change in the law by Act 46 of 1999 providing for restricted intervention in revision was an attempt to see that the trial work was not stopped by the courts passing interim orders and the appellate courts granting stay of trial of work. This is another case where on an issue of whether a document must be received or not, precious time has been lost and mindlessly sought to be delayed further by elaborate and laboured arguments which are frivolous.

9. The order already passed is set aside and the copy of the document filed in court is ordered to be received. The defendant is granted full liberty to cross-examine the tenability of the document produced as either not the true copy to be received as secondary evidence or that it is not supported by adequate evidence to find a justification for reception under Section 65 of the Evidence Act.
10. The civil revision is allowed on the above terms.

(K.KANNAN)
JUDGE

09.03.2015
sanjeev