

In the High Court of Punjab and Haryana at Chandigarh

CR No.5214 of 2013

Date of decision: 20.07.2015

Aadar Singh

.....Petitioner

Versus

M/s Bassiark Trading Co.

.....Respondents

CORAM: HON'BLE MRS. JUSTICE SABINA

Present: Mr.Vijay Sharma,Advocate for the petitioner.
Mr.Pritam Saini,Advocate for the respondents

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SABINA, J

Petitioner has filed this petition under Article 227 of the Constitution of India challenging the order dated 4.7.2013 (Annexure P5.) .

Learned counsel for the petitioner has submitted that the trial Court has erred in dismissing the application moved by the petitioner for permission to lead secondary evidence. The application was liable to be allowed subject to proof of loss of documents in question. In support of his arguments learned counsel has placed reliance on **Ashok Kumar Sachdeva vs. Harish Malik** 2007(4) RCR (Civil) 311 wherein it was held as under:-

5. After hearing learned Counsel for the parties, I am of the view that to prove a document by way of primary or secondary evidence is a rule of evidence. Whether the party seeking leave

of the Court to lead secondary evidence ultimately succeeds in proving the document or not is a question of fact and depends upon evidence. Petitioner has pleaded in the application the loss of original document. Under what circumstances document was lost is a question of fact and evidence. It is settled rule of pleadings that a party must disclose material facts and need not plead evidence. In the instant case material fact is loss of document and circumstances leading to loss is a question of evidence. This question can only be decided after providing opportunity to the party concerned to lead secondary evidence. To grant leave to lead secondary evidence does not mean the document is admitted in evidence nor it is a finding of the existence of any of the conditions indicated in Section 65 of the Evidence Act. It only amounts to holding an enquiry regarding existence of document and its loss under some circumstances. Failure or success to prove the existence of document or its loss can not be pre-determined that too without providing opportunity. Whether it is proved or not, is to be seen after the leave is granted and the material/evidence produced, is evaluated. The question raised by learned Counsel appearing for the respondent is premature at this stage."

Learned counsel for the respondents, on the other hand, has submitted that before the application for permission to lead secondary evidence could be allowed, petitioner was required to establish the existence of the documents. In support of his arguments learned counsel has placed reliance on **H.Siddqui (D) by**

Lrs. vs. A.Ramalingam 2011(2) R.C.R(Civil) 385 wherein it was held as under:-

“10. Provisions of Section 65 of the Act 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide: [The Roman Catholic Mission & Anr. v. The State of Madras & Anr.](#), AIR 1966 SC 1457; [State of Rajasthan & Ors. v. Khemraj & Ors.](#), AIR 2000 SC 1759; [Life Insurance Corporation of India & Anr. v. Ram Pal Singh Bisen](#), 2010 (2) RCR(Civil) 459; 2010(2) S.C.T 217; 2010(2) R.A.J.351; (2010)4SCC 491; and [M. Chandra v. M.Thangamuthu & Anr.](#), 2010(4) RCR(Civil) 696; 2010(5)R.A.J 551;(2010) 9 SCC 712).”

Learned counsel has further placed reliance on **Smt.J.Yashoda vs. Smt. K.Shobha Rani** 2007(2) RCR (Civil) 840 wherein it was held as under:-

“The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under [Section 64](#), documents are to be provided by primary evidence. [Section 65](#), however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section. In [Ashok Dulichand v. Madahavlal Dube and Another](#) [1975(4) SCC 664], it was inter alia held as follows:

"After hearing the learned counsel for the parties, we are of the opinion that the order of the High Court in this respect calls for no interference. According to clause (a) of [Section 65](#) of Indian

Evidence Act, Secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in 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 of any person legally bound to produce it, and when, after the notice mentioned in [Section 66](#) such person does not produce it. Clauses (b) to (g) of [Section 65](#) specify some other contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of [Section 65](#), the appellant filed applications on July 4, 1973, before respondent No. 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed Photostat copy. Prayer was also made by the appellant that in case respondent no. 1 denied that the said manuscript had been written by him, the Photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was however, nowhere stated in the affidavit that the original document of which the Photostat copy had been filed by the appellant was in the possession of Respondent No. 1. There was also no other material on the record to indicate the original document was in the possession

of respondent no.1. The appellant further failed to explain as to what were the circumstances under which the Photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent No. 1 in his affidavit denied being in possession appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the Photostat copy. We find no infirmity in the above order of the High Court as might justify interference by this Court."

Respondent has filed suit for recovery against the petitioner. During the pendency of the suit, petitioner moved an application for permission to lead secondary evidence qua clearance chit/writing dated 3.12.2007. While moving the application, petitioner had based reliance on cross-examination of DW1 Amrik Singh.

Cross-examination of DW1 has been placed on record as Annexure P8. A perusal of the same reveals that DW1 Amrik Singh had stated that he had not maintained any file to keep the clearance chit given by the farmers. He further stated that he had already closed the shop. No entry was made in the records of the firm regarding the clearance chit given by Aadar Singh to M/s Jimindara Trading Company. Witness voluntarily stated that the records of the firm were kept by Munim-Anil Kumar. He further stated that he had

not brought the clearance chit given by Aadar Singh because record had been misplaced and he had already left the business. The records were not with him and he had left the business.

Thus, from the statement of DW1, it is evident that no entry was made qua the clearance chit in question by him nor he had maintained any file to keep the clearance chit. As per this witness, the records were maintained by Munim- Anil Kumar. Although, the said witness had stated that the petitioner had handed over original clearance chit dated 3.12.2007 to him but this part of the statement in his examination-in-chief is shattered in his cross-examination. As per DW1, the records of the firms were maintained by Munim- Anil Kumar and DW1 had not stated to the effect that he had handed over the original chit to Anil Kumar for making an entry in the record.

In these circumstances, application moved by the petitioner for permission to lead secondary evidence qua the clearance chit dated 3.12.2007 was liable to be dismissed as from the statement of DW1 the existence of the original chit was not established. In view of the judgment relied upon by the learned counsel for the respondents, judgment relied upon by the learned counsel for the petitioner fails to advance the case of the petitioner.

No ground for interference is made out.

Dismissed.

**(SABINA)
JUDGE**

July 20,2015
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