

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

Civil Revision No.7226 of 2013

Date of decision:30.03.2015

& Civil Revision No.5611 of 2014

Narinder Singh alias Nidhan Singh

... Petitioner

versus

Jasbir Singh and others

.... Respondents

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. Surinder Singh Siao, Advocate,
for the petitioner.

Mr. H.N.S. Gill, Advocate,
for the respondents.

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. These are two suits where parties are the same, one at the instance of the plaintiffs, who are the petitioners here and another at the instance of the defendant in the plaintiffs' suit, who are the plaintiffs in the other suit. The petitions in the suits have been disposed of by a common order and the revision petitions are therefore taken up together. The reference to defendant in the case is to the sons and the reference to the plaintiff in the case is the person claiming to be daughter.

2. The defendant, who resisted an action claiming a share in the property as heirs of Hardial Singh, had a contention to make that Hardial Singh had executed a Will in favour of the sons to the exclusion of the daughter through whom the plaintiff's claim was made. The Will was alleged to have been made on 13.12.1973 before the death of Hardial Singh that took place on 15.12.1973. The mutation in favour of the defendants-sons on the basis of the alleged Will was said to have been made on 05.06.1975 through Mutation No.794. The plaintiff denied that there existed any Will and it was defendant's turn to establish that there was a Will and the bequest in favour of the defendant.

3. The defendant had in his written statement contended that the original Will had been produced before the revenue officials at the time of mutation proceedings and it was likely that the plaintiffs themselves secreted the original file from the mutation file. The defendant moved an application for the production of secondary evidence. The secondary evidence was not available through any of the copies made at the relevant time but it was by way of oral evidence of the contents. The court rejected the plea to allow for any oral evidence since no evidence was given about who had seen the execution of the Will or who were the attestors of Will.

4. Section 65 of the Evidence Act sets out various circumstances under which secondary evidence could be adduced.

One of the grounds under Section 65(c) is when the original has been destroyed or lost, or when the party offering the evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it within reasonable time. Having regard to the fact that the defendants have stated that the original was not with them and that it had been delivered to the revenue office at the time of mutation proceedings and that it was not available even in the mutation file, it was a case of the defendants explaining the justifiable circumstance for offering secondary evidence thereof. A copy of the original is a secondary evidence and such a copy could be made under any of the modes which Section 63 itself contemplates. Section 63(5) is also secondary evidence though not always pressed before courts and, therefore, admits of very little attention from courts. Section 63(5) would, therefore, require to be produced and it reads thus:-

“Oral accounts of the contents of a document given by some person who has himself seen it.”

5. If the defendant was therefore contending that no other copy had been prepared and he was prepared to offer oral evidence, it should still be taken as secondary evidence. Such evidence must be given by a person who has seen it. It also depends on the evidence that is actually given about the recitals, about the manner of dispositions, persons present, the mental capacity of the deceased

and every other matter that would be essential and relevant for proof of the instrument. I have already observed that the justification for the production of secondary evidence had been already brought out in the written statement. The manner of whether the court will accept the evidence tendered as such secondary evidence is a matter of judicial appreciation and such evidence cannot be thwarted at the threshold even without allowing for the defendant to give evidence in that regard. If such evidence is given, the court will examine the surrounding circumstances and the quality of evidence to accept or reject the contentions raised in the defence as regards the genuineness of the Will. The court is bound to frame an issue regarding the truth and the genuineness of the Will alleged to have been executed on 13.12.1973 and the order passed already shall be set aside to allow the defendant to offer such evidence and the court will take a decision as regards the genuineness or otherwise of the Will including even the existence or otherwise of the Will while disposing of the case. The reference to the Will in the mutation proceedings is only to be taken as a corroborative piece of evidence and will not substitute the requirement of having to establish in the first place the existence of the Will; in the second place, truth and genuineness in the manner Section 68 of the Evidence Act dictates that the evidence shall be give and finally in the manner that Section 63 of the Indian Succession Act enjoins that the Will shall be

executed and attested as per the requirements of law.

6. The civil revisions are disposed of on the above terms.

7. The counsel says that the cases are of the year 2008 and they are getting adjourned from time to time. The parties will use all their resourcefulness and cooperate with the court for early disposal of the case.

(K.KANNAN)
JUDGE

30.03.2015
sanjeev