

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

C.R. No. 7923 of 2014

Date of decision:- 30.10.2015

M/s Unicon Buildcon Pvt. Ltd.

...Petitioner

Versus

Prithi Singh and anr.

...Respondents

CORAM: HON'BLE MS. JUSTICE RITU BAHRI

Present:- Mr. Sanjay Vij, Advocate
for the petitioner.

Mr. N.D. Achint, Advocate
for respondent No. 1

RITU BAHRI J.(Oral)

Petitioner has filed the instant revision petition under Article 227 of the Constitution of India assailing order dated 07.10.2014 (P-1) passed by Civil Judge (Jr. Divn.), Pataudi whereby application filed by the petitioner for leading secondary evidence in respect to affidavit dated 06.03.2006, has been dismissed on the ground that the petitioner failed to prove the existence of the affidavit.

Petitioner in his written statement has stated that the time of execution and registration of sale deed bearing vasika No. 3548 dated 06.03.2006, Vijay Pal and Smt. Savita, parents of Prithi Singh had handed over an affidavit to it regarding Prithi Singh's age. The original affidavit was within the possession of petitioner. As per affidavit, the date of birth of

Prithi Singh was 10.02.1988 and he was major. The sale deed was executed in favour of the petitioner by respondent No. 1 vide vasika No. 3548 dated 06.03.2006 for a valuable sale consideration of Rs.16,50,000/-, which was received by him through Demand Drafts bearing No. 009651 dated 14.01.2006 for Rs.2,75,000/- and 490437 dated 14.01.2006 for Rs.13,75,000/-. The drafts were got encashed by respondent No. 1. Thereafter, respondent No. 1 became dishonest and filed a suit for declaration with a consequential relief of permanent injunction projecting himself that he was minor at the time of execution and registration of the sale deed and thus, challenged the same.

The petitioner filed written statement and denied all the allegations and averred that the date of birth of respondent No. 1 was 10.02.1988 and he was major at the time of registration of the sale deed and placed on record the duly sworn affidavit by parents of respondent No. 1 and attested by Executive Magistrate, Farrukhnagar. In cross examination of respondent No. 1, respondent No. 1 recognized and acknowledged the signatures of his father on the affidavit.

Thereafter, the petitioner filed the application for leading secondary evidence in respect to affidavit dated 06.03.2006, as the same has been lost but the application has been dismissed.

Learned counsel for the petitioner has vehemently argued that as per Section 65 of the Indian Evidence Act, the application filed by the petitioner should have been allowed, as the copy of the affidavit sought to

be produced by way of secondary evidence, was already available on record and filed at the time when the written statement by the petitioner was presented and thus it cannot be stated or presumed that the affidavit was not in existence.

Reference has been made to judgments passed by this Court in cases of *M/s Ram Dass Hira Lal and another vs. Sunil Kumar Sekhri and others, 2007(4) RCR (Civil) 313 and Kamlesh Rani vs. Sukhdev Nagpal and others, 2012(1) HLR 95* whereby it was held that if loss or destruction of a document is well proved, court should not decline to accept secondary evidence of a such document. Trial Court formulate its opinion whether the document has been destroyed or lost and also look into the evidential value of the document.

On the other hand, learned counsel for the respondents has referred to a judgment of Hon'ble the Supreme Court of India in a case of *Smt. J. Yashoda vs. Smt. K. Shobha Rani, 2007(2) RCR (Civil) 840* whereby Hon'ble the Supreme Court while considering the provisions of Section 63 and 65 held that Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence, which law requires to be given first, when a property explanation of its absence is given.

Section 65 of the Indian Evidence Act, reads as under:-

“65. Cases in which secondary evidence relating to documents may be given.—Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—

(a) When the original is shown or appears to be in the 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, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) 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;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force is to be given in evidence; to be given in evidence;”

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Reference at this stage can further be made to a judgment passed by this Court in a case of **Ashok Kumar Sachdeva vs. Harish Malik, 2007(4) RCR Civil 311** wherein in para 5 of the judgment, it has been observed as under:-

After hearing learned counsel for the parties, I am

GAURAV ARORA
2015.12.11 14:27
I attest to the accuracy and
integrity of this document

of the view that to prove a document by way of primary evidence 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 a settled rule of pleadings that a party must disclose material facts and need not plead evidence. In the instant case, material facts is loss of document and circumstances leading to loss of 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 Indian Evidence Act. It only amounts to holding an enquiry regarding existence of document or its loss under some circumstances. Failure or success to prove the existence of document or its loss cannot 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.”

Reference at this stage can further be made to a judgment of this Court in a case of **Kuldip Kaur vs. Chattar Singh and another, 2008**

(3) RCR (Civil) 463 wherein it has been held that photocopy of the will is to

be allowed to be proved as secondary evidence if case of existence and loss of original is made out. In para 4, it has been observed as under:-

4. Mr.Sudeep Mahajan, however, would seriously contest the contention raised by counsel for the petitioner and would say that sufficient basis have not been provided by the petitioner to entitle him to lead the secondary evidence in regard to the documents. He has made reference to **Ashok Dulichand Vs. Madahavlal Dube and another, (1975) 4 Supreme Court Cases 664** and **J.Yashoda Vs. Smt.Shobha Rani, 2007 (3) Civil Court Cases 195 (S.C.)** to say that photostat copies of the documents were not allowed as secondary evidence in these cases on the ground that the petitioners therein could not show how the photostat copies were got made, when the original was not in the possession of the party. That requirement may not apply to the facts of the present case. In regard to one document, certified copy of the registered will has been placed on record. There is no objection made to production of this document by the counsel for the respondents as secondary evidence. The second will also concededly was in the possession of the petitioner and as such, he could have had the occasion to make photocopy thereof. Accordingly, the observations in the cases of *Ashok Dulichand* and *J.Yashoda* (*supra*) would not apply to the facts of the present case. The petitioner has laid sufficient basis to show existence of the document and has made an averment that the same is lost. He accordingly has made out a case for leading secondary evidence in regard to the second will also which has been declined. It will be futile to mention that only permission to lead secondary evidence has been granted and it will always be open for the parties to argue about the value to be attached to this piece of evidence, which is taken on record as secondary evidence. The

impugned order to an extent declining the prayer of the petitioner for leading secondary evidence of the will of Parkash Kaur is set-aside. The petitioner would be permitted to lead secondary evidence in regard to the said will also. “

The ratio of **Ashok Kumar Sachdeva's case (supra)** and **Kuldip Kaur's case (supra)** are fully applicable to the facts of the present case. A copy of the affidavit sought to be produced by way of secondary evidence was already available on record and filed at the time when the written statement was presented by the petitioner, thus it cannot be stated or presumed that the affidavit was not in existence. Thus, the application should have been allowed to lead secondary evidence.

In view of the above, order dated 07.10.2014 (P-1) passed by Civil Judge (Jr. Divn.), Pataudi is hereby set aside and the instant revision petition is **allowed** and the photocopy of the affidavit of the petitioner dated 06.03.2006 shall be taken into consideration by the trial Court as secondary evidence.

October 30, 2015
G Arora

(**RITU BAHRI**)
JUDGE