

APPLICATION NO.7584 of 2015
IN T.O.S.No.57 of 2013 and
C.S.NO.No.396 of 2012
PUSHPA SATHYANARAYANA, J

The application is filed seeking leave to lead evidence with the certified registration copy of the Will dated 05.12.1991 as secondary evidence.

2. The applicant had filed O.P.No.204 of 2011 for grant of probate. Since the respondents had filed the caveat in the above probate, it was converted into T.O.S.No.57 of 2013. The probate is with respect to the Registered Will dated 05.12.1991 executed by the father of the applicant.

3. The respondents also had filed a suit for partition in C.S.No.396 of 2012, which is pending before this Court. It is alleged by the respondents that the said Will is surrounded with suspicious circumstances and that the Will is not a genuine one. There are also other objections raised by the respondents, that the Will is a rank forgery and that the father of the applicant was capable of signing his name in all the documents, as he was an educated person, but only thumb impression is affixed on the alleged Will.

4. In the affidavit filed in support of the application, in para 5, it is stated as follows:-

"I respectfully submit that I have filed the original will dated 05.12.1991 along with the petition in O.P.Sr.No.21843 of 2003 before this Hon'ble Court for granting probate. I have also paid the necessary charges for the translation of the said Will and the said Will also got translated in the month of August 2003. Further, the said O.P.Sr.No.21843 of 2003 was returned on 04.08.2003 for certain compliances. But none of the counsel for the petitioner (my Advocate) nor the Registered Clerk took back the bundle from the Registry. When my counsel approached the concerned section to get back the case bundle he was informed that no such bundle is available in the return section. Even after making thorough check up in the filing section and in the return section, the said case bundle could not be traced till date and the Registry could not find the whereabouts of the bundle."

The petitioner has alleged that the Will was filed into Court and when it was returned for certain compliance, it was never taken from the return section of the Registry and that the Registry had misplaced the bundle. A note was called for, from the Registry in this regard.

5. The Registry has submitted a note as follows:-

"It is most respectfully submitted that the Original Petition for probate in O.P.D.No.21843 of 2003 was filed on 30.07.2003, with Original Will by the counsel for petitioner M/s.P.Jerome Pushparaj.

The Original Will was sent for translation on 05.08.2003 in Document No.74 of 2003. The Original Petition and Original Will along with translation version of the Will had been returned by the Registry on 05.05.2004 and the said Original Petition with Original Will were received by the counsel for the petitioner M/s.Jerome Pushparaj on 14.06.2004 as found in the return register and the same were not represented so far. (A copy of the Extract of the Return Book is annexed as Flag 'A')

It is further submitted that subsequently another original petition for probate is filed in O.P.D.No.32331 of 2006 by the same counsel M/s.P.Jerome Pushparaj on 21.11.2006 with certified copy of Will. The said Original Petition was returned for certain compliances and the same was represented along with change of vakalat dated 12.03.2010 by another counsel M/s.V.Ramesh, T.Thyagarajan and Saravana Pragadesh. The certified copy of Will filed in the later petition sent for translation on 28.11.2006 in Document No.120 of 2006 and the above said Original Petition was numbered as O.P.No.204 of 2011 on 16.03.2011, which was converted into T.O.S.No.57 of 2013.

Thereafter, the petitioner in Original Petition / Plaintiff in T.O.S was represented by the counsel M/s.J.Parthasarathy and presently Mr.V.Sekar, Advocate is appearing for the plaintiff."

6. Now the question is whether the applicant has to be permitted to lead evidence with the certified registration copy of the Will as secondary evidence.

7. Section 65(c) of the Evidence Act reads as follows:-

"65. Cases in which secondary evidence relating to documents may be given.....

(a).....

(b)....

(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;"

8. Section 65 of the Act is to safeguard the interest of a person, who is unable to produce either the Original or the secondary evidence of the types mentioned in Section 63 of the Act. It has been seen that the contents of the document must be proved by the production of the original document and secondary evidence of it, is not generally admissible. The various exceptions to the rule in which secondary evidence relating to the documents have been given or stated in the above Section 65. The principle is, so long as the original document existed and is available, the same being best evidence must be

produced. If the same cannot be produced on account of its loss or destruction or any other cause, secondary evidence is admissible.

9. The scope of the said Section is that when the best proof is lost or destroyed, the next best proof within the power of litigant can be produced. In other words, so long as the superior evidence is within the possession of the litigant, he shall not be permitted to proceed with the inferior proof.

10. In the present case, from the note given by the Registry, the Original Will was filed in O.P.Diary No.21843 of 2003 on 30.07.2003 by the learned counsel for the petitioner. After the original Will was translated on 05.08.2003, the original was returned by the Registry on 05.05.2004 and the same was received by the petitioner's counsel on 14.06.2004 as found in the return register and the same was not represented. The petitioner had once again filed fresh O.P.in diary No.32331 of 2006 through the same Counsel on 21.11.2006 with the certified copy of the Will. Later, the petitioner had changed the counsels twice. Subsequently, O.P.No.204 of 2011 was converted into T.O.S.No.52 of 2013 whereas in the affidavit filed in support of the application, the applicant has stated that the original was never taken back

from the Registry of this Court, which is far from the truth. Secondary evidence is permissible in law. As per Section 65(c), (i) where the original has been destroyed (ii) where the original is lost or (iii) where the party offering such evidence cannot produce it in a reasonable time for a reason not arising out of his own default or negligent. The secondary evidence is admissible. Unless the three limbs of the Section is satisfied, which are the condition precedent, the secondary evidence cannot be permitted.

11. In this case, though the petitioner has stated that it was lost after presenting it in the Registry, it is proved beyond doubt that the counsel had taken return of the Will along with the original petition and never represented, but advised the petitioner to file another O.P with the certified copy of the original. A certified copy of the document is not admissible without proof that the original is lost or destroyed. When there is no evidence about the Original Will in this regard the certified copy cannot be admitted in evidence. No doubt, the question whether or not the sufficient proof of search for, the loss of the original has been given, it is for the Court to decide. Unless the person seeking the leave of the Court, comes up with a genuine case, the same need not be permitted.

12. In the present case, the petitioner having taken back the original document for the reasons best known to him, has shifted the blame on the Registry, for not having returned the same. It is evident from the records that the petitioner has come up with an absolutely false case. The petitioner claiming under the Will must satisfy the Court about the loss or producing the original, before leading a secondary evidence. But having stated a blatant lie in the affidavit, the applicant cannot have any indulgence from this Court.

13. In this regard, ***AIR 1925 Madras page 1005 [RANGAPPA NAYAKAR -vs- RANGASAMI NAYAKAR AND OTHERS]*** is useful to refer:

...."As regards the title derived from the Will the Will itself has not been produced nor even any true copy of the Will. The non-production of the Will itself is not properly accounted for in the evidence on behalf of the plaintiff. If the plaintiff comes into Court setting up a Will and claiming certain properties on the ground of the dispositions contained therein, he was bound to take all steps necessary for the production of the Will and it is only if and when he should satisfy the Court about his efforts to get the original of the Will produced, he can be allowed to adduce secondary evidence especially oral evidence with regard to the contents of the document. We are also constrained to observe that the oral evidence with regard to the Will is of a most unsatisfactory character...."

14. In this case, there is no need to go into the question of the scope of the word 'lost' as any loss should be in absolute terms. Section 65(c) makes it abundantly clear that if a person is not able to produce the original for a reason other than the one arising from his own default or negligent, he may be permitted to lead secondary evidence. The applicant has not stated that he has lost the Will due to the reasons not arising from his own default and negligence. But, he has sworn to an affidavit with false averments. The applicant also has not stated whether he has enquired with his erstwhile counsels in this regard. The conduct of the applicant, having changed two counsels, thereafter, would indicate that the claim of the applicant is not genuine.

15. In the light of the above discussion, the applicant cannot be permitted to produce a secondary evidence, namely, the certified copy of the original Will. Hence, the application is dismissed.

11.08.2016

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PUSHPA SATHYANARAYANA, J

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