

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

**Civil Revision No.2441 of 2016 (O&M)
Date of decision : 28.05.2016**

Tej Maan Singh

.....Petitioner

Versus

Lalita Grewal

...Respondent

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

- 1. Whether Reporters of the 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*

Present: Mr. K.S. Dhillon, Advocate for petitioner.

DARSHAN SINGH, J.

The present revision has been preferred against the order dated 26.02.2016, passed by the learned Civil Judge (Junior Division), Jalandhar, in civil suit No.52353/2013 titled as Tej Maan Singh Vs. Lalita Grewal, vide which the application moved by respondent-defendant for leading the secondary evidence to prove the registered Will dated 18.12.2000 allegedly executed by Dr. Harbhajan Singh in favour of respondent-defendant Lalita Grewal has been allowed.

2. As per the report of the office, notice issued to respondent has been received back duly served. However, none has put in appearance on behalf of the respondent.

3. Annexure P-2 is the copy of the application moved by the respondent-defendant before the learned trial Court for seeking permission to lead the secondary evidence wherein it is mentioned that at the time of sanctioning of the mutation, original Will dated 18.12.2000 was produced before the revenue authorities and this fact is also mentioned in the mutation itself. After sanctioning of the mutation, the original Will remained with the revenue authorities and was never returned to applicant-defendant. She tried her best to locate the said Will in original with the revenue authorities as well as herself but she failed to locate the same despite best efforts. Hence the original Will is not traceable on the part of the applicant-defendant and has lost for all intent and purposed. However, the copy thereof is available on the judicial record.

4. Learned counsel for the petitioner contended that the respondent is seeking permission to lead the secondary evidence as per Part 1st of Clause (c) of Section 65 of the Indian Evidence Act, 1872 (for short the 'Act'). He contended that no foundation has been laid by the respondent-defendant to seek the permission to lead the secondary evidence. There is no material on record to show that the said Will has lost. Unless the loss of the Will is proved the permission to lead the secondary evidence cannot be given. He relied upon case *Kalia Vs. State of Madhya Pradesh 2013(3) RCR (Criminal) 958*.

5. I have duly considered the aforesaid contentions.

6. Section 65 of the 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 in [India] 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.

7. In the impugned order, the learned trial Court has reproduced Clause (a) of Section 65 of the Act but that Clause is not applicable to the case in hand as it is not the plea of the respondent-defendant that the Will in question is in possession of or power of the person against whom the same is sought to be proved or that of any person who is out of reach of, or not subject to, the process of the Court, or any person legally bound to produce it, but even after having received the notice under Section 66 of the Act he did not produce it.

8. As per averment in the application, the case of the respondent-defendant falls in the first part of Section 65 Clause (c). There are two parts of Clause (c) of Section 65 of the Act. Both parts are independent. The first part provides that the secondary evidence can be given where the original document has been destroyed or lost. The second part comes into play when a party offering evidence of its contents cannot, for any other reason not arising from its own part or neglect produce it in reasonable time. In para-3 of the application the respondent-defendant has pleaded that after the mutation the original Will was not returned to her by the revenue authorities. She tried her best to locate the original Will with the revenue authorities as well as with herself but she failed to locate the same. The original Will is not traceable and has been lost for all intent and purposes. So, the respondent-defendant has sought the permission to lead the secondary evidence on the ground that the original Will has lost.

9. The Hon'ble Supreme Court in case ***Rakesh Mohindra Vs. Anita Beri and others 2015 (4) RCR (Civil) 1023*** has laid down as under:-

“17. The pre-conditions for leading secondary evidence are that such original documents could not be produced by the party relied upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original documents is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot accepted.”

It was further laid down as under:-

“22. It is well settled that if a party wishes to lead secondary evidence, the Court is obliged to examine the probative value of the document produced in the Court or their contents and decide the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. It is equally well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law.”

10. In view of the aforesaid ratio of law laid down by the Hon'ble Apex court first the respondent-defendant was required to lay down the factual foundation to establish her right to lead the secondary evidence by showing that the original Will has lost. For that purpose the respondent-defendant could have examined the revenue officer/official along with the

record of sanctioning the mutation on the basis of said Will. He could have also deposed that the said Will was not available in their office and had lost. In the impugned order the learned trial Court has not even given the reference that the application moved by the defendant is supported by an affidavit that the said Will is not traceable by her and has lost. Thus, unless it is established that the original Will is lost the secondary evidence in respect of the said Will on the ground pleaded in the application was not legally permissible.

11. Thus, keeping in view my aforesaid discussion, the present revision petition is hereby allowed. The impugned order dated 26.02.2016 is hereby set aside. The learned trial Court will pass fresh order on the application moved by respondent-defendant to lead the secondary evidence in order to prove the Will dated 18.12.2000 by providing an opportunity to respondent-defendant to lay the factual foundation of her right to lead the secondary evidence by producing the material/evidence to show the loss of original Will.

28.05.2016

sunil yadav

**(DARSHAN SINGH)
JUDGE**