

In the High Court of Punjab and Haryana, at Chandigarh

Civil Revision No. 7797 of 2015

Date of Decision: 29.03.2016

Sachin Khurana and Others

... Petitioner(s)

Versus

Satish Kumar Khurana and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Shekher Dhawan.

- | | | |
|----|---|------------|
| 1. | Whether reporters of local newspapers may be allowed to see judgment? | Yes |
| 2 | To be referred to reporters or not? | |
| 3 | Whether the judgment should be reported in the Digest? | Yes |

Present: Mr. Lokesh Sinhal, Advocate
for the petitioner(s).

Mr. Pawan Malik, Advocate
for respondents No.1 to 4 and 6.

Shekher Dhawan, J.

Present petition is challenge to the order dated 30.10.2015, passed by learned Civil Judge (Senior Division), Nuh, whereby application filed by defendants/respondents for seeking permission to lead secondary evidence in respect of Will dated 15.1.1984 was allowed and they were permitted to lead secondary evidence to prove the alleged Will.

Relevant facts of the case that defendants/applicants had filed an application before the Court below that Dayal Das Khurana had

executed a Will dated 15.1.1984 and the same was scribed and attested by Manohar Lal and Ramzani, who had died. On 19.7.1991, the said Will was produced before the Naib Tehsildar (Sales), who returned the same with endorsement "original seen and returned" and on the basis of said Will, a conveyance deed was issued in the name of beneficiaries in respect of the land situated at village Biwan and mutations No. 2574 dated 22.5.1991 & No. 2186 dated 22.5.1991 of inheritance of land situated in Nuh and Ferojpur Namak were also sanctioned in favour of the beneficiaries on the basis of said Will. The said mutations were challenged by the plaintiffs. An application was moved before the Tehsildar (Sales) on 14.6.1991 and duplicate conveyance deed was issued. As per defendants, original Will was not traceable despite best efforts and they were in possession of photocopy thereof and the same be allowed to be proved by way of secondary evidence.

Plaintiffs/petitioners contested the application that Will dated 15.1.1984 is a bogus document as Dayal Das Khurana never executed any Will. The said Will does not bear his signatures. No such Will was seen by the father of the plaintiffs during his life time, who died on 26.3.1989. Plaintiffs also took the plea that if there was any Will, the same should have been registered even after the death of Dayal Dass. Even the name of scribe and his address have not been mentioned and the alleged Will is just a forged document. The Will was not produced for seven years. Had it been the case of genuine Will, the beneficiaries must have obtained probate. More so, sale certificate was required to be issued in the name of Dayal Dass in the year 1971 and

Naib Tehsildar (Sales) has no power to issue any duplicate conveyance deed and the application for leading secondary evidence is without any merit. Plaintiffs also took the plea that applicants/defendants have not been able to make out a case as to when the original Will was lost and as to why any complaint was not lodged with the police or any authority. More so, mere photocopy is not sufficient because the expert is not in a position to compare the signatures from the photocopy in a case where the original Will is not produced. So the application be dismissed. On these facts, the Court below accepted the application.

Learned counsel for the petitioners submitted that the Court below has not considered the fact that had there been any such Will, the defendants could have attached the same along with the written statement. Neither the original Will nor photocopy thereof was attached along with the written statement. Even the list of documents to be relied upon was not filed along with the written statement and the defendants have come with the distorted version. The case of respondents is that original Will was produced before the Naib Tehsildar (Sales) and the same was returned after making endorsement "original seen and returned". But there is no prima facie evidence to prove the said fact. There is no stamp of Naib Tehsildar and it could not be made out from any document that endorsement on the said photocopy has been made by the Naib Tehsildar.

Learned counsel for the petitioners also submitted that it is a strange case where mutations No. 2186 and 2574 find mention that the same were being entered and sanctioned on the basis of some "oral

Will” of 1991 and that fact itself falsifies the version of defendants because there is no concept of oral Will. The respondents have not been able to make out a case as to where the Will was kept and how and when the same was lost and the Court below allowed the application without considering the said fact by passing the impugned order.

Having considered the submissions made by learned counsel for the parties, this Court is of the considered view that leading of secondary evidence is to be permitted as per the provisions of Section 65 of the Indian Evidence Act, 1872 and the relevant provisions thereof read as under:

"65. Case 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 moveable;*
- (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 60 (India) to be given in evidence;*
- (g) *when the originals consist 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 not 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.”

The above referred provisions of law make it clear that if any party approaches the Court for leading secondary evidence, the said party has to make out a case that the document was actually in existence and the same was lost or destroyed. Thereafter, the party has to make out a case by producing a copy thereof. But if the party fails to prove the same, application for leading secondary evidence is not maintainable. Such a view was taken by this Court in ***Mangat Ram v. Prabhu Dayal and Others 2002(4) RCR (Civil) 706***, quite identical to the facts of the case in hand. In the present case, defendants have not filed any copy of the said Will with the written statement nor any such document was mentioned in the list of documents to be relied upon. Strangely enough, mutations No. 2186 and 2574 were sanctioned on the basis of sale “oral Will”, which cannot be made basis for allowing secondary evidence. The Court below has completely ignored this fact while passing the impugned order.

In the present case, if the entire contention of the applicant/defendants deems to be correct, it is, however, not understood as to how they have been able to get the copy of Will. Photostat copy of the document can be prepared by manipulation and presented as original. Therefore, it would normally be unsafe on the mere asking to allow production of photocopy as secondary evidence. This is admittedly not certified copy of the original Will and it is not clear as to whether this is copy of original Will. The basic principle with

respect to evidence that is to be produced is that the best evidence available ought to be produced. The original document is best and primary evidence. Section 65 provides other alternative methods for producing and proving documents, which for various reasons cannot be produced. Secondary evidence is admissible in respect of conditions mentioned in Clauses (a) to (g) of Section 65. The purpose is to give protection to such persons who despite their intentions and efforts are unable in view of circumstances beyond their control produce on record the primary evidence. Such a view was taken by the coordinate Bench of this Court in case ***Mukesh Kumar alias Motta v. State of Haryana 2011(1) RCR (Civil) 675***. Similar view was taken by another coordinate Bench of this Court in case ***Banarsi Dass v. Om Parkash and Others 2005(2) RCR (Civil) 72***.

In view of above, the Court below fell in error while ignoring the above said fact and thereby allowed application for leading secondary evidence vide impugned order dated 30.10.2015. Hence, present petition stands allowed; the order under challenge is set aside and the application, filed by respondent/defendants is dismissed.

(Shekher Dhawan)
Judge

March 29, 2016

"DK"