

\$~A-31

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of decision: 24.8.2016

+ CM(M) 789/2016 & CM Nos.29916-19/2016

PAWAN KATARIA Petitioners
Through Mr.Amit Anand Tiwari and
Mr.Abhinav Raghuvanshi, Advocates
versus
ARDEEP KUMAR BATTA & ANR. Respondents
Through Mr.Rajeev, Advocate

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. By the present petition under Article 227 of the Constitution of India the petitioner seeks to impugn the order dated 27.5.2016 by which application filed by the the petitioner under section 63 of the Indian Evidence Act, 1872 seeking to lead secondary evidence was dismissed.
2. The the petitioner has filed a suit for specific performance of the contract dated 5.3.1997 alongwith permanent and mandatory injunction. The case of the petitioner is that the flat was purchased but the documents were executed in the name of respondent No.1 for the reason that both were relatives and were having business relations and further respondent No.1 had undertaken to re-transfer the said flat in the name of Smt.Poonam late wife of the petitioner. It was further stated that while Smt.Poonam was ill the respondent No.1 had stolen the papers i.e. title documents during his visit to the house of the petitioner.
3. It is in the above background that the petitioner has filed the present

application under section 63 of the Indian Evidence Act. It is stated in the application that a notice under Order 12 Rule 8 CPC and section 66 of the Indian Evidence Act has been served on the respondent No.1. The respondent No.1 has not replied and hence it is prayed that the the petitioner may be allowed to lead secondary evidence to proved his case.

4. By the impugned order the trial court came to a conclusion that the court is of the opinion that the the petitioner has miserably failed to prima facie satisfy the court that the documents of which secondary evidence has been sought to be produced, are really in power and possession of respondents. Hence, the application was dismissed.

5. I have heard learned counsel for the parties.

6. Learned counsel appearing for the the petitioner has relied upon ***Mangat Ram vs. Ashok Kumar Sharma, (2010) 168 DLT 634*** to support his contention that there was enough ground to allow the application. Learned counsel appearing for the respondent has relied upon ***U.Sree vs. U.Srinivas, (2013) 2 SCC 114*** and ***H.Siddiqui (dead) by LRs. Vs. A.Ramalingam, AIR 2011 SC 1492*** to contend that under the scheme of things of the Indian Evidence Act the petitioner has to first lay the foundation to justify leading of secondary evidence and then only the question of allowing the application under section 63 or 65 would arise.

7. Section 63, 64 and 65 of the Indian Evidence Act read as follows:-

63. Secondary evidence

Secondary evidence means and includes—

(1) certified copies given under the provisions hereinafter contained;

(2) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies.

(3) copies made from or compared with the original ;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a documents given by some person who has himself seen it.

64. Proof of documents by primary evidence

Documents must be proved by primary evidence except in the cases hereinafter mentioned

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 documents 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 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 ⁴⁰[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 no other kind of secondary evidence, 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.

8. This Court in the case of *Prem Chandra Jain vs. Shri Sri Ram (2009) ILR 7 DEL 605* held that it is not for the party to apply with an application under section 65 of the Evidence Act for permission to lead secondary evidence. The parties who seek to lead secondary evidence have to lay the foundation of the background to justify leading secondary evidence for which no permission is required. This court held as follows:-

“4. It is only after such evidence has been led can the court form an opinion whether the circumstances/situation in which it is permissible to lead secondary evidence exist or not. For instance, whether a document has been lost or destroyed is a question of fact. It is only after the person claiming so has been cross examined, can a decision be

taken as to the existence and loss or destruction of the original.

5. The court, on an application seeking permission to lead secondary evidence, even if setting out reasons as contained in either of the Clauses of Section 65, cannot take a decision on the correctness of the reasons. The application thus serves no purpose except delaying the proceedings. It is however often found that the courts allow or disallow the applications, without giving an opportunity to the parties for laying a foundation for reception or rejection of secondary evidence. Such procedure is impermissible in law. Factual controversies cannot be adjudicated on applications. That is however not to be understood as allowing a mini-trial on this aspect. The party seeking to prove document by secondary evidence is to lead evidence of the existence of circumstances/situations in which secondary evidence is permissible, during leading its evidence, whether by way of examination of witnesses or cross examination of opponents witnesses, in the suit/other proceeding itself. It will be decided at the stage of disposal of suit only, whether case for leading secondary evidence has been made out or not and if so, whether document stands proved by secondary evidence.

9. The Supreme Court in *H.Siddiqui (dead) by LRs. Vs. A.Ramalingam (supra)* held as follows:-

“10. Provisions of Section 65 of the Act 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational

evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide: The Roman Catholic Mission and Anr. v. The State of Madras and Anr.: AIR 1966 SC 1457; State of Rajasthan and Ors. v. Khemraj and Ors. AIR 2000 SC 1759; Life Insurance Corporation of India and Anr. v. Ram Pal Singh Bisen : (2010) 4 SCC 491; and M. Chandra v. M. Thangamuthu and Anr. : (2010) 9 SCC 712) : (AIR 2011 SC 146)”

10. The above judgment was followed by the Supreme Court in *U.Sree vs. U.Srinivas (supra)* as follows:-

17. Recently, in H. Siddiqui (Dead) by L.Rs. v. A. Ramalingam (2011) 4 SCC 240, while dealing with Section [65](#) of the Evidence Act, this Court opined though the said provision permits the parties to adduce secondary evidence, yet such a course is subject to a large number of limitations.

“12.....In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original.

It has been further held that mere admission of a document in evidence does not amount to its proof. Therefore, it is the obligation of the Court to decide the question of admissibility

of a document in secondary evidence before making endorsement thereon.

18. In the case at hand, the learned Family Judge has really not discussed anything relating to foundational evidence. The High Court has only mentioned that when the letter was summoned and there was a denial, the secondary evidence is admissible. In our considered opinion, such a view is neither legally sound nor in consonance with the pronouncements of this Court and, accordingly, we have no hesitation in dislodging the finding on that score.”

11. Hence, where the original documents are not produced, a factual foundation has to be laid for giving secondary evidence while leading evidence. In the absence of a factual foundation the secondary evidence would be inadmissible. There is an obligation on the court to decide on the question of admissibility of document as secondary evidence before making an endorsement thereon the document.

12. In the present case without leading any evidence the petitioner has filed an application under section 63 of the Indian Evidence Act for permission to lead secondary evidence. As already noted above by this court in *Mangat Ram vs. Ashok Kumar Sharma (supra)* the application is neither necessary nor warranted. The petitioner had to lead his evidence including evidence to lay the foundation to permit the court to appreciate as to whether the secondary evidence can be admitted as evidence. The question of admissibility of a document would have to be gone into before making an endorsement, as noted in the above judgments.

13. In view of the above, the impugned order is quashed as the same suffers from material irregularity. The petitioner may proceed accordingly in light of the above for recording of secondary evidence. The petition stands

disposed of. All pending applications also stand disposed of accordingly.

JAYANT NATH, J.

AUGUST 24, 2016/n