

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

**Civil Revision No.3794 of 2016
Date of Decision: 11.10.2017**

Kanwaljit Kaur BediPetitioner
Vs
Paramjit Singh Sawhney & Others
....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Amar Vivek, Advocate
for the petitioner.

Mr. Kanwaljit Singh, Sr. Advocate with
Mr. Abhishek Bajaj, Advocate
for respondent No.1.

Mr. J.S. Bagga, Advocate
for respondent No.2.

Mr. Suvir Sehgal, Sr. Standing Counsel with
Mr. Jaivir Singh Chandail, Jr. Standing Counsel
for U.T., Chandigarh/respondent No.3.

RAJ MOHAN SINGH, J.

[1]. Petitioner has assailed the order dated 08.04.2016 passed by the Civil Judge (Jr. Divn.) Chandigarh vide which application for secondary evidence was allowed in favour of the defendants.

[2]. Brief facts are that a suit was filed for declaration to the effect that the plaintiff was entitled to succeed and inherit being the owner to the extent of 1/3rd share of the entire estate,

assets, bank deposits and savings etc. of her father late Sh. Harbans Singh Sawhney including H.No.1527, Sector 34-D, Chandigarh being the legal heir. Plaintiff also claimed *mesne profits* in terms of 1/3rd share from the aforesaid estate to be recovered from defendant Nos.1 and 2 @ Rs.7500/- per month from the date of filing of the suit till the decree. Plaintiff also claimed interest and costs @ Rs.5000/- being her 1/3rd share in the property after declaring the alleged Will in favour of the defendant Nos.1 and 2 to be forged and fabricated. Joint possession was also claimed besides claiming mandatory injunction, permanent injunction and decree for recovery of *mesne* profits. Plaintiff pleaded in the suit that defendant No.1 has falsely claimed to be in possession of alleged Will in his favour in respect of estate of Sh. Harbans Singh Sawhney wherein he claimed 50% and 30% shares respectively in the suit property allegedly bequeathed in favour of defendant Nos.1 and 2. Defendant No.1 has not produced any such alleged original Will before any authority and the alleged Will, if any of late Sh. Harbans Singh Sawhney is false and fabricated and does not confer any right on defendant Nos.1 and 2.

[3]. Plaintiff also pleaded that the Estate Officer, UT, Chandigarh committed a wrong and resorted to flagrant violation of law by entertaining a mere photostat copy of an alleged

unregistered Will while transferring the property in favour of one of the heirs of late Sh. Harbans Singh Sawhney despite the objections raised by two out of the three legal heirs of late Sh. Harbans Singh Sawhney. When objections were invited, two out of the three legal heirs filed the objections. The Estate Officer had passed the order dated 01.06.2009, directing the parties to produce original Will, however in clear disregard thereafter the Estate Officer passed the order of transfer of 50% share in the property in favour of defendant No.1, who is one of the three legal heirs of Late Sh. Harbans Singh Sawhney only on the basis of photocopy of an unregistered Will. Plaintiff alleged that the Estate Officer in summary proceedings could not bypass the provisions of the Indian Succession Act and the Indian Evidence Act (hereinafter to be referred as 'the Act') in accepting the photostat copy of the unregistered Will without any proceedings to prove the alleged photostat copy of the Will or without following due procedure as to the admission of secondary evidence in accordance with law.

[4]. Plaintiff also alleged that during the proceedings before the Estate Officer, the plaintiff moved an application dated 12.12.2008 highlighting the original Will had not been produced before the Estate Officer and, therefore, the original Will be got produced as there was no such Will in existence. Despite

several rounds of hearings in the context of production of aforesaid original Will, the Estate Officer passed a specific order on 01.06.2009 requiring the parties to produce original Will of late Sh. Harbans Singh Sawhney. At one point of time even the Estate Officer expressed his inability to transfer the property in the absence of the original Will, however no specific order was passed to that effect. Thereafter the Estate Officer issued a communication to the plaintiff requiring the plaintiff to appear before the Estate Officer in the month of October 2009, even though the proceedings before him had already come to an end after the parties could not produce the original Will before him. Plaintiff had duly submitted an affidavit on 11.06.2009 that she did not have any original Will with her. On 13.11.2009, the parties appeared before the Estate Officer. Defendant Nos.1 and 2 submitted that they were unable to produce original Will before the Estate Officer as no such original Will existed with them. However, plaintiff raised objections before the Estate Officer that the Will in question was forged and fabricated. There was no Will in existence. The plaintiff also questioned the action of the Estate Officer in transferring the property in favour of defendant Nos.1 and 2 solely on the basis of photostat copy of the alleged original Will which could not have been considered in the absence of production of original Will. It was

pleaded by the plaintiff in the plaint on 21.04.2010 that a Will has to be produced in accordance with law with the provisions of Indian Succession Act. The loss or destruction of the Will has to be independently established in accordance with law. The Estate Officer in any case has no power in a summary proceedings to establish the photostat copy of the Will as an actual Will.

[5]. Petitioner has assailed the impugned order on the ground that on 27.03.2008, as per statement of Amarjit Singh Sethi, Advocate made to the Police which was in the context of stand of defendant No.1, according to which he saw the original Will with defendant No.1 on 27.03.2008. According to petitioner, if the original Will was kept in *Almirah* by the mother of the parties, then once defendant No.1 had taken out the same for comparison and for applying the mutation, there was no question of keeping it back in the same *Almirah* which was unattended. On 12.12.2008, the plaintiff filed an affidavit before the Estate Officer in mutation proceedings questioning that since there was no original Will, therefore, she was withdrawing her earlier affidavit dated 27.03.2008 in favour of defendant No.1. Since there was no original Will, therefore, she was misled. On 01.06.2009, the Estate Officer gave opportunity to the parties to produce the original Will. The parties failed to

produce the original Will. None of the parties claimed that the Will had been lost or stolen by the plaintiff. On 13.11.2009, despite non-production of the original Will, the Estate Officer illegally mutated the property on the basis of photostat copy of the alleged Will. In the month of April 2010, the plaintiff filed the suit with the averments that there was no original Will available with defendant No.1.

[6]. Learned counsel for the petitioner submitted that in the written statement filed by defendant No.1, no pleadings were made in respect of existence of the original Will at any point of time or the same was available with any person or the same was ever lost. No such pleadings were made that the Will was allegedly possessed by the plaintiff or the plaintiff had allegedly taken it away. The pleadings made by defendant No.1 were totally silent with regard to the original Will having been misplaced or lost. The written statement was filed in the month of August 2010. In the meanwhile, the police held inquiry in pursuance of a criminal complaint instituted by the plaintiff. The complaint was also dismissed. Defendant No.2 was proceeded against *ex parte*. After more than 4 years, written statement was filed on behalf of respondent No.2 for which no permission was sought as he had already been proceeded against *ex parte*. The written statement was simply placed on record. He had joined

the suit from that stage as no written statement was required to be filed. Even in this revision petition there was no averment with regard to Will being in possession of the plaintiff or the same had ever been removed by the plaintiff from some place. In the month of June 2015, for the first time defendant No.1 sought to introduce a new case by giving suggestion to the plaintiff in the cross-examination in respect of possession of the Will. Still no effort was made to incorporate the plea by moving an appropriate application for amendment of the written statement.

[7]. On 14.09.2015, the application was filed by defendant No.1 for leading secondary evidence, for which there was no foundation in the pleadings. The said application was allowed by the trial Court vide the impugned order dated 08.04.2016 and that is how the present revision petition came to be filed before this Court.

[8]. Learned counsel for the petitioner submitted that the filing of the application without there being any foundation in the pleadings by the defendants was an abuse of process of law and was an after thought. There was no averment as to how and in what manner the photostat copy of the Will was taken by the defendants from the original. The photostat copy was lacking in material particulars to be examined by way of any

secondary evidence. Learned counsel further submitted that the secondary evidence can only be allowed in respect of a document which has been prepared from the original by means of mechanical process. Since there was no foundation laid by the defendants in respect of existence or loss of alleged original Will in the pleadings, therefore, leading of secondary evidence could not be allowed.

[9]. Learned counsel by relying upon Section 65 of the Act contended that the secondary evidence can be given where the original is shown or appears to be in possession or power of the person against whom the document is sought to be proved or of any person out of reach or not subject to process of the Court or any person legally bound to produce it and when after the notice mentioned in Section 66 of the Act, such person produce it. Clause 'c' of the aforesaid Section deals with the situation where 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 neglect produce it in reasonable time. Learned counsel contended that no notice under Section 66 of the Act was given by defendant No.1 and, therefore, secondary evidence and the contents of the document as referred in Section 65(a) cannot be given effect in the absence of issuance notice under Section 66 of the Act.

[10]. Learned counsel by relying upon **Hira vs. Gurbachan Kaur, 1988(2) PLR 173** submitted that it was incumbent upon the defendants to show that the original Will had been destroyed or lost and cannot for any other reason not arising from his own default or neglect produce at any reasonable time. In the written statement, no averments were made that the original Will had been lost or destroyed or was not otherwise available, therefore, at such a belated stage, no plea could be taken by the defendants.

[11]. Learned counsel further by relying upon **Surinder Kaur vs. Murari Lal, 1993(2) R.R.R. 535** submitted that if in the pleadings no specific plea was made in respect of existence or loss of the document, then from the conduct of the parties, it can be taken to be a fact that defendant No.1 has not come to the Court with clean hands and for lack of particulars regarding loss of the Will, the Court would grant permission to lead evidence only when it comes to the conclusion that the document has been lost or destroyed. Since no material has come on record in respect of loss of document or destruction thereof, therefore, the permission for leading secondary evidence was wholly unwarranted.

[12]. Learned counsel also submitted that in order to enable the party to produce secondary evidence, it is necessary for the

party to prove existence and execution of the original document. Learned counsel by relying upon **Ved Parkash and Anr. vs. Smt. Kartar Kaur and Ors., (1993) 104 PLR 452; Malwa Bus Service (P) Ltd, Moga District Faridkot through its Managing Director and another vs. Amrit Kaur and another, PLR (1987) 91 P&H 618** and **Union of India vs. Ibrahim Uddin & Anr., (2012) 8 SCC 148** submitted that the evidence beyond pleadings cannot be looked into in the absence of any amendment in the pleadings in terms of Order 6 Rule 17 CPC. No evidence can be seen in the absence of any pleadings in record and no party can be permitted to travel beyond the pleadings as all the necessary and material facts are required to be pleaded by the party in support of the case set up before the Court.

[13]. On the other hand, learned Senior counsel for respondent No.1 vehemently opposed the case of the petitioner on the ground that no stay of proceedings was granted in this case. Notice of motion was issued only on the contention of learned counsel for the petitioner that the petitioner was amenable to the settlement as respondent Nos.1 and 2 herein are the real brothers. No stay was granted by the Court and the case has already reached upto the stage of rebuttal and arguments. Both the parties have already concluded their

respective evidence. The evidence of the defendants was closed on 16.01.2017. No defence evidence is to be led. On 23.07.2008, there was admission made by the plaintiff in an affidavit dated 27.03.2008 before the Estate Officer wherein it was pleaded that the plaintiff is the daughter of the deceased and has no interest in the above property and as such she has no objection to its transfer in favour of her brothers Lt. Gen. Paramjit Singh Sawhney and Sh. Darshanbir Singh as per wishes of her father vide unregistered Will dated 17.04.1990. She further deposed that the transfer or payments would be completely binding on her and she also undertook to bind herself and her heirs and legal representatives not to revoke the declaration made in the affidavit Ex.PW-2/D1.

[14]. Learned Senior counsel referred to para 9 of the plaint and submitted that in view of the said pleadings, there was no such requirement of issuing any notice under Section 66 of the Evidence Act. Similar was the ground emerging out of pleadings made in para no.14 of the plaint. In the written statement filed by defendant No.1, learned Senior counsel relied upon the reply given in para nos.9 and 14, to counter the plea of the petitioner. The crux arising out of the stand taken by the respondents is that the admissibility of the document which was relied after permission for secondary evidence would be seen by the trial Court at an appropriate stage.

[15]. Learned Senior counsel by referring to para No.2 on merits of the reply to the application submitted that it was not the stand of the plaintiff in the plaint that late Sh. Harbans Singh Sawhney had not executed the Will in question, rather the stand of the plaintiff was that she had been misled by defendant No.1 that her father had left behind an unregistered Will dated 17.04.1990 and that is why the plaintiff filed her affidavit before the Estate Officer mentioning therein that she has no objection in case the property in dispute is transferred in the names of his brothers. But later on the plaintiff learnt that the alleged Will did not exist in the eyes of law, thereafter she filed an objection before the Estate Office in the form of affidavit.

[16]. Learned Senior counsel by relying upon clauses A and B of Section 65 of the Act and in view of para no.9 of the plaint submitted that there was no requirement of issuing any notice under Section 66 of the Act. He emphasized that the criminal complaint lodged by the plaintiff also stood closed. As per Ex.DW3-10, the copy of the Will was duly notarized and the Notary Prem Krishan Dass has also appeared as DW-2 besides Amarjit Singh Sethi, Advocate as PW-6 and official of the Estate Officer as DW-3. Since both the parties had already led evidence, at this juncture, the admissibility of the evidence led by way of exhibiting documents would be seen at the relevant

stage.

[17]. I have heard learned counsel for the parties and also perused the record.

[18]. Notice of motion in this revision petition was issued on 28.05.2016. Notice regarding stay was also issued. It was submitted by learned counsel for the petitioner that the petitioner was amenable to settlement as respondent Nos.1 and 2 are her real brothers. Vide the impugned order prayer in terms of Section 65 of the Act has been allowed. At this stage, the Court is not supposed to hold the trial. Leading of secondary evidence is like an enquiry to be conducted for establishing existence of document and loss thereof as per pleadings of the parties. Granting leave to lead secondary evidence does not mean that the document has been admitted in evidence, nor it will provide a finding in respect of existence of any condition incorporated in Section 65 of the Act. At the most it amounts to holding an enquiry regarding existence of a document and its loss in certain conditions. The failure or success to prove the existence of a document or its loss cannot be pre-determined that too without providing any opportunity to the parties. The existence and loss of the document would be proved with reference to the evidence to be led by the parties and the same would be decided at a later stage. The copies made from the

original by mechanical process is covered under Section 63(2) of the Act. The secondary evidence as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible, the party relying upon the same is not entitled to introduce by way of secondary evidence.

[19]. In view of law laid by the Hon'ble Apex Court in **Shalimar Chemicals Works Ltd. vs. Surendra Oil & Dal Mills, 2010(8) RCR (Civil) 423**, the photocopy of the documents cannot be taken on record as evidence by leaving the plaintiff to support its case in terms of proving existence of a document at a later stage i.e. by leaving the issue of admissibility of that evidence open and hanging by marking them as exhibits subject to objection of proof and admissibility. In terms of Order 13 Rule 8 CPC the Court has power to impound the documents notwithstanding anything contained in Rules 5 and 7 of Order 13 CPC and Order 7 Rule 17 CPC till such time as may be considered fit by the Court.

[20]. The Hon'ble Apex Court in **Bipin Shantilal Panchal vs. State of Gujarat, 2001(1) RCR (Criminal) 859**, laid down that the procedure has been set for receiving the documents when the same is objected to during trial. The Hon'ble Apex Court has castigated the practice of holding up trial on objections taken at

the time of tendering documents in evidence. At that stage asking the Court to pass an appropriate order on objections has been categorized as an 'archaic practice'.

[21]. On the basis of aforesaid ratio, the leading of evidence at the stage pursuant to the passing of the impugned order would not crystallize any substantial right in favour of the defendants, rather the evidence led by the parties would be tested at the threshold of admissibility, validity and genuineness of the document in terms of execution and its nature. Later stage would be an appropriate stage for lawful consideration of such a criteria i.e. validity, admissibility and genuineness of the document. Though there is no provision in law for de-exhibiting the document already exhibited in evidence, but the exhibition of a document, if objected to has to be answered in terms of its admissibility at a later stage. The offer of secondary evidence can be at best impeached in cross-examination. It will be for the Court to examine and decide as to whether it will be appropriate to rely upon such secondary evidence or not for want of compliance of Section 65 of the Act. In case Court finds the secondary evidence not reliable, the Court is at liberty to eschew the same. However, the attempt of a party for production and to exhibit the document cannot be thrown at this threshold. The view expressed in **Dr. S.P. Arora vs. Satbir**

Singh, 2010(5) R.C.R. (Civil) 350 and **Simar Pal Singh vs. Hakam Singh, 2009(14) R.C.R. (Civil) 273** can be relied in the aforesaid context.

[22]. In terms of ratio as culled out from **H. Siddiqui (dead) by LRs vs. A. Ramalingam, 2011(2) RCR(Civil) 696**, it can be noticed that though the provision permits the parties to adduce secondary evidence, but the same is subject to large number of limitations. The secondary evidence relating to the contents of the document is inadmissible until non-production is accounted for, so as to bring within one or the other cases provided for in the Section. When there is no factual foundation led for secondary evidence it is not permissible for the Court to allow the party to adduce secondary evidence. It is a settled principle of law that the secondary evidence must be authenticated by fundamental evidence. Mere exhibition of a document does not dispense with the proof of its execution, therefore, it is squarely within the power of the Court to decide the admissibility of a document in secondary evidence at a subsequent state. Existence of foundation for leading secondary evidence in the written statement would also be taken care by the trial Court at the appropriate stage.

[23]. The contention of both the parties would be adequately answered by the Court at the time of consideration of the issue

on merits. Vide the impugned order, the leading of secondary evidence has been allowed. It does not amount to certify the admissibility of such a document produced on record at this stage of litigation. It is always open to the Court to comment upon admissibility of the document in view of evidence led by the parties. The Court has to see the admissibility of the document. Mere denial by the parties to produce original document in whose possession it is stated to be does not lay down fundamental facts for producing secondary evidence. Even in the case of falling under the ambit of Section 65(c) of the Act, the Court has to see admissibility of such evidence where it is lost or destroyed by the party in whose favour it created an enforceable right. In **U. Sree vs. U. Srinivas, 2013 (1) RCR (Civil) 883**, the Hon'ble Apex Court has commented that to permit secondary evidence which has been destroyed by the person in whose possession it was and whose it created an enforceable legal right or an obligation, is normally not to be allowed as secondary evidence. The secondary evidence of such a nature may be tampered with or changed and it would be against public policy to take chance of running the risk of fraud being committed.

[24]. The facts involved in the present case are somewhat different. The prayer in terms of Section 65 of the Act has been

allowed by the impugned order. It will not dilute the rigor of proving the execution of the document, admissibility and validity thereof. The Court would apply its mind as regards execution, validity and genuineness and admissibility of the document at a later stage. The impugned order commenting conclusiveness, if any, in the aforesaid context has to be ignored and diluted. The photostat copy of document can be produced in evidence only when it is alleged and proved that the original was in existence and the same has been lost or destroyed or is in possession of the opposite party, who failed to produce it, or any other circumstances mentioned in Section 65 of the Act. These facts are fundamental to the controversy and would be tested with reference to the material on record at an appropriate stage on merits.

[25]. At this stage, only an enquiry in terms of Section 65 of the Act is pending. These facts can be established at a later stage when the Court will apply its mind on merits, however photostat copy of the document may or may not come within the definition of secondary evidence as contained in Section 63 of the Act. There cannot be any straightjacket formula by any defined words and answers because photostat copy may or may not carry the probative value of such a document and has to be proved independently and, therefore, the case relating to photostat copy to be considered as secondary evidence has to be considered on defined parameters in accordance with law.

[26]. In the light of aforesaid attending facts and circumstances of the case, the impugned order can be explained to mean that no such conclusive opinion with regard to genuineness of the secondary evidence has been given by the trial Court. The evidence led by the party on record in the context of secondary evidence would be tested by the trial Court on the defined parameters and its validity, genuineness and admissibility in accordance with law. Mere exhibition of document will not dispense with proof of its execution in accordance with law. If the admissibility of document is commented upon at this stage, it may prejudice the case of either side at the time of trial. It is under the domain of the trial Court to see validity and admissibility of the document which was allowed to be exhibited with an endorsement of objection. Since both the parties have already concluded their respective evidence and the case is fixed for rebuttal and arguments, therefore, the trial Court shall proceed to decide the admissibility of the document produced by the defendants as secondary evidence in accordance with law and thereafter the trial Court shall proceed to decide the suit on merits.

[27]. With the aforesaid observations, the revision petition is disposed of accordingly.

October 11, 2017
Atik

(RAJ MOHAN SINGH)
JUDGE

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No