

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

**CR No.6859 of 2016
Date of Decision-10.01.2017**

Om Parkash and others ... Petitioners

Versus

Avinashi Lal Sharma and others ... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Sarju Puri, Advocate for the petitioners.

Mr. Vikram Bali, Advocate for the respondents.

RAJ MOHAN SINGH, J.

[1]. Petitioners have assailed the order dated 26.09.2016 passed by Civil Judge (Junior Division), Chandigarh whereby an application for additional evidence filed by the plaintiffs to produce certified copy of statement of PW 2-Prem Lata Sharda recorded in a criminal case was dismissed.

[2]. A Civil Suit titled as Om Parkash Sharma and others Vs. Avinashi Lal Sharma and others was filed for declaration. Jagan Nath Sharma was the original owner of the property in question. He died on 23.06.1998. Plaintiff No.1-Om Parkash Sharma being real nephew was the sole heir of Jagan Nath Sharma and was entitled to inherit the property left by Jagan Nath Sharma under the Hindu Succession Act. Jagan Nath Sharma also executed a registered Will dated 28.04.1980 in favour of Om Parkash Sharma. On the basis of aforesaid, Om Parkash Sharma claimed absolute title, being owner

in possession of the property in question after the death of Jagan Nath Sharma.

[3]. Plaintiff-Om Parkash Sharma agreed to sell 1/3rd share of the house comprised the entire ground floor to plaintiffs No.2 to 5 and received Rs.15 lacs as sale consideration from them vide agreement to sell dated 16.10.1998 and also executed an irrevocable general power of attorney dated 16.10.1998 in their favour. Plaintiffs No.2 to 5 were put in possession of 1/3rd share as per agreement in question. On 25.10.1998, defendants got a case registered and with the help of the police, plaintiffs No.2 to 5 were dispossessed from that portion of the house and possession was delivered to the defendants on 30.10.1998. Plaintiffs No.2 to 5 claimed the possession of the portion back and filed suit for declaration and other reliefs.

[4]. The suit was contested by defendants No.1 to 4, 6 and 7. Defendant No.2-Dr. Pawan Kumar Sharma, one of the trustees on behalf of Trust filed written statement and also set up a counter claim. Averments of the plaint were denied. It was denied that a false case was registered against plaintiffs No.2 to 5 and they were dispossessed from the portion of the house. In the counter claim, defendant No.2 claimed that on 01.06.1998, Jagan Nath Sharma created and got registered a Trust and thereafter, he made a Will on 08.06.1998 and got the same registered in favour of the Trust. In para No.10 of the written statement, it was pleaded that the first

meeting of the Trust was held under the Chairmanship of Jagan Nath Sharma in House No.3143, Sector 21-D, Chandigarh which is the registered office of the Trust. Resolutions were passed and he presided over the said meeting. Proceedings of the meeting dated 10.06.1998 were signed by him.

[5]. Plaintiffs controverted the allegations of the written statement by filing replication. Trust deed and Will were claimed to be forged and fabricated. Plaintiffs-petitioners pleaded that Jagan Nath Sharma was physically and mentally incapacitated because of his serious illness and was not in sound state of mind at the relevant time and was totally incapable of executing any document and he had not presided over the meeting dated 10.06.1998, nor the proceedings of the meeting were signed by him on 10.06.1998.

[6]. Plaintiffs-petitioners examined Devendra Parsad, Forensic Documents Expert as PW 6 who examined the documents containing the signatures of Jagan Nath Sharma on the deed of Trust and gave his report that the person who made the standard signatures marked S.1 to S.12 did not write questioned signature marked Q1 i.e. 'J.N. Sharma'. The questioned signature marked Q1 was an imitated forged signature. Resolution was claimed to be forged according to the report of PW6.

[7]. Prem Lata Sharda-defendant No.6 was the Secretary of the said Trust and she had appeared as witness i.e. PW2 in the criminal case titled as State Vs. Rajinder Singh and others. Her

statement was recorded on 04.09.2010 and 08.09.2010. Petitioners wanted to tender certified copy of statement of Prem Lata Sharda (PW2) by way of additional evidence. Petitioners claimed that statement of PW2-Prem Lata Sharda has great bearing on the merits of the case. Trial Court vide order dated 26.09.2016 dismissed the application on the ground of delay. That is how, the present revision petition came to be filed.

[8]. I have heard learned counsel for the parties.

[9]. Learned counsel for the petitioners contended that petitioners only wanted to tender the certified copy of statement of Prem Lata Sharda recorded in the criminal case without examining any witness to prove its authenticity or otherwise. Learned counsel further stated that even though the suit was filed in the year 1998, but the defendants appeared only in the year 2009, therefore, delay was not solely attributable to the plaintiffs.

[10]. Learned counsel relied upon **Shri Bhaiyashbir Chand Vs. Smt. Bachan Kaur and others, 1966-1968 PLR 101** to contend that statements recorded in judicial proceedings and certified copy obtained from the record are admissible in terms of Sections 70 and 80 of the Indian Evidence Act. The Court under Order 18 Rule 17 is empowered to allow such a prayer even after conclusion of the evidence.

[11]. On the other hand, learned counsel for the respondents has submitted that Prem Lata Sharda was one of the person who

was instrumental in getting the criminal case registered being sister of Dr. Pawan Kumar Sharma who is the Secretary of the Trust. The certified copy of the statement cannot be relied against a person who did not appear as witness in the case. Since the plaintiffs did not examine Prem Lata Sharda as a witness, therefore, the statement even if, given by her in criminal case cannot be used against her. Om Parkash Sharma has not come in the witness box to face cross examination. The evidence of the plaintiffs was closed by order of the Court. Rajinder Singh Aulakh appeared in the Court and admitted that earlier he was residing in Mohali in rented accommodation and has left the said accommodation and thereafter, started living in the house in question in the year 2001. The statement made by Rajinder Singh Aulakh would be appreciated by the Court viz-a-viz the stand of the plaintiffs and the written statement filed by the defendants. Statement of Smt. Mirdula Chadha in respect of her admission qua possession of the defendant-Trust would also be gone into by the trial Court at the relevant stage. The case is fixed for rebuttal evidence, if any and for arguments.

[12]. This Court in CR No.713 of 2014 titled as Om Parkash Sharma and others Vs. Avinashi Lal Sharma and others has already granted necessary extension for early disposal of the suit. Since, Prem Lata Sharda has not been examined as a witness in the present case, therefore, statement made by her in a criminal case has to be tested in terms of Section 33 of the Indian Evidence Act.

Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts has to be brought on record. The evidence given by a witness in a judicial proceeding is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay, the Court considers unreasonable. Provided that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross examine, that the questions in issue were substantially the same in the first as in the second proceeding. Since, Prem Lata Sharda has not been examined in the present case, therefore, requirement of Section 33 of the Indian Evidence Act cannot be complied with.

[13]. The Court has to decide the admissibility of the evidence which is sought to be produced. When either party proposes to give evidence of any fact, the Court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the facts, if proved, would be relevant, and not otherwise. The cross examination as to previous statements can be made in terms of Section 145 of the Indian Evidence Act. A witness may be cross examined as to previous statement made by him/her in writing or

reduced into writing and relevant to matters in question, without such writing being shown to him/her, or being proved; but, if it is intended to contradict him/her by the writing, his/her attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him/her. Since the witness has not been examined in the present case, therefore, question of complying with Section 145 of the Indian Evidence Act does not arise.

[14]. Learned counsel by relying upon **Md. Abdul Azeez Vs. State of A.P., 2003 CriLJ 4410** submitted that the statement of Prem Lata Sharda recorded in the criminal case is totally inadmissible in the present case as Section 33 of the Indian Evidence Act deals with relevancy of certain evidence for proving the same in subsequent proceeding, the truth of facts stated therein. Certain conditions are to be complied with. Since the present case do not attract applicability of Sections 33 and 145 of the Indian Evidence Act, therefore, such a prayer cannot be granted at this stage. Since the witness has not been examined in the present case, therefore, fact cannot be proved strictly.

[15]. It is a settled principle of law that an elementary right of an accused or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the Court trying the case which then has the opportunity of seeing the witness and observing his demeanour and can thus form a far better opinion as

to his reliability than is possible from reading a statement or deposition.

[16]. The law cited by learned counsel for the petitioners has no application in view of mandatory requirement of Sections 33 and 145 of the Indian Evidence Act. Moreover, the powers under Order 18 Rule 17 CPC are meant for the Court, when the Court requires some evidence for just and proper adjudication of the matter. Since there is a legal flow in the proposed evidence to be led, therefore, this Court is not inclined to interfere in the matter.

[17]. In view of requirement in terms of Sections 35 and 145 of the Indian Evidence Act, the production of certified copy of statement made by Prem Lata Sharda in a criminal case cannot be allowed to be produced in the present case particularly when Prem Lata Sharda has not been examined as witness in the present case.

[18]. In view of aforesaid, I do not find it to be a fit case for interference in exercise of powers under Article 227 of Constitution of India. This revision petition is accordingly dismissed.

(RAJ MOHAN SINGH)
JUDGE

10.01.2017
Prince

Whether reasoned/speaking

Yes/No

Whether reportable

Yes/No