

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH
Sr. No.: 230

Criminal Revision No.7271 of 2015 (O & M)
Date of Decision: January 09, 2017

Jagmail Singh & another

..... PETITIONERS

VERSUS

Karamjit Singh & others

..... RESPONDENTS

...

CORAM: **HON'BLE MR. JUSTICE JASPAL SINGH**

...

PRESENT: - Mr. M.S. Kang, Advocate, for the petitioners.

Mr. V.K. Shukla, Advocate, for the respondents.

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Jaspal Singh, J

1. By virtue of this revision petition preferred under Article 227 of the Constitution of India, petitioners have sought setting aside of order dated September 30, 2015 passed by the Civil Judge (Junior Division), Moga, whereby an application filed by them under Section 65 & 66 of the Indian Evidence Act, 1872 (for short, 'Act') seeking permission to prove Will dated January 24, 1989 executed by Babu Singh in favour of petitioners by way of secondary evidence was dismissed.

2. The facts giving rise to instant petition are that petitioners preferred a suit for declaration to the effect that they are

owners to the extent of ½ share each of the land owned by Babu Singh son of Phuman Singh, situated in village Kokri Kalan, Tehsil & District Moga and mutation Nos.9971 dated February 28, 1991 and 9359 dated February 25, 1991 sanctioned by the Assistant Collector 2nd Grade, Moga in favour of Baldev Singh (predecessors-in-interest of respondent Nos.1 and 2) and Shamsheer Singh (respondent No.3) are illegal, null and void as the said mutations have been sanctioned on the basis of a forged Will dated March 20, 1988 and also prayed for consequential relief of permanent injunction to restrain the respondents from alienating, transferring or mortgaging the suit property.

3. During pendency of the aforesaid suit, an application under Section 65/66 of the Act was filed on March 19, 2014 seeking permission to prove copy of Will dated January 24, 1989 by way of secondary evidence. The said application was allowed vide order dated July 4, 2014. Feeling aggrieved against the said order, respondents preferred Civil Revision No.4645 of 2014 which was allowed by this Court on the ground that once the petitioners have alleged that the original Will is in possession of the revenue official, they should have served a notice upon him under Section 66 of the Act for its production and in case, it is alleged that the said Will has been lost, then the application could have been filed for leading secondary evidence but in the absence of the compliance of the aforesaid procedure, the application per se filed under Section 65 of the Act is not maintainable.

In view of the aforesaid apparent error on the part of the Court below, the present revision petition is hereby allowed and the impugned order

is set aside. However, the respondents are still at liberty to move an application under Section 66 of the Act to the revenue official to whom the alleged Will was given for the purpose of sanctioning of mutation and in case of denial on his part that the Will has been lost, they can maintain the application for secondary evidence.

4. Subsequent thereto, petitioner preferred another application under Section 65/66 of the Act, pursuant to aforesaid order for issuance of notice under Section 66 of the Act to the revenue officials for production of original Will dated January 24, 1989 stated to have been handed over by the petitioner to revenue officials for sanctioning the mutation in their favour. Both the revenue officials were given notice for production of the original Will dated January 24, 1989 but they failed to produce the said Will. It was only thereafter, after hearing learned counsel for the parties, application was dismissed vide impugned order dated September 30, 2015.

5. Dis-satisfied by the impugned order, petitioners have approached this court by way of instant revision petition.

6. The contention of learned counsel for the petitioners is that impugned order is not sustainable in the eyes of law as it suffers from patent errors of law and is against the letter & spirit of Sections 65 & 66 of the Act. While the above referred provisions of the Act, learned counsel for the petitioners has contended that Section 65(a) of the Act allows for production of secondary evidence when the original is shown or appears to be in possession or power of against whom the document is sought to be proved, or 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. Party concerned is entitled to prove the same by way of secondary evidence. The petitioners have already served notice provided under Section 66 of the Act to the revenue officials through court but the Will which is sought to be produced by way of secondary evidence was not produced by either of the revenue officials. Moreover, the petitioners were granted the liberty to move an application under Section 66 of the Act to the revenue officials by this court vide order dated November 25, 2014 while setting aside previous order dated July 4, 2014 passed by the civil court.

7. Learned counsel for the petitioners further contends that existence of the original Will can only be proved during the course of arguments and it is not the requirement of law that it should be proved at the first instance and only thereafter, secondary evidence can be allowed. Thus, impugned order dated September 30, 2015 is liable to be set aside. Consequently, application moved by the petitioners before the trial court under Section 65/66 of the Act deserves to be allowed.

8. This court has given an anxious thought to the aforesaid submissions put-forth by learned counsel for the petitioners but does not find any factual or legal substance therein.

9. Undoubtedly, previous order whereby an application filed by the petitioners under Section 65/66 of the Act was allowed, has already been set aside by this court vide order dated November 25, 2014 and it was thereafter, a fresh an application was moved seeking

permission to prove Will dated January 24, 1989 by way of secondary evidence, that too, after issuance of notice as required under Section 66 of the Act.

10. For proper appraisal of the matter in controversy, it would be proper to reproduce Sections 65 and 66 of the Act which read 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 1[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.

66. Rules as to notice to produce.—Secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, 1[or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

(1) when the document to be proved is itself a notice;

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it;

(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4) when the adverse party or his agent has the original in Court;

(5) when the adverse party or his agent has admitted the loss of the document;

(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.”

11. A glance at the aforesaid provisions makes it crystal clear that secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power of against whom the document is sought to be proved, or 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. As per facts & circumstances of the instant case, original

Will dated January 24, 1989 was given to the revenue official(s) for incorporating and sanctioning of mutation on the basis thereof, but to the utter surprise, though, both the revenue officials, namely, Pyare Lal and Rakesh Kumar, Patwaries, were served under Section 66 of the Act to produce original Will dated January 24, 1989 but they failed to produce it. Moreover, they have nowhere stated about the existence of the aforesaid Will. So, the pre-requisite condition i.e. existence of the Will, remains un-established on record. Thus, learned trial court has rightly declined the permission to prove Will dated January 24, 1989 by way of secondary evidence. Impugned order dated September 30, 2015 suffers from no infirmity or illegality, rather the same is absolutely in accordance with the evidence available on file as well as settled proposition of law.

12. In view of what has been discussed above, this Court does not find any merit in the instant petition and the same is dismissed with no order as to costs.

January 09, 2017
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(Jaspal Singh)
Judge

Whether Speaking/ Reasoned:
Whether Reportable:

Yes/ No
Yes/ No