

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

**CR No. 7316 of 2015 (O&M)**  
**Date of Decision: November 20, 2017**

**Sushil Kumar**

...Petitioner

**Versus**

**Raghav Sadana and others**

...Respondents

**CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY**

Present: Mr. V.K. Sandhir, Advocate  
for the petitioner.

Mr. Abhinav Sood, Advocate  
for the respondents.

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**ANITA CHAUDHRY, J.**

The petitioner is aggrieved by the order dated 28.09.2015 (Annexure P-6) passed by the Civil Judge (Sr. Division), Amritsar, vide which application filed by him seeking permission to lead secondary evidence with respect to the notice sent by the defendants had been dismissed.

It is necessary to notice few facts before referring to the submissions made by both the sides.

The plaintiffs filed a suit seeking specific performance of an agreement dated 24.09.2004. The parties had allegedly agreed to sell for consideration of Rs. 78 lacs. The defendants received Rs.10 lacs in advance and the sale deed was to be registered on 21.04.2005.

The defendants were to supply the Jamabandi as well as vacant possession at the time of execution of the sale deed. It was also agreed that the entire loan amount due from the defendants to State Bank of Patiala who was holding a equitable mortgage, was to be paid by defendant. The case set up by the plaintiffs was that they were ready and willing to perform their part of the contract and on the persuasion of the defendants, they paid Rs.14,03,000/- and gave the details of amount paid in para 7 of the suit. It was pleaded that some more payments were subsequently made and a total amount of Rs.26,12,000/- was paid. It was pleaded that they got their presence marked on the due date expressing their readiness and willingness but defendants did not turn up. They sent a notice dated 14.5.2015. In response to their notice a reply was received and they had again written calling upon the defendants to clear the bank dues and to get the sale deed executed within a week, failing which the earnest amount was to be forfeited. It was pleaded that meanwhile a notice dated 27.07.2005 was received by the defendants from their bankers and a photocopy was forwarded to them which disclosed that over Rs.23 lacs was due to the bank and over Rs.7 lacs in the account of M.L. Vinay Kumar and the outstanding amount due was over Rs.30 lacs. It was pleaded that the plaintiffs with the remaining balance consideration appeared before the Sub-Registrar again on 01.08.2005 and got their presence marked and also reported the matter to the police. Meanwhile, a public notice appeared in the newspaper 'Hindustan Times' that the property was

carrying a charge and it was fixed for auction. The plaintiffs again wrote to the defendants calling upon them to execute the sale deed. It was pleaded that in order to save the property from distress sale, the plaintiffs deposited two amounts vide two separate cheques to the tune of Rs.25,70,000/-. It was pleaded that meanwhile the defendants through their counsel served a notice levelling false allegations. It was pleaded that they approached the bank for no due certificate and they demanded more amount, which was deposited on 06.10.2005. It was pleaded that in this manner, they had paid over Rs.51 lacs and the balance due at the time of execution of the sale deed was a little over Rs.26 lacs.

Defendant no.2 took the plea that the plaintiffs were guilty of distortion of facts and the plaintiffs were estopped by their own act and conduct and they were defaulters and they were not ready and willing to perform their part of agreement and were not possessed of sufficient funds and some loan was to be paid to the bank, therefore, they had agreed to sell the property but it was made clear to the plaintiffs that the property was under mortgage and the plaintiffs had to pay the loan amount. It was pleaded that it was further agreed that sale deed of half portion would be executed on 20.01.2005 and the remaining on 21.04.2005 and the defendants in the meantime were to negotiate with the bank and the amount negotiated was Rs.31,50,000/-, which was to be paid before 31.03.2005. It was pleaded that defendant no.2 was partially blind and had lost his vision and was unable to read

the documents and the plaintiffs had stated that all the terms had been incorporated. It was pleaded that he did not retain the copy of the agreement with him and it had been promised that they would give the copy but failed to do so and later on it was found that these facts were not incorporated. It was pleaded that defendant had written a letter to the plaintiffs on 11.04.2005 requesting them to perform their part of the agreement and to send the balance amount out of the total amount within a week and send sufficient funds for purchase of the stamp papers and the plaintiffs failed to comply with it and that compelled them to extend the date by one month i.e. 20.05.2005. It was pleaded that the plaintiffs were not ready with the balance sale consideration and the only purpose to sell the property was to discharge the loan and the plaintiffs had failed to perform their part of the agreement.

The defendants had referred to a letter written by them to the plaintiffs on 11.04.2005. The copy of the letter was not appended along with the written statement.

Issues were framed and trial had commenced when defendant no.2 filed an application asking the plaintiffs to produce the original copy of the notice sent to them. That application was dismissed as the letter was denied. Thereafter, the defendants moved another application seeking permission to lead secondary evidence with respect to the letter and appended a copy. That application was dismissed by the trial Court and that order reads as under:-

*“Heard on application under Section 65 of Indian Evidence Act so moved by defendant no.2 seeking permission to lead secondary evidence qua one letter dated 11.4.2005. Application has been moved on the ground that defendant No.2 relied upon said letter dated 11.4.15 addressed to the plaintiff. During the cross-examination of the plaintiff, the defendant moved an application under order 11 rule 12 CPC for production of original letter but in spite of that, plaintiff had not produced the said letter on false and frivolous ground. Perusal of the file shows that when the suit was filed and when the written statement was filed even though the averring of the said letter was there, however did not produce the copy thereof on record in list of reliance of documents with any other document showing postage thereof. Counsel for the applicant has argued that letter was posted under certificate of posting. When the defendant No2/applicant has not placed on record any copy of said letter alongwith postage receipt at that time and even the applicant relies on the same and when the plaintiff did not produce original of the same even when demanded that would not ipso facto make out ground for allowing secondary evidence specially when the other mode of proof regarding postage of said letter through postal authorities is also there. It is not the case that document existed and now stands lost and so secondary evidence be allowed. In the circumstances application stands dismissed.”*

I have heard the submissions of both the sides. Some documents were placed on record.

The submission on behalf of the petitioner was that the petitioner had moved an application calling upon the plaintiffs to produce the original notice received by him and on his failure to produce it, he had filed an application for leading secondary evidence and he fulfilled all the conditions laid down in Section 65 & 66 of the Evidence Act and the trial Court had wrongly dismissed the application. It was urged that the authenticity or the genuineness of the document is not to be considered at this stage and it is to be left to the trial Court to determine it later but the permission should have been granted to lead secondary evidence. Reliance was placed upon ***Smt. Santosh Kumari Vs. Shadi Lal Manchanda and others 2011(2) PLR 241, Kashmir Kaur Vs. Sukhwant Kaur and others 2006(1) RCR (Rent) 464, M/s. Enn Ess Electronics Jalandhar and others Vs. Smt. Harbans Kaur and others 2009(5) RCR (Civil) 130, Bipin Shantilal Panchal Vs. State of Gujrat 2001(1) RCR (Crimilal) 859 and Meena Sharma Vs. Rama Sharma and others 2007(4) RCR (Civil) 413.***

On the other hand, the submission is that it would be very easy for any party to ask for permission to lead secondary evidence and firstly the existence of the document is to be proved. It was urged that the conduct of the defendant may be seen and in order to wriggle out of that agreement, he has alleged that the plaintiffs had made manipulations and did not insert the necessary clauses in the agreement

which is falsehood and they had paid the entire amount to the bank though it was the duty of the defendants and in terms of the agreement, the loan was to be cleared by the defendants and they have manufactured a document and did not produce its copy along with the written statement and they did not file the copy of the notice or the AD at that point of time and it is easy to manage it later. Relying upon ***Smt. J. Yashoda Vs. Smt. K. Shobha Rani 2007(2) RCR (civil) 840, Pawan Chawla Vs. M/s. Amrit Handloom House & Ors. 2009(5) RCR (Civil) 700*** and ***Joginder Singh Grewal Vs. Gurmeet Singh Grewal and others 2014(48 RCR (Civil) 708***, the submission was that when they have categorically denied the receipt of any notice, it is the petitioner who has to first prove that any such notice was sent and they cannot be allowed to produce a photocopy of the notice.

The question thus arises as to in what circumstances secondary evidence could be led for producing a photocopy of a notice sent by a party. The Apex Court in ***J. Yashoda's case*** (supra) held as under:-

9. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. [Section 65](#) deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under [Section 64](#), documents are to be provided by primary evidence. [Section 65](#), however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the

contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section.

The defendant is yet to prove the existence of the document and he could not make a prayer for producing the same by way of secondary evidence only on the ground that it was not produced by the other side. The document is typed. Its copy was not filed here alongwith the revision. It was filed after taking number of adjournments. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. On a perusal of the notice, it is seen that it is a typed copy. It was not sent though a lawyer. The petitioner did not even say who had typed the letter. The existence of that document is doubtful. I do not find any merit in the revision and is dismissed.

**(ANITA CHAUDHRY)**  
**JUDGE**

November 20, 2017

Sunil

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No