

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

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CR No. 7410 of 2017

Date of decision : October 30, 2017

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Smt. Vishnu Kanta and others

.....Petitioners

Versus

Paropkar Singh and others

.....Respondents

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CORAM: HON'BLE MS. JUSTICE RITU BAHRI

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Present: Mr. Adarsh Jain, Advocate for the petitioners.

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RITU BAHRI, J.

Present revision petition has been filed under Article 227 of the Constitution for setting aside and quashing order dated 16.9.2017 passed by the Civil Judge (Jr. Div.) Hodal, whereby application of Paropakar Singh respondent no1-defendant no.1 for producing secondary evidence has been allowed. Vide this application, respondent no.1/defendant no.1 sought permission to prove the Will dated 25.1.2002 along with affidavits dated 5.3.2007 and 14.2.2007, photostat copies of which were already on record of the case file as mark D-1 to mark D-3 by way of secondary evidence.

Petitioners-plaintiffs filed suit for declaration and permanent injunction (Annexure P-1) that their mother Smt. Sushila Devi died intestate on 20.3.2002 leaving behind her sons and daughters and all of them were

entitled to inherit the suit land in equal share being class-I heirs. In this suit, written statement dated 4.11.2014 (Annexure P-2) was filed by respondent no.1-defendant no.1, whereby a specific plea was taken that a Will dated 25.1.2002 had been executed by Smt. Sushila Devi in favour of respondent no.1-defendant no.1 before her death on 20.3.2002 and he became the sole owner of the property based on the Will and that mutations were granted after joint affidavits were tendered by the petitioners-plaintiffs and the performas respondents-defendants no. 2 to 7 before the Revenue Authorities. Copy of mutation no. 4533 dated 19.4.2007 Ex.D-4 (Annexure P-3) has been placed on record. Respondent no.1-defendant no.1, thereafter, filed an application (Annexure P-4) for leading secondary evidence stating that the original Will dated 25.1.2002 and affidavits dated 5.3.2007 and 14.2.2007 had been produced before the revenue authorities for sanction of the mutation of the inheritance of Smt. Sushila Devi since deceased. The record keeping official of Kanoongo office has lost/misplaced the original documents. Respondent no.1-defendant no.1 also summoned the revenue officials concerned with the record of Will but they could not produce the same. Since the existence of the original Will and affidavits is proved on record and loss of the original documents has also been established on record, therefore permission was sought to prove the documents by way of secondary evidence, the photostat copies of which were already on record of the case file as mark D-1 to mark D-3.

Reply (Annexure P-5) to the said application was filed.

While passing the impugned order, it has been observed that DW-5 Kapoor Singh stepped into the witness box and in his examination in chief, he admitted that he handed over the mutation no. 4533 after original

Will deed and affidavits were produced by Propkar Singh. He also stated that Sushila executed the Will in favour of Propkar Singh. Moreover later on those in original form could not be produced on the case file because despite strenuous efforts none of the revenue officials appeared into the witness box for producing the relevant documents. Since DW-5 Kapoor Singh had admitted sanctioning of mutation no.4533, the application for leading secondary evidence was allowed.

Counsel for petitioner has argued that mere sanctioning of mutation itself would not itself be sufficient to prove that the original Will dated 25.1.2002 along with affidavits dated 14.2.2007 and 5.3.2007 were existing and have got lost. He further argued that mere oral assertion given by DW-5 Kapoor Singh, Kanoongo would not be sufficient evidence to show that the original of the photostat documents marked D-1 to D-3 exists. He has referred to the Supreme Court judgment **Smt. J. Yashoda vs. Smt. K. Shobha Rani, 2007 (2) RCR (Civil) 840** to contend that the secondary evidence can only be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. This judgment of hon'ble the Supreme Court rather goes in favour of the respondent no.1-defendant no.1. In this case, hon'ble the Supreme Court interpreted Section 65 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 is Section 66, such person does not produce it.”

In paragraph 9 of this judgment, Hon'ble the Supreme Court has observed 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. In [Ashok Dulichand v. Madahavlal Dube and Another](#) [1975(4) SCC 664], it was inter alia held as follows:

"After hearing the learned counsel for the parties, we are of the opinion that the order of the High Court in this respect calls for no interference. According to clause (a) of [Section 65](#) of Indian Evidence Act, Secondary evidence may be given of the existence, condition or contents of a document when 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 of, or not subject to, the process of the Court of any person legally bound to produce it, and when, after the notice mentioned in [Section 66](#) such person does not produce it. Clauses (b) to (g) of [Section 65](#) specify some other contingencies wherein secondary evidence relating to a document may be given, but we are

not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of [Section 65](#), the appellant filed applications on July 4, 1973, before respondent No. 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed Photostat copy. Prayer was also made by the appellant that in case respondent no. 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was however, nowhere stated in the affidavit that the original document of which the Photostat copy had been filed by the appellant was in the possession of Respondent No. 1. There was also no other material on the record to indicate the original document was in the possession of respondent no.1. The appellant further failed to explain as to what were the circumstances under which the Photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent No. 1

in his affidavit denied being in possession appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the Photostat copy. We find no infirmity in the above order of the High Court as might justify interference by this Court."

In the facts of the present case, DW-5, Kapoor Singh, Kanoongo had appeared and admitted that the original Will deed and the affidavits had been produced before him at the time of the sanction of the mutation no.4533. He also admitted that Sushila executed the Will in favour of Propkar Singh. Therefore, the existence of those documents stood proved and the photostat copies of those may be admissible in secondary evidence.

There is no infirmity or illegality in the impugned order passed by the Court below that requires interference of this Court. In view of all that has been discussed above, present revision petition is dismissed.

30.10.2017*ritu***(RITU BAHRI)
JUDGE**

Whether speaking/reasoned

Yes

Whether reportable

No