

RSA No. 4645 of 2013

(1)

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No. 4645 of 2013

DATE OF DECISION: 23.3.2017

Hira Singh and another

.....Appellants

Versus

Ajit Singh

.....Respondent

BEFORE:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. S.K. Daaria, Advocate
for the appellants.

Mr. H.S. Baath, Advocate
for the respondent.

DAYA CHAUDHARY, J.

Appellants-Hira Singh and Bachan Singh were defendants before the trial Court. Respondent-plaintiff-Ajit Singh filed a suit for recovery, which was decreed in his favour vide judgement and decree dated 9.1.2012 passed by the trial Court. Thereafter the present appellants filed an appeal before the learned Additional District Judge, Tarn Taran to challenge the judgment and decree dated 9.1.2012 passed by the trial Court. Said appeal was dismissed vide judgment and decree dated 17.1.2013.

After loosing the battle before the two courts below, the appellants have filed the present appeal before this Court to challenge the judgments and decrees passed by both the courts below.

Learned counsel for the appellants submits that both the Courts

below have not appreciated the evidence available on record and wrong and erroneous findings have been given, which are liable to be set aside. The alleged pronote and receipt were prepared by the respondent-plaintiff in connivance with witnesses and the suit was filed on false and frivolous grounds. The statements of PW-1 to PW-3 are contradictory and unbelievable. The first lower appellate Court has not properly appreciated the fact that the pronote and receipt were not proved on record before the trial Court. Those documents were not exhibited and the same were not having any evidentiary value in the eyes of law. The claim of the respondent-plaintiff in the civil suit was based on pronote and receipt, which was missing. It was admitted by him during his cross-examination that no complaint was registered even after missing of the documents. Both the Courts below have not taken into consideration this material fact. Learned counsel further submits that Jagtar Singh, the scribe of the pronote was not produced as witness and without recording his statement, the pronote and receipt could not be proved on record and were not admissible as per Indian Evidence Act, 1872 (hereinafter referred to as 'the Act'). It is also the argument of learned counsel for the appellants that the alleged pronote and receipt were specifically denied by the appellants and the alleged signatures on the said pronote and receipt were to be proved by the respondent-plaintiff. Learned counsel has also relied upon the judgment of this Court in the case of **Mukesh Kumar alias Motta Vs. State of Haryana** 2011 (1) RCR (Criminal) 356.

Learned counsel for the respondent submits that the judgments and decrees passed by both the Courts below are well reasoned and are based on proper appreciation of evidence and no ground is made out to set

aside the concurrent findings recorded by both the Courts below. Learned counsel further submits that simply a denial was there and no evidence was led by the appellant-defendants to show that the pronote and receipt in dispute were illegal, void and forged documents. The bald statement of defendant-Hira Singh has not been corroborated by any other evidence. It has been proved on record that nothing was paid by the appellants-defendants to the respondent-plaintiff towards loan amount and as such there is no illegality in the findings recorded by the trial Court as well as by the lower appellate Court.

Heard the arguments advanced by learned counsel for the parties and have also perused the judgments and decrees passed by both the Courts below.

The trial Court in the suit filed by the respondent-plaintiff has framed the following issues:-

1. Whether defendant executed a pronote and receipt dated 05.12.2005 in favour of plaintiff? OPP.
2. Whether the plaintiff is entitled recovery anything from defendants on the basis of such pronote and receipt? OPP.
3. Whether the alleged pronote and receipt are illegal, null, and void, forged and fabricated? OPD.
4. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD.
5. Whether the present suit is not within period of limitation? OPD.
6. Relief.

The trial Court while allowing the suit of the respondent-plaintiff recorded following findings:-

“The counsel for defendants argued that the dangers receipt does not bear the signatures of replying defendant and the alleged pronote and receipt is illegal, null and void as original is not produced on the file and as far as secondary evidence for proving the pronote is concerned the loss is not proved. So in these circumstances the pronote is not proved on the file as the scribe has not come present to depose in the court and counsel for defendants drawn my attention to the cross examination of PW2 who also show his ignorance regarding registration of any FIR for the loss of pronote and he further drawn my attention to the cross examination of PW2 where he stated that Ajit Singh plaintiff told him regarding loss of pronote and argued that accordingly, loss of the document is not proved. So it cannot be read into evidence. On this counsel for plaintiff argued that the plaintiff specifically proved the loss when he appeared as PW1 and specifically stated that when he was coming from the village Narla to Patti to meet his counsel to discuss regarding pronote on that day, the original pronote and receipt alongwith some other documents have been lost. So to my mind the evidence of a person on oath is enough to prove any fact and in this case plaintiff has specifically stated that the pronote has been lost. The other argument of the defendant that the alleged pronote does not bear the signature of defendants Hira Singh and Bachan Singh is also not convincing, as the marginal

witness PW2 has specifically stated that the pronote and receipt was executed and it was scribed by Jagtar Singh at the instance of Hira Singh defendant no.1 and after scribing the same, it was read over and explained to defendants and after admitting the same, Hira Singh defendant no.1 signed in English on pronote and receipt after receiving a Rs.1,35,000/- in cash. PW2 specifically stated that Ajit Singh plaintiff paid a sum of Rs.1,35,000/- in cash to Hira Singh defendant no.1 and defendant no.2 Bachan Singh who is the father of defendant no.1 had also put his guarantee that he is responsible to return back the loan amount alongwith interest.”

Similarly, the finding recorded by the lower appellate Court are reproduced as under:-

“On the other hand, there is simple denial on behalf of the defendant Hira Singh, which is not corroborated by any evidence and as such it stands proved that the defendants executed the pronote and receipt dated 05.12.2005 in favour of the plaintiff when the loan of Rs.1,35,000/- was taken by Bachan Singh who is father of Hira Singh signed the pronote Ex.P1 and the receipt Ex.P2 as guarantor. It also stands proved that nothing has been paid by the defendants to the plaintiff towards the loan amount. So, there is no illegality in the findings returned by the trial Court on issues no.1 and 2. So, both these issues are decided in favour of the plaintiff while affirming the findings on these issues returned by the learned

trial Court.

No evidence has been led by defendants that the pronote and receipt in question is illegal, void or forged document. There is a bald statement of defendant Hira Singh uncorroborated by any other evidence and as such it cannot be said that the pronote and receipt in question is illegal, void or a forged document. So, issue no.3 is decided against the defendants and findings on this issue returned by the trial Court are hereby affirmed.”

The case as set up by the respondent-plaintiff-Ajit Singh is that appellant-defendant No.1-Hira Singh borrowed a sum of Rs. 1,35,000/- from him for carrying on business as Commission Agent and executed a pronote and receipt in lieu thereof in the presence of the witness. He promised to repay the loan amount on demand but he failed to repay the amount. To prove the execution of pronote Ex. P1 and receipt Ex P2 by the appellants-defendants, the respondent-plaintiff himself appeared as PW-1 and reiterated the facts as mentioned in the suit. The original pronote and receipt were not proved on record as the same were stated to have been lost along with other documents. There was simple denial of pronote and receipt on the part of appellant-defendant No.1 Hira Singh. Both the Courts below have held that the documents i.e. pronote as well as receipt were proved on record and also that a sum of ₹1,35,000/- was borrowed by Bachan Singh as loan, who is father of Hira Singh. Both the courts below have also held that no evidence has been led by the appellants-defendants to prove that the pronote as well as the receipt are illegal, void and forged document.

For deciding the controversy in hand, Sections 63 and 65 of the Act are relevant and the same are reproduced as under:-

“63. Secondary evidence means and includes—

(1) certified copies given under the provisions hereinafter contained;

(2) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies.

(3) copies made from or compared with the original ;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a documents given by some person who has himself seen it.

Illustration:

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original.”

“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 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 40[India]

to be given in evidence ;

(g) when the originals consist 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, 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.”

A perusal of aforesaid sections clearly shows that both the sections relate to the cases, wherein, secondary evidence relating to documents may be given. The secondary evidence may be given of the existence, condition or contents of a document in the cases as mentioned therein.

In the present case, original documents were in the custody and possession of the respondent-plaintiff. He while appearing as PW-1 has stated that the original documents were lost and he was having photocopies thereof. Both the Courts below have failed to establish as to how the respondent-plaintiff has been able to get the photocopies of the documents, which can be prepared by manipulation and presented as original. Therefore, it is normally unsafe to allow the production of photocopy of the documents as secondary evidence. The basic principle relating to evidence

is to be produced as the best evidence available ought to be produced. Original document is the best and primary evidence but Section 65 of the Act provides other alternative methods for producing and proving documents, which for various reasons cannot be produced. Secondary evidence is admissible in respect of conditions mentioned in Clauses (a) to (g) of Section 65 of the Act. The purpose is to give protection to such persons who despite their intentions and efforts are unable to produce on record the preliminary evidence because of the circumstances beyond their control. In case the original document is destroyed by the person in whom it created an enforceably legal right or an obligation then the secondary evidence of the same is not normally to be allowed.

The pre-conditions for leading secondary evidence are that such original documents could not be produced by the party relied upon such documents inspite of best efforts but unable to produce the same, which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of preliminary evidence unless it is established that the original document is lost or destroyed or being deliberately withheld by the party in respect of that document sought to be used as secondary evidence in respect of that document cannot be accepted.

Hon'ble the Apex Court in the case of ***M. Chandra vs. M. Thangamuthu***, (2010) 9 SCC 712 has considered the requirement of Section 65 of the Evidence Act and held as under:-

“47. We do not agree with the reasoning of the High Court. It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be

admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party.”

It is well settled proposition of law that in case the party wants to lead secondary evidence, the Court is to examine the probative value of the document to be produced in the Court or to decide the question of admissibility of a document in a secondary evidence. The party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. Simply by saying that original document has been lost, is not sufficient to allow the party to lead secondary evidence.

In the present case also, the pronote and receipt have not been proved on record as per provisions of Sections 63 and 65 of the Act and as such photocopy of the documents have no evidentiary value in the eyes of law. It has been stated by the respondent-plaintiff that the pronote and receipt have been lost but it has been admitted in cross-examination that no complaint was registered after missing of said documents. Even the scribe of said document was not examined before the trial Court and it was not proved on record that the photocopies of those documents were admissible

under the Act. The burden to prove was upon the respondent-plaintiff as to how the original documents were lost or any complaint was made thereafter or not. It was not the duty of the appellants-defendants to examine any witness to prove that the alleged pronote and receipt does not bear their signatures and as such the findings recorded by both the Courts below are not only contrary to the facts and circumstances of the case but also contrary to the provisions of Section 63 and 65 of the Act. Same view was taken by Hon'ble the Apex Court in the case of **Rakesh Mohindra Vs. Anita Beri and others** 2015 (4) RCR (Civil) 1023.

In view of the facts and law position as explained above, there is merit in the contentions raised by learned counsel for the appellants. Accordingly, the present appeal is allowed and judgments and decrees passed by both the Courts below are hereby set aside.

23.3.2017
pooja

(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
Yes