

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

**(1) RSA No.2486 of 2010 (O&M)
Date of Order: 11.05.2018**

Anil Kumar

..Appellant

Versus

Smt. Shanti Devi

..Respondent

(2) RSA No.3901 of 2010 (O&M)

Smt. Shanti Devi

..Appellant

Versus

Anil Kumar

..Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. O.P.Sharma, Advocate,
for the appellant (in RSA No.2486 of 2010)
for the respondent (in RSA NO.3901 of 2010)

Mr. Rakesh Dhiman, Advocate,
for the appellant (in RSA No. 3901 of 2010)
for the respondent(in RSA No.2486 of 2010)

ANIL KSHETARPAL, J(Oral)

By this judgment, Regular Second Appeal Nos. 2486 and 3901 of 2010, filed by the plaintiff and the defendant, respectively, shall stand disposed of as both are arising out of the same suit. Main appeal being RSA No.3901 of 2010 has been filed by the Plaintiff-appellant against concurrent findings of fact arrived at by the courts below.

Plaintiff Smt. Shanti filed a suit claiming to be widow of late

Sh. Ganeshi Lal.

On the other hand, defendant claims that Smt. Shanti is not the widow and late Sh. Ganeshi Lal had executed a registered Will in his favour on 02.06.1995. Defendant further pleaded that the plaintiff was not the wife of Ganeshi Lal, whereas Smt. Krishna daughter of Shankar Lal was the wife of Ganeshi Lal.

Learned trial court after appreciating the evidence available on the file, dismissed the suit while recording a finding that the plaintiff has failed to prove that she was the wife of late Sh. Ganeshi Lal. The court further held that the registered Will stands proved as scribe, attesting witness Hari Singh, Sub-Registrar who registered the Will and registration clerk have been examined in evidence.

Plaintiff filed the first appeal. Learned first appellate court upheld the finding of the trial court that the plaintiff is not proved to be wife of late Sh. Ganeshi Lal. However, learned first appellate court held that the Will is not proved as the original will was not produced and no permission was sought for leading secondary evidence. Learned first appellate court, however, committed an error in partly accepting the appeal although the suit filed by the plaintiff was to be dismissed. Once the Court had found that plaintiff was not the wife of late Sh. Ganeshi Lal, that is how the defendant-appellant is also in appeal.

Learned counsel for the appellant-Shanti Devi in RSA No.3901 of 2010, while relying upon Ex.P1, a copy of the voter list prepared in the year 1970 to assert the relationship between Shanti Devi and Ganeshi Lal is proved. He further submitted that Smt. Shanti Devi is also getting a widow's pension from the Welfare Department. He has also submitted that brother of late Sh. Ganeshi Lal had appeared on her behalf and had

supported her case.

On the other hand, learned counsel for the defendant-respondent has submitted that when Smt. Shanti Devi appeared in the evidence in Court, she could not even disclose the names of the family members and close relatives of late Sh. Ganeshi Lal. He has further referred to Ex.DW7/A, Ex.DW7/B and Ex.DW7/C, to assert that late Sh. Ganeshi Lal was married to Smt. Krishna.

In the considered opinion of this Court, following questions of law arises for determination:-

“Whether a separate application for permission to lead secondary evidence is required to be filed before secondary evidence can be taken into consideration?”

Sections 63, 65 and 66 of the Evidence Act does not provide for filing any formal application for permission to lead secondary evidence. Section 65 of the Act only provides that the secondary evidence may be given by the party in the absence of primary evidence. Normal practice is that a separate application is filed. However, in cases where secondary evidence has already been led, courts should not ignore the evidence led only on the ground that application for permission has not been filed and allowed. Secondary evidence has been defined in Section 63 of the Act, whereas Section 65 of the Act deals with cases in which secondary evidence relating to documents may be given. Sections 63 and 65 of the Evidence Act are extracted as under:-

63. Secondary evidence

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 he 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 documents 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 careful reading of the aforesaid provisions does not in any manner suggest that a formal separate application is required to be filed.

Further learned counsel for the appellant could point out from the judgment of the trial court that any objection in this respect was ever taken. In such situation, plaintiff-appellant could not be permitted to raise this objection at the time of hearing of the first appeal.

In view of the above, the first appellate court committed an

error in overlooking the evidence on the ground that no permission was sought. In the present case, certified copy of the registered Will was exhibited. Original record available with the office of the Sub-Registrar was brought before the Court for examination. Attesting witness and scribe of the Will as well as the Sub-Registrar have been examined in evidence to prove the execution of the registered Will.

Hence, question of law framed earlier is answered in favour of the defendant.

As far as argument of learned counsel for the appellant that the voter list prepared in the year 1970 establishes the relationship between Shanti and Ganeshi Lal, does not have much substance.

In this case, both the courts have examined the evidence in detail and on appreciation of the evidence, courts have found that the plaintiff is not proved to be the wife of Ganeshi Lal. The courts have noticed that in the voter list for the year 1999, name of the plaintiff was not recorded whereas her name was included subsequently in the year 2000. Defendants have summoned voter list for the years 1975, 1982, 1987, 1995 and 1999 and name of Shanti Devi is not found along with Ganeshi Lal, whereas all other family members have been enrolled as voters.

As regards argument that Smt. Shanti Devi is getting widow's pension from the Welfare Department, it may be noticed that the aforesaid widow's pension has been sanctioned after the death of Ganeshi Lal. No evidence has been produced on file to prove that the Welfare Department carried out any investigation or verification before sanctioning the pension.

As regard the evidence of the brother of Ganeshi Lal, it is sufficient to mention that his evidence is not supported by any documentary

evidence. Defendant has further produced on record Ex.DW10/1 and examined “Pandas” from Gar Mukteshwar to prove that as per bahi entry (Note Book), Krishan Devi is recorded as wife of Ganeshi Lal and elder brother of late Sh. Ganeshi Lal had brought the ashes of Krishna for immersion in the river Ganga. He has deposed that it is their family profession, which is followed from generation to generation and they are maintaining the record in regular course. The entry in the register brought by him is more than 30 years old and has been maintained in due course.

In view of the discussion made above, there is no ground to interfere with the concurrent findings of fact arrived at by the courts below.

The regular second appeal No.3901 of 2010 is dismissed whereas Regular Second Appeal No.2486 of 2010 is allowed.

May 11, 2018
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No