

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Civil Revision No.408 of 2019

Date of Decision: 07.05.2019

Som Nath

...Petitioner

versus

Smt. Kamla Rani and others

...Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Varun Sharma, Advocate,
for the petitioner.

Mr. Nippun Sharma, Advocate,
for respondents no.1 and 2.

Amol Rattan Singh, J.

Vide this petition, the petitioner, i.e. the plaintiff before the learned Civil Judge (Junior Division), Jalandhar, challenges the order passed by that court on 15.12.2018, allowing the application filed by the contesting respondents (contesting defendants before the trial court), seeking to lead secondary evidence in the suit.

As per the application (copy Annexure P-4 herewith), such secondary evidence was sought to be led in the context of an agreement dated 25.06.1980 executed by Bimla Devi (mother of the petitioner-plaintiff), by which the suit property was to be sold to respondent no.2 herein, i.e. Bhagirath, for a sale consideration of Rs.30,000/-.

It was further contended in the application, that as per the testimony of Bhagirath before the trial court, the written agreement had been taken away from him by Bimla Devi on the ground that she was to execute a power of attorney in respect of the said property; but thereafter, she did not return the document (as contended in the application).

It was further contended in the application that despite an application separately moved before the trial court, seeking that the plaintiff be asked to produce the said agreement, he had not done so, and therefore, secondary evidence may be permitted to be led.

2. Notice having been issued in the application, the petitioner-plaintiff filed a reply thereto (copy Annexure P-5 with the present petition), raising preliminary objections on the maintainability of the application on the ground that even cross-examination of the defendants already having been conducted, and further, that with DW3 Ashok Kumar having stated that the original agreement had already been produced on judicial file but with DW2 Kiran having stated that she was in possession of the agreement and that she was willing to produce it, the applicants could not file the application in the face of the contradictory stands taken.

3. In the reply on the merits of the application, the petitioner-plaintiff refuted the execution of the agreement itself, further stating that if any such agreement had been executed, it would have been in the possession of the purchasers, i.e. the defendants, and consequently, the application deserved to be dismissed.

4. Having considered the contentions on both sides, the learned trial court, vide the impugned order, first referred to the essential conditions on which secondary evidence could be led, in terms of Section 65 of the Indian Evidence Act, 1872, and thereafter recorded a finding that in his cross-examination, DW1 Bhagirath, had specifically stated that the original agreement was returned to Bimla Devi.

It was further recorded that though cross-examinations of the DWs had been conducted, they had not been concluded; and further, no prejudice

would be caused to the plaintiff if the application was allowed because the plaintiff would get an opportunity to “shatter the genuineness of the agreement” by way of cross-examination.

5. Hence, next recording that a perusal of the case file revealed that the applicant was not in possession of the original document, i.e. the agreement, and it was lying in the possession of the other party, there was a legal and valid reason for the application to be filed.

Consequently, observing to the effect that “subject to proof of existence and loss of agreement and all just exceptions of Section 65 of Indian Evidence Act”, the application was allowed.

6. Before this court, upon notice having been issued, learned counsel for the parties have addressed arguments essentially in terms of what was contended before the trial court, with learned counsel for the petitioner-plaintiff submitting that there being contradictory statements made by the witnesses for the respondent-defendants, with one witness (DW1) stating that the original agreement had already been produced on file, whereas the other witness (DW2) stated that she was in possession of the agreement, obviously the allegation made in the application itself, to the effect that it was returned to the mother of the petitioner (plaintiff) and therefore secondary evidence with regard to the said agreement was required to be led, is a wholly untrue contention.

7. Learned counsel for respondents no.1 and 2 on the other hand reiterated the stand that the petitioner-plaintiff not having produced the original agreement despite an application filed before the trial court seeking a direction to him to do so, there was no choice with the defendants but to lead secondary evidence qua the document.

8. To consider the contentions raised, first of all Section 65 of the

Indian Evidence Act, 1872, which is the provision that deals with secondary evidence being led, needs to be referred to and is reproduced hereinbelow:-

“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 evidence²; 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.”

Thus, the condition sought to be invoked by the respondent-

defendants for leading secondary evidence is contained in clause (a) of the aforesaid provision (their contention being that the original document was returned to the mother of the petitioner-plaintiff and therefore is out of reach for them), though of course the petitioner is wholly denying any such possession of the document by him or his mother.

10. Having considered the matter, though the testimonies of the witnesses for the respondent-defendants have not been placed on record in the present case to specifically point to any contradictions contained therein as to the status of the aforesaid document and its possession, in my opinion, the impugned order needs to be set aside with a direction needed to be given to the trial court to pass a detailed order specifically referring to any contradictions in the testimonies of the witnesses for the defendants, as regards the possession of the document, i.e. the agreement in question, and then determine as to whether in the light of those testimonies, the application filed by the respondent-defendants is maintainable or not, inasmuch as whether the testimonies would point to the fact that the document is/was actually in possession of the petitioner-plaintiff or his mother, or whether it would appear from the statements of such witnesses that the document was in the possession of the defendants.

The aforesaid direction is considered necessary in view of the fact that the allegation of the petitioner-plaintiff is that DW1 Bhagirath specifically first stated that the original agreement had been produced on the judicial file, a further allegation being that on the other hand, DW2, Kiran, had admitted (as contended on behalf of the petitioner-plaintiff), that the document was in her possession. Obviously, if that is actually an admission made by DW2, then it could not be in the possession of the plaintiff or his mother, unless of course,

the learned trial court, after appraising the aforesaid and any other testimonies necessary to be looked at, comes to a positive finding that no such admission had been made by the defendants' witnesses, or that any such admission made was completely out of context and actually did not point to the fact that the document was in possession of either DW2 or any other defendant. That court would also examine as to whether the original document had at any stage been actually placed on the judicial file or not, in terms of the testimony of DW1 Bhagirath (as has been alleged on behalf of the petitioner-plaintiff).

11. Thereafter, recording its finding with detailed reasons after scrutiny of the testimonies, by referring to such part of testimonies as would be necessary, that court would pass a fresh order on the application filed under Section 65 by the respondent-defendants.

Consequently, while allowing this petition and setting aside the impugned order, the trial court is directed to ensure that at the time when it considers the secondary evidence led before it, it would, naturally, specifically also refer to the testimonies of the witnesses for the respondents, bringing out any contradiction contained therein qua the status of the document sought to be now led by way of secondary evidence, and thereafter, after looking at other circumstances and evidence led before it, pass a detailed and reasoned order as to whether the said document can be accepted by way of secondary evidence or not, though even if that is so, naturally, it would still need to be proved to be an agreement between the parties.

With the aforesaid directions, this petition is allowed.

May 07, 2019

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DINESH
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I attest to the accuracy and
integrity of this document

(AMOL RATTAN SINGH)
JUDGE