

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

CR No. 5516 of 2007 (O&M)

Date of decision: March 14, 2019

Sham Gopal

...Petitioner

Versus

Ved Parkash and others

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. Sarju Puri, Advocate,
for the petitioner.

Mr. Kuldip Sanwal, Advocate,
for the respondents.

JAISHREE THAKUR, J.

1. This revision has been filed under Article 227 of the Constitution of India with a prayer for setting aside the order dated 11.10.2007 passed by the Rent Controller, Nawanshahar, whereby the application filed by the respondents for permission to lead secondary evidence has been allowed.

2. In brief, facts are that the petitioner herein filed a petition under Section 13 of the East Punjab Urban Rent (Restrictions) Act, 1949 for ejectment of the respondents from the premises in question. It was averred in the petition that earlier Varinder Mohan Khosla was the owner of the premises in dispute and thereafter the petitioner by way of registered sale deed dated 27.9.1998 became the owner of the premises in question. It was

further averred that on 1.6.1981, Sham Dass had taken the premises on rent at the rate of ₹1500/- per month from earlier owner namely Varinder Mohan Khosla. It was further stated that the said Sham Dass had sublet the premises to one Lekh Raj on 1.4.1982 and thus neither Sham Dass nor his legal representatives i.e. Ved Ram and Madan Lal were in possession of the premises in question. The sublettee constituted a firm under the name and style as Lekh Raj and Brothers and continued in occupation of the premises in question as sub-tenants without consent of the previous as well as present landlord, the petitioner herein.

3. The petition was contested by respondents No. 3, 4 and 6 by filing written reply, inter-alia, contending that the petition is not maintainable for want of mis-joinder of necessary parties. It was stated that the property was in the ownership of Amar Nath and Kedar Nath from whom M/s Sham Dass Lekh Raj took on rent about 35 years ago through Kedar Nath Khosla and since then M/s Sham Dass Lekh Raj is in possession as tenant and they are using the tenanted premises as godown from the inception of tenancy.

4. During the course of the trial, the respondents filed an application for leading secondary evidence in relation to Partnership Deeds dated 13.4.1954, 9.12.1972 and 25.1.1983, all pertaining to the firm M/s Sham Dass Lekh Raj on the ground that the original Partnership Deeds have been misplaced and the same could not be traced out despite best efforts made by them, though they are in possession of attested copies thereof and therefore sought to prove the same by seeking permission to lead secondary evidence.

5. The application was contested by the petitioner on the ground that the Partnership Deeds as set up never existed and the copies thereof are fabricated and manipulated. It was submitted that original deeds, if any are submitted to the Income Tax Department and they are never returned to the assesses. As such, the question of loss of the alleged original Deeds does not arise. The Rent Controller, as already noticed, allowed the application, giving rise to the instant revision.

6. Learned counsel for the petitioner submits that after a period of 8 years and after last opportunity was granted to the respondents to lead their evidence on 9.3.2007, they moved the application for leading secondary evidence on 15.5.2007 and that too in respect of the three Partnership Deeds, which were not referred to in the reply filed by them. It is further submitted that even the date of loss off or any complaint regarding loss of the partnership deed has not been mentioned. It is further submitted that the respondents are seeking to rely on attested photocopies of the partnership deed when there were no photostat machines available in the year 1966 and 1972 and therefore, the question of there being attested copies of the original does not arise. It is further submitted that photostat copy of the original cannot be received as secondary evidence under Section 63 read with Section 65 of the Evidence Act and as such, the impugned is liable to be set aside on this ground. In support of his arguments, learned counsel relies on the judgment rendered in **Smt. J. Yashoda Versus Smt. K. Shobha Rani 2007 (2) RCR (Civil) 840**.

7. Per contra, learned counsel appearing on behalf of the respondents, while supporting the impugned order, submits that in order to

lead secondary evidence the pre-requisite proof of existence as well as loss of the documents has been proved and therefore, the Rent Controller has rightly granted permission to the respondents to lead secondary evidence and no interference is called for in the instant revision.

8. I have heard learned counsel for the parties and also perused the record.

9. The only question that arise for consideration is whether the impugned order allowing the secondary evidence to be led is sustainable?

10. Admittedly, the respondents herein, who are tenants in the disputed premises, applied for permission to lead secondary evidence in relation to Partnership Deeds dated 13.4.1954, 9.12.1972 and 25.1.1983 in support of their case that there was no subletting. In fact, the petitioner/landlord sought eviction on the ground that the tenant had sublet the said premises, whereas the plea was being set up by the tenants that there was no subletting since the partnership firm was in possession of the premises as tenant. The application was contested and eventually allowed by the Rent Controller.

11. Learned counsel for the petitioner argues that Section 63 of the Evidence Act pertains to secondary evidence which means it includes (i) certified copies given under the provisions hereinafter contained; (ii) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies; (iii) copies made from or compared with the original; (iv) counterparts of documents as against the parties who did not execute them; and (v) oral accounts of the contents of a document given by some person who has himself seen it. It is

argued that photo copies/Xerox copies in the absence of the original is not permissible in evidence as secondary evidence. It is further argued that an application filed seeking permission to lead secondary evidence does not state as to how the original were lost or misplaced, while further arguing that at the time of registration of a firm there is mandatory requirement for the original partnership deed to be submitted with the Income Tax Department and it was always open for the respondents to get certified copies from the Income Tax Department. It is further argued that requirement of Section 65 of the Indian Evidence Act has not been satisfied in so far the secondary evidence could be led by summoning records from the Income Tax Department.

12. The Hon'ble Supreme Court in **Smt. J. Yashoda's case (supra)**, while dealing with the question of allowing secondary evidence came to hold that as a general rule, secondary evidence would be led only in the absence of primary evidence and secondary evidence may be allowed in the absence of better evidence available, when proper explanation for its absence is given. In a judgment rendered in **H. Siddiqui (dead) by Lrs Vs. A. Ramalingam 2011 (2) Civil Court Cases 405**, it has been held as under:-

“Provisions of Section 65 of the Act 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non

*production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide: **The Roman Catholilc Mission & Anr. v. The State of Madras & Anr.**, AIR 1966 SC 1457; **State of Rajasthan & Ors. v. Khemraj & Ors.**, AIR 2000 SC 1759; **Life Insurance Corporation of India & Anr. v. Ram Pal Singh Bisen**, (2010) 4 SCC 491; and **M. Chandra v. M.Thangamuthu & Anr.**, (2010) 9 SCC 712)”*

13. Similarly, in **M/s Parkash Chand Kapoor Chand Versus Inderjit Singh and others 2007 (1) SLJ 127**, it has been held as under:-

“...The principle underlying the provisions of Section 65 of the Evidence Act is that the best evidence that is available should be produced. The original document is always the best and primary evidence. Section 65 provides an alternative method of proving the contends of a document which for various reasons cannot be produced. However, it is liable to be shown that the original document of which secondary evidence is sought to be produced was in existence. Besides, secondary evidence is admissible when it is shown that the primary evidence which is the original document was in existence...”

14. Recently in **U. Sree v. U. Srinivas, 2013 (1) RCR (Civil) 883**, the Hon'ble Supreme Court has held that mere denial by the party to produce the original document in whose possession it is stated to be does not lay down ground for producing secondary evidence.

15. Section 65 of the Indian Evidence Act enumerates in which cases secondary evidence relating to documents can be led. Section 63 (2) may be referred to which allows a document to be admitted as secondary evidence, being a copy prepared by mechanical process and the correctness of the Photostat document has to be established. In a situation where photostat copy of a document is produced and there is no proof of its accuracy or of it having been compared with or it being true reproduction of the original, such document cannot be considered as secondary evidence. In other words, photostat copy of a document is not admissible as secondary evidence unless proved to be genuine or is admitted by opposite party. Thus a Photostat copy of a document can be produced in evidence only when it is alleged and proved that the original was in existence and is lost or destroyed or is in possession of opposite party who failed to produce it or in any other circumstances mentioned in section 65 of the Act.

16. In the instant case, the written statement/reply of respondent is available on record (Annexure P/4), which is silent regarding execution of any partnership deeds. The application to lead secondary evidence has been allowed, giving an opportunity to the petitioners herein to object regarding admissibility of the same.

17. In **Surinder Kaur v. Mehal Singh and others 2014(1) R.C.R. (civil) 467** it has been held as under:-

- "a) *Photostat copy of a document can be allowed to be produced only in absence of original document.*
- b) *When a party seeks to produce Photostat copy it has to lay the foundational facts by proving that original document existed and is lost or is in possession of*

opposite party who failed to produce it. Mere assertion of the party is not sufficient to prove these foundational facts.

- c) The objections as to non existence of such circumstances or non existence of foundational facts must be taken at earliest by the opposite party after the photostat copy is tendered in evidence.*
- d) When the opposite party raises objection as to authenticity of the Photostat copy its authenticity has to be determined as every copy made from a mechanical process may not be accurate. Both the requirements of clause (2) of section 63 are to be satisfied.*
- e) Allowing production of Photostat copy in evidence does not amount to its proof. Its probative value has to be proved and assessed independently. It has to be shown that it was made from original at particular place and time.*
- f) In cases where the Photostat copy is itself suspicious it should not be relied upon. Unless the court is satisfied that the Photostat copy is genuine and accurate it should not be read in evidence .*
- g) The accuracy of photostat copy shall be established on oath to the satisfaction of court by the person who prepared such copy or who can speak of its accuracy."*

18. In view of the above, it is a settled principle of law that mere exhibition of a document does not dispense with proof of its execution. Therefore, photostat copies of the documents are required to be proved in terms of their execution. This court finds no ground to interfere with the impugned order since the petitioner herein has been allowed opportunity to raise objection regarding the genuineness of the documents sought to be proved by way of secondary evidence.

19. Consequently, the revision petition is dismissed. However, since this matter has remained pending in this court for several years, the trial court is hereby directed to decide the issue of admissibility of photostat copies of the partnership deeds at the earliest, preferably within a period of three months on receipt of certified copy of this order in terms of the direction given in **Surinder Kaur case (supra)** and conclude the case within a period of six months thereafter.

March 14, 2019
prem

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
No