

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

**CR No. 5744 of 2015
Date of Decision : 18.1.2019**

Surender

.....Petitioner

v.

Samundri and others

.....Respondents

CORAM : HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present : Mr. Abhinav Sood, Advocate, for the petitioner

Mr. Vishwajeet, Advocate, for respondent no.1

Mr. Ajay Ghangas, Advocate, for respondents no.2 to 6

Amol Rattan Singh, J. (Oral)

By this petition the petitioner challenges the order of the learned trial Court Additional Civil Judge (Senior Division), Ganaur, dated 14.8.2015 (copy Annexure P-5), by which the application filed by the respondent-defendants under Section 65 of the Indian Evidence Act, 1872, has been allowed.

Vide the said application the defendants sought to lead, by way of secondary evidence, an agreement of sale contended by them to have been entered into by defendant No.1 with one Mahabir Prashad Jain (not a party to the lis) on 19.11.2010, that allegedly being the basis of the sale deed executed between defendant No.1 and defendants No.2 to 6, the suit property having been further sold by Mahabir Prashad Jain to defendants No.2 to 6 on the strength of the agreement of sale in his favour (as contended).

The application for leading secondary evidence was filed on the

ground that on the date that the said agreement was to be proved in evidence, Mahabir Prashad Jain is contended to have been coming to Court with it but lost the bag containing the agreement, in respect of which loss an FIR was registered on the same date, i.e. 19.11.2014.

The learned trial Court, after considering the arguments made before it on the aforesaid application, eventually held that since the FIR had been registered on the same day, the reasoning given in the application was plausible and in any case simply by placing a copy of the agreement on record by way of secondary evidence did not amount to the said agreement being actually proved, which of course would need to be proved to the satisfaction of that Court.

On the aforesaid reasoning, the application was allowed.

Before this Court learned counsel for the petitioner first points to Order 8 Rule 1A of the CPC which is reproduced as follows :-

“1A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him – (1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set off or counter claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

(2) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to documents -

(a) produced for the cross-examination of the plaintiff's

witnesses, or

(b) handed over to a witness merely to refresh his memory.”

He, therefore, submits that with not even a copy of the alleged agreement having been annexed with the written statement, the application seeking to prove the said agreement by way of secondary evidence, was only an after thought after the document had been created.

He further submits that in the sale deed executed in favour of defendants no.2 to 6 (also respondents no. 2 to 6 in this petition), not even a reference to the aforesaid agreement of sale has been made, which further proves the fact that actually it was a subsequently created document and consequently, the application under Section 65 of the Indian Evidence Act should have been dismissed.

In reply thereto, learned counsel for the respondent submits that as a matter of fact a legal notice was issued by defendant No. 1 to Mahabir Prashad Jain on 18.11.2011, referring to the aforesaid agreement of sale dated 19.11.2010, with another legal notice having been issued by Mahabir Prashad Jain to defendant No. 1 on 16.4.2012, again referring to the same agreement of sale.

However, on query by the Court, he is not certain whether the aforesaid legal notices were also annexed with the written statement, as a part of the documents, though the agreement of sale in question has been duly referred to in paragraph 1 of the reply on merits in the written statement.

He next submits that a suit seeking specific performance of the said agreement dated 19.11.2010, was instituted by Mahabir Prashad Jain on 30.5.2012, which was subsequently withdrawn on a compromise stated to have been reached between him and respondent No.1 herein, Samundri.

In rebuttal, learned counsel for the petitioner submits that despite all the aforesaid arguments raised by learned counsel for the respondents, they have not been able to show even here that there was any communication at all with the petitioner with regard to the agreement of sale now sought to be led by way of secondary evidence.

Having considered the aforesaid arguments, though learned counsel for the petitioner is correct that in terms of Rule 1A of Order 8 of the CPC, at least a copy of the agreement of sale relied upon by the respondents-defendants should have been produced with the written statement, factually it has been very much referred to in the written statement.

Hence, considering the fact that the learned trial Court has already observed that simply by placing a copy of the said document on record by way of secondary evidence does not prove such document, with that document having to be fully proved beyond doubt after evidence is led by both parties before that Court, this petition is disposed of by maintaining the impugned order, but with a direction to the trial Court to duly take into consideration what is stipulated in Rule 1A of Order 8 CPC at the time of adjudicating upon the genuineness (or otherwise) of the document sought to be led by way of secondary evidence.

Naturally, to reiterate, the genuineness of the document shall have to be proved by the respondent-defendant.

(AMOL RATTAN SINGH)
JUDGE

18.1.2019

Ashwani

Speaking/Reasoned
Reportable

Yes/No
Yes/No