

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

CR No.7211 of 2017

Date of Decision: September 03, 2019

Ashok Kinger

.... Petitioner

Versus

Pradeep Kinger & Ors.

.... Respondents

CORAM: HON'BLE MR. JUSTICE SUDIP AHLUWALIA

Present: Mr. Ramesh Kumar Bamal, Advocate for the Petitioner.

Mr. Manish Joshi, Advocate for the Respondents.

SUDIP AHLUWALIA, J.

This Revisional Application is directed against the order dated 15.09.2017 passed by the Ld. Civil Judge (Senior Division), Chandigarh, in Civil Suit No.1219 of 2015.

2. Vide the impugned order, the Ld. Court below had allowed an Application filed by the Respondent/Defendant No.1 under Section 65 of the Indian Evidence Act to adduce secondary evidence in order to prove the Will dated 8.1.2006, claimed to have been executed by his father Shri Hardyal Kinger (since deceased), who was also father of the Petitioner/Plaintiff. The grounds on which such secondary evidence was sought to be led have been noted by the Ld. Court below as follows -

“2.....that after the death of Sh. Hardyal Kinger, the

plaintiff took the original Will along with other documents from the house. During the renovation work carried out in the house, the defendant No.2 found certain documents pertaining to Sh. Hardyal Kinger and she handed over all the documents to the defendant No.1 as she is an illiterate lady. During the scrutiny of the documents handed over by defendant No.2 to defendant No.1, the defendant No.1 found a photocopy of Will dated 08.01.2006 executed by Sh. Hardyal Kinger. Thereafter, the defendant No.1 enquired about the genuineness of the Will from defendant No.2 and one of its witness namely Sh. Gurdev, who told the defendant No.1 that Sh. Hardyal Kinger had executed this Will. Even defendant No.2 told the defendant No.1 that the plaintiff had taken away many documents including original of Will dated 08.01.2006 at the time the plaintiff came to Chandigarh to attend last rites of Sh. Hardyal Kinger. Despite number of requests by the defendant No.1 & 2 the plaintiff refused to hand over or to act upon the Will executed by Sh. Hardyal Kinger. He further argued that presently the case is fixed for defendant evidence and in order to prove the Will, the original of the same is required. The original Will dated 08.01.2006 is in possession of the plaintiff. He further argued that the defendnat No.1 had filed an application/notice under Section 66 of Indian Evidence Act, 1872 for directing the plaintiff to produce the original Will dated 08.01.2006. However, in reply plaintiff had denied that he is not in possession of original Will dated 08.01.2006. As the plaintiff is not producing the original Will, therefore, the defendant No.1 has no other option except to prove the Will by way of secondary evidence as required under Section 65 of Indian Evidence Act, 1872.”

3. The Application was vehemently resisted on behalf of Petitioner/Plaintiff, who took a categorical stand that the disputed Will in question was never actually executed as claimed by the Respondents. Rather, the photostat document sought to be tendered as secondary evidence was actually a forged and fabricated document,

in which, somehow the signature of deceased Hardyal Kinger had visibly been superimposed on an artificially typed document, and the actual document from which the present photostat copy is said to have been prepared was intentionally concealed by the Respondents, since perusal of the same would immediately go to show that it is a falsely created document manufactured only for the purpose of contesting the proceedings between the parties. Further, the Petitioner categorically denied that he had ever seen the original of the disputed Will, much less taken away the same with him as claimed by the Respondents. In addition, authenticity as well as admissibility of the disputed document has been assailed by drawing the attention of the Court to several other circumstances existing in the present case, to which reference will be made subsequently in this order.

4. The Ld. Court below nevertheless was not persuaded by the contentions raised on behalf of Petitioner and ultimately allowed the Application under Section 65 of the Indian Evidence Act after recording the following observations -

“5. As per the case of the defendant No.1, Will executed by Sh. Hardyal Kinger is not in their possession. The said Will dated 08.01.2006 is very material for arriving at a proper and just adjudication of the matter in question. To determine the final question in controversy between the parties, the said Will is a necessary document. The application u/s 66 of Evidence Act has been disposed off. Hence, in view of the above and without commenting on the merits of the case, the application of defendant No.1 for allowing the defendant to adduce secondary evidence in order to prove Will dated 08.01.2006 executed by late Sh. Hardyal Kinger stands allowed. Application in hand stands disposed off

accordingly.”

5. Aggrieved with the aforesaid decision, Ld. Counsel for the Petitioner has made the following submissions before this Court, which according to him, were not considered by the Ld. Trial Court in their proper perspective before allowing the Respondent's Application-

- “a) That the disputed document purporting to be the Will does not fall within the six exceptions u/s 66 of the Evidence Act, nor can it be admitted in view of the provisions laid down in Sections 63 or 65 of the evidence Act as the Respondent No.1 had failed to lay the necessary foundation to lead such secondary evidence in the case as the story raised by him is false on the face of it ;*
- b) That the plea raised in the Written Statement filed by the Respondent No.1 alongwith Photocopy of the disputed document was altogether false to the effect that the Plaintiff had taken away the said Will at the time of Kirya of his father in the year 2007 ;*
- c) That the claims of Respondent No.1 concerning the disputed Will are ex facie absurd considering that it was purportedly executed by his father for valuable property, and yet the same was not in the knowledge of Respondent No.1 or any other of his family members at the relevant time ;*
- d) That after having allegedly executed the Will as claimed, father of the parties did not deem it fit to get the same even registered with the local Authorities in Chandigarh where he continued to reside till his death, which therefore, ex facie falsifies the Respondent No.1's claim ;*
- e) That similarly, it is a manifestly absurd preposition that the Petitioner had taken away the original Will with him way back in 2007 and his other family members did not consider challenging him all these years for such act by either issuing any legal notice to him, or by lodging any FIR for such act ;*

- f) That likewise, it is unbelievable that father of the Petitioner and Respondent No.1, who was staying with them would not disclose about, or hand over the original Will to their son (s)/legatee(s) for whose benefit it was allegedly executed ;*
- g) That again, it is altogether unbelievable that mother of Petitioner and Respondent No.1 had handed over the Will to Petitioner but would not tell about it to Respondent No.1 for a full period of nine years even though she was all along staying with him, and also that after the original was allegedly taken away by the Petitioner an unauthenticated copy of the document would crop up after a long span of nine years ;*
- h) That there is no document or material to show that the document relied upon is a true Photocopy of the original, nor there is any evidence or indication as to who had Photocopied or compared it with the original ;*
- i) That being an unregistered document, which was never produced before any competent Authority at any previous stage, it further goes to show that it was forged and fabricated, which does not even indicate as to who had scribed/typed the same, nor the place where it was executed;*
- j) That the document does not bear any endorsement to the effect that it is a true Photocopy of the original, nor there is any evidence as to in whose possession the original Will had been kept till it was taken away.*

In this manner, it has been argued on behalf of the Petitioner that the technique adopted by Respondent No.1 is a visible instance of forging a document by an unscrupulous party and then claiming that original is with the opposite party in order to lead inadmissible secondary evidence of the same.

6. In addition, the Ld. Counsel for Petitioner has cited a number of decisions of this and other High Courts as well as of the Supreme Court in support of his contentions.

7. From their side, the Respondents have also placed certain citations to emphasize that in the given facts and circumstances, secondary evidence of the disputed Will in question ought to be accepted.

8. Brief reference at this stage to the case laws cited on behalf of Respondents would appear to be in order, before proceeding to consider the relevant merits and applicability of the case laws relied upon by the Petitioner's side in seeking to challenge the impugned order -

9. In '**Rameshwar Vs. Tara Chand**' CR No.6733 of 2013 decided on 04.07.2014, it was held by this Court -

"8. xxxxxxxx

13.....Leading of evidence cannot be shunned merely because its probative value would not be of high order.

9.....Validity and genuineness of a document as also probative value of the same are not the questions which should not be posed by the civil court to itself at the time of considering request of a party for leading the evidence."

10. In '**Surinder Kaur Vs. Mehal Singh and Others**' CR No.4696 of 2013 decided on 04.12.2013 this Court had observed as under -

"6.....'Best Evidence Rule' is a golden thread which runs through the provisions relating to admissibility of evidence, and when seen in context of documentary evidence such rule is enshrined in section 64 of the Act which provides that documents must be proved by primary evidence..... However other documents are required to be proved in accordance with the provisions of the Act. Needless to say that in cases where the document cannot be proved by primary evidence secondary evidence to prove the same is permissible under the Act.

19.....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. These foundational facts, however, are to be proved by leading cogent evidence. As regards the question whether photostat copy of a document comes within the meaning & definition of 'secondary evidence' as contained in section 63 of the Act, there cannot be absolute answer because every photostat copy may not be accurate. For this purpose the probative value of the Photostat copy has to be proved independently."

11. In 'Jawahar Lal Vs. Surinder Singh & Ors.' 2014(2) Civil Court Cases 259 (P&H), it was held by this Court -

"18. In the case in hand, photostat copy of the alleged agreement dated 16.05.1994 is sought to be produced by way of secondary evidence. It is pertinent to mention here that fact regarding the existence and loss of a document is a question of evidence, however, without affording any opportunity, the trial Court has dismissed the application. Proper opportunity has not been afforded to the petitioner to lay down foundation for leading secondary evidence.

19. In view of above, the impugned order is set aside. The petitioner would be afforded an opportunity to lead evidence to prove existence and loss of the alleged agreement dated 16.05.1994 and the respondents shall also be afforded an opportunity to rebut it. Thereafter, the trial Court shall decide as to whether the photostat copy of the alleged agreement dated 16.05.1994 should be admitted as secondary evidence. Its probative value shall be independently assessed by the trial Court in accordance with the settled principles of law."

12. In 'U.Sree Vs. U.Srinivas' 2013(1) Civil Court Cases 348 (SC), the Supreme Court has observed -

"14.....As the evidence on record would show, the said

*letter was summoned from the father who had disputed its existence. The learned Family Court Judge as well as the High Court has opined that when the person is in possession of the document but has not produced the same, it can be regarded as a proper foundation to lead secondary evidence. In this context, we may usefully refer to the decision in **Ashok Dulichand v. Madhavlal Dube 1975(4) SCC 664** wherein it has been held that according to clause (a) of Section 65 of the Indian Evidence Act, secondary evidence may be given of the existence, condition or contents of a document 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.....”* (Emphasis added)

13. In '**Nawab Singh Vs. Inderjit Kaur**' C.A. No.2735 of 1999 decided on 06.05.1999, it was held by the Apex Court -

“3. Having heard the learned counsel for the parties, we are of the opinion that the trial court was not justified in rejecting the prayer seeking leave of the court for production of secondary evidence. The prayer has been rejected mainly on the ground that the copy of the rent note sought to be produced by the appellant was of doubtful veracity. The trial court was not justified in forming that opinion without affording the appellant an opportunity of adducing secondary evidence. The appellant has alleged the original rent to be in possession of the respondent. The case was covered by Clause (a) of Section 65 of the Indian Evidence Act, 1872.

4. xxxxxx

5. The appeal is allowed. The impugned order of the trial court dated 3.2.98 and the order of the High Court dated 16.9.98 passed in revision are both set-aside. The appellant is granted leave of adducing secondary evidence of the existence, condition and contents of the rent note dated

23.9.1994. The trial court shall appoint a date on which the appellant shall have the liberty of adducing such secondary evidence as he may choose to do but if he fails to adduce such evidence on the appointed date, he shall not be entitled to an adjournment for the purpose. The appellant shall also be liable to pay costs quantified at Rs. 5000/- (Rupees five thousand only) to the respondent, having regard to all the circumstances.”

14. On considering the above Citations, the contentions raised on behalf of the Respondents can therefore, be summarized to the effect that when the secondary evidence of a document is sought to be led, the same cannot be disallowed merely because it has doubtful probative value and which, in all propriety, ought to be assessed only subsequently at the stage of trial. But for the purpose of permitting it to be led into evidence, appropriate opportunity needs to be given to the Applicant to prove existence of the original document followed by an equal opportunity to the other side to rebut the same. It is however, the submission of the Petitioner that even for the purpose of permitting secondary evidence of a document, the Court must ensure that the necessary foundation for leading the same is properly laid by the Applicant's side as specifically envisaged under Sections 63 and 65 of the Evidence Act, and that there are numerous instances of such secondary evidence being disallowed in absence of the requisite foundation not being laid before admitting the document. The decisions relied upon by the Petitioner's side in seeking to oppose leading of the secondary evidence in the present case are now taken up for consideration in the following Paragraphs -

15. In '**Ashok Dulichand Vs. Madhavlal Dube and another**'

1975 AIR (SC) 1748, the Supreme Court dismissed the Appeal in an Election Petition filed by the unsuccessful candidate against the decision of the High Court disallowing him from leading in evidence a Photostat copy of a disputed document u/s 65(a) of the Evidence Act by observing *inter-alia* -

“7. After hearing the learned Counsel for the parties, we are of the opinion that the order of the High Court in this respect calls for no interference. According to clause (a) of section 65 of the Indian Evidence Act, secondary evidence may be given of the existence, condition or contents of a document 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. Clauses (b) to (g) of section 65 specify some other contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of section 65, the appellant filed applications on July 4, 1973, before respondent No. 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed photostat copy. Prayer was also made by the appellant that in case respondent No. 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was, however, nowhere stated in the affidavit that the original document of which the photostat copy had been filed by the appellant was in the possession of respondent No. 1. There was also no other material on the record to indicate that the original document was in the possession of

respondent No. 1. The appellant further failed to explain as to what were the circumstances under which the photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent No. 1 in his affidavit denied being in possession of or having anything to do with such a document. The photostat copy appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the photostat copy. We find no infirmity in the above order of the High Court as might justify interference by this Court.

16. The above decision was thereafter followed by the Apex Court in '**Smt. J. Yashoda Vs. Smt. K. Shobha Rani**', 2007(2) R.C.R. (Civil) 840, in which it was observed -

*“9. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section.(The decision in **Ashok Dulichand's case (supra)** narrated in previous Paragraph reproduced).*

10. The admitted facts in the present case are that the original was with one P. Srinibas Rao. Only when conditions of Section prescribed in Section 65 are satisfied, documents can be admitted as secondary evidence. In the instant case clause (a) of Section 65 has not been satisfied. Therefore, the High Court's order does not suffer from any infirmity to warrant interference.”

17. In '**Mangat Ram Vs. Prabhu Dayal and others**' 2002(4) R.C.R. (Civil) 706, this Court dismissed the Revision against dismissal of the Application u/s 65, by noting -

“4. A perusal of the order passed by the Civil Judge shows that primary reason for rejecting application as that defendant/petitioner failed to prove that how he arranged photo copies of the original documents. The view of the Civil Judge extracted in para above appears to be that once the documents are lost or destroyed then the defendant/petitioner must show how its photocopies have been procured. It is not a case where the documents were required to be kept in duplicate or in triplicate. Having failed to prove as to how he arranged the photocopies of the original documents, the application was dismissed. Even at the time of hearing, learned counsel was not able to explain this aspect.”

18. Similarly, in '**Aneeta W/o Ramkesh Rajpoot Vs. Saraswati W/o Chhatradhari Gupta**' 2013(5) R.C.R. (Civil) 783, the Madhya Pradesh High Court dismissed a Petition under Article 227 of the Constitution against rejection of an Application under Section 65 of the Evidence Act after observing -

“11.....In support of his forceful submissions, learned counsel has placed reliance on two decisions of Supreme Court Nawab Singh (supra) and Smt. J. Yashoda (supra) and also of learned Single Bench of Rajasthan High Court Smt. Ratan Sharma (supra). But, to me, even then in the facts and circumstances of the present case the photocopy

of the document of receipt cannot be admitted in secondary evidence. On bare perusal of the application under Section 65 of the Evidence Act which has been rejected by the impugned order it is found that although it has been mentioned that under the false pretext the plaintiff and her husband obtained the original receipt from petitioner/defendant, but, nowhere it has been so stated in the application that the photocopy was made from the original and it was compared with original. The name of the person, who had obtained the photocopy by mechanical process has also not been mentioned in the application and further who compared the same with original his name is also not mentioned nor any affidavit in that regard has been filed.

12.....Even if accurate photocopy is obtained by a mechanical process, it is a matter of common parlance that after inserting some words on a document which is already a photocopy and by interpolating the same, another photocopy of the said interpolated photocopy may be obtained and thus the accuracy of photocopy is always surrounded by dark clouds of doubt. In the present case since there is no averment in the application under Section 65 that photocopy was compared with the original and it is an accurate photocopy of the original and further by not filing any affidavit of person who obtained the said photocopy is on record, it is difficult to hold the hallmark and authenticity and accuracy of the photocopy.

13. xxxxxx

14.

*Thus, the Apex Court has held that photocopy was not sufficient to prove that driver had a valid licence. By following the aforesaid decision of Supreme Court, Shri Justice Dipak Misra, J (as His Lordship then was) in **Haji Mohd. Islam and another v. Asgar Ali and Another 2006 (4) R.C.R. (Civil) 190 : 2006 (2) R.C.R. (Rent) 316 : 2006 (3) MPLJ 334 : AIR 2007 MP 157**, has held that when a photocopy without any reasonable source has been filed, it*

*is not permissible as secondary evidence. Yet there is another decision of this Court in **W.P. No.8224/2010 Sunil Kumar Sahu v. Smt. Awadharani decided on 31-8-2010**, wherein it has been held that photocopy of a document is not admissible as secondary evidence under Section 65 of the Evidence Act.”*

19. In '**Jai Prakash Singh Vs. State of Bihar' 2007(5) R.C.R. (Criminal) 369**, the Patna High Court had set aside an order allowing leading of secondary evidence by observing *inter alia* -

*“5. Learned Court below by the impugned order has allowed this prayer of the prosecution to admit the photo copy of the injury report in evidence. This has been opposed by the learned counsel on behalf of the petitioner. In this connection my attention has been drawn to the case of **Ashok Dulichand v. Madhavlal Dube, (1976) 1 SCR 246 : (AIR 1975 SC 1748)**. In this decision the Hon'ble Supreme Court has held that in a case of photo copy of a document, before it is admitted in evidence it has to be explained as to what were the circumstances under which photo copy was prepared and who was in possession of the original document at the time when its photo copy was taken and this should be above suspicion. In the present case as will appear from the impugned order dated 3-8-2005 it appears that the original injury report was not attached with the case diary rather only its photo copy was attached to it. This is a great circumstance against the case of the present petitioner. As held by the Hon'ble Supreme Court in the above mentioned case before a photo copy of a document is admitted into evidence it has to be explained as to what were the circumstances under which the photo copy was prepared and who was in possession of the original document at the time when its photo copy was taken and this must be above suspicion. In the present case as will appear from the impugned order as also the facts and circumstances of this case that the prosecution has not been able to specify when the photo copy of the original injury*

*report was prepared and under what circumstances. It has also not been stated as to who was in possession of the origin document at the time when its photocopy was prepared. Under this circumstance I think that the learned Court below by the impugned order has wrongly decided to admit the photo copy of the injury report. It may be stated here that it is well settled that the photo copy of a document is admissible as secondary evidence if it is proved to be genuine. The genuineness is to be proved either by examining the photographer or some other evidence as has been held in the case of **Subarna Barik v. The State of Orissa (AIR 1976 Orissa 236).**”*

20. In '**Mahindra and Mahindra Ltd. Vs. Board of Trustees for the Port of Calcutta**' 2013 (5) R.C.R. (Civil) 296, the Calcutta High Court dismissed the Revision preferred against the Trial Court's Order rejecting the prayer to lead secondary evidence of the disputed document under Section 65(a) of the Evidence Act by observing -

“8. There is no reason to accept the contention of Mr. Basu. On the petitioner’s own showing, the documents in question had been issued by the opposite party and addressed to the petitioner. The originals thereof, thus, cannot be in the possession of the opposite party. Neither has it been shown nor does it appear that the originals are in the possession or power of the opposite party. It is also not a case where the opposite party is legally bound to produce it. In terms of Order VII Rule 14, Civil Procedure Code, it is for the plaintiff to produce in the Court any document on which it seeks to rely on in support of his claim. I wonder how a submission could be made to the effect that Section 65(a) of the Act is applicable here. That apart, since the petitioner seeks to rely on the documents in question in support of its claim, which were addressed to it, the opposite party cannot be called upon to produce the same to prove the claim of the petitioner. The prayer of the petitioner to call upon the opposite party to produce the originals of the documents in

question is thoroughly misconceived. In any event, Mr. Mitra is right in his contention that the petitioner has not proved that the originals are destroyed or lost. The petitioner not having laid the foundation for tendering secondary evidence, question of invoking Section 65(a) of the Act did not arise. The learned Judge was, therefore, right in refusing the petitioner's prayer."

21. In '**Major Singh and others Vs. Kulwinder Kaur and others'** **2013(19) R.C.R. (Civil) 415**, this Court had rejected admissibility of the Photostat copy of an unregistered will by observing -

*"3. Perusal of the file reveals that the suit was filed on 16.8.2003, however, it continued prolonging on one pretext or the other. The alleged Will placed on record transpires that it was neither scribed by the petition writer nor a registered document. The last two lines, above the date, appears to have been inserted later on. The thumb impression of Mohinder Singh is not visible, therefore, it cannot be said that the original Will was bearing the thumb impression of Mohinder Singh. This photo copy of the Will cannot, by any stretch of imagination, be said to be identical with the original document which the petitioner want to prove. Mohinder Singh had died on 28.6.1999. He is stated to be above 80 years of age. The alleged Will is stated to have been executed just one month and few days before his death. The Will is on the plain paper and is not even on the stamp paper. In any case, while going to the extreme and ignoring all the circumstances, in the absence of the proof whether the original Will was bearing thumb impression of Mohinder Singh as there was no thumb impression on the photo copy of the Will, it would be difficult to hold that this document is genuine, the original of which was actually executed by Mohinder Singh. As such, the said application cannot be allowed. It has been observed by the Apex Court in the case of **Smt. J. Yashoda vs. Smt. K. Shobha Rani, 2007 (2) R.C.R. (Civil) 840** that photostat copies of the original cannot be received by way*

*of secondary evidence in terms of Section 63 of the Evidence Act. The Apex Court in Smt. J. Yashoda's case (supra), while relying upon the judgment delivered in case **Ashok Dulichand v. Madahavlal Dube 1975 (4) SCC 664**, endorsed the view returned by the learned Single Judge, allowing the revision petition on the ground that document can be received in evidence under the head of secondary evidence only when the copies are made from or compared with the original or certified copies or such other document as enumerated in Section 63 of the Evidence Act and not otherwise. Since the documents being photo copies, there was no possibility of the same being compared with the original.*

4. The present case stands in reverse situation. Even if this photo copy is allowed, then the respondents would be in a disadvantageous position so as to rebut the document and there would not be any availability of the thumb impression of Mohinder Singh to be compared with his standard thumb impression. Secondly, this document cannot, by any stretch of imagination, be said to be a true copy of the original.”

22. In '**Jagmail Singh & another Vs. Karamjit Singh & others'** **2017 (1) Law Herald 391**, a Coordinate Bench of this Court upheld the decision of the Trial Court dismissing the prayer for leading secondary evidence even in a case where a notice under Section 66 of the Evidence Act had been served upon the Respondents to produce the original Will, which was claimed to be in their possession by observing -

“11. A glance at the aforesaid provisions makes it crystal clear that secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power of against whom the document is sought to be proved, or 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. As per facts & circumstances of the instant case, original Will dated January 24, 1989 was given to the revenue official(s) for incorporating and sanctioning of mutation on the basis thereof, but to the utter surprise, though, both the revenue officials, namely, Pyare Lal and Rakesh Kumar, Patwaries, were served under Section 66 of the Act to produce original Will dated January 24, 1989 but they failed to produce it. Moreover, they have nowhere stated about the existence of the aforesaid Will. So, the pre-requisite condition i.e. existence of the Will, remains un-established on record. Thus, learned trial court has rightly declined the permission to prove Will dated January 24, 1989 by way of secondary evidence. Impugned order dated September 30, 2015 suffers from no infirmity or illegality, rather the same is absolutely in accordance with the evidence available on file as well as settled proposition of law.”

23. In '**Karnail Singh Vs. M/s. Kalra Brothers, Sirsa' 2009(2) R.C.R. (Civil) 380**, a Coordinate Bench of this Court had observed that in a case of admission of Photostat copy of a document purporting to bear the signatures of a party, such signatures cannot be examined even by producing a Handwriting Expert, since as had been held by a Single Judge of this Court in **Sh. Surjit Ram Vs. Sh. Prem Kumar Khera, 1995 (2) PLR 140 (SB) -**

“20. Even the signatures of the appellant on the photostat copies could not have been examined as was done by the respondent by producing a handwriting expert. In Sh.Surjit Rai's case (supra), a learned Single Judge has held as under:-

“..... In my view, signatures cannot be compared from the photocopy of the agreement because in these days of advance technology, signatures of a person can be lifted

from one document and put on another document by super imposition.”

24. In '**Ved Parkash Vs. Smt. Kartar Kaur**' 1993 (2) R.C.R. (Rent) 680, this Court in dismissing the Revision preferred against rejection of a prayer for leading secondary evidence had observed -

“3. After hearing learned Counsel for the petitioner at length, I am of the view that there is no merit in this revision petition. In order to enable a party to produce secondary evidence, it is necessary for the party to prove existence and execution of the original document. The trial Court taking into consideration the pleadings as well as other circumstances of the case, came to the finding that receipt does not seem to be genuine. The trial Court also found that the very existence of the document is itself doubtful one. In view of this finding, the trial Court rightly declined the prayer of the petitioner to lead secondary evidence as he had failed to prove this very existence of the receipt.”

25. In '**M/s. Enn Ess Electronics Jalandhar and others Vs. Smt. Harbans Kaur and others**' 2009(5) R.C.R. (Civil) 130, this Court in dismissing the Revision preferred against the Trial Court's Order rejecting admission of secondary evidence had noted *inter alia* -

“13. The learned trial Court further noticed that the petitioners have failed to explain as to under what circumstances photocopy was prepared and as to who was in possession of the original document at the time of preparation of the said copy. Thus, the Court came to the conclusion that no foundation had been laid by the petitioners for leading secondary evidence in the shape of photocopy. Thus, a finding was recorded that the document sought to be proved was not covered under the provisions of Section 63 of the Evidence Act. Thus, the learned trial Court came to the conclusion that the petitioners have failed to prove that any notice under Section 66 of the Act

before seeking permission to lead secondary evidence was given and further that the document did not fall in any of the categories mentioned under Section 63 of the Evidence Act, therefore, the permission for leading secondary evidence could not be granted."

Thereafter, the Revision was dismissed with the following observations -

*"28. The contention of the learned counsel for the petitioners that presumption of notice by knowledge can be drawn, is not acceptable. It may also be noticed here that in the present case as per the case set up the petitioners had failed to prove on record to indicate as to under what circumstances the photo copy was prepared and who was in possession of the original document at the time of preparation of the photocopy. Rather it is positive case set up by the petitioners that at no stage the petitioners were in possession of the original, from where the said photocopy could be said to have been prepared or compared so as to make out a case for producing the same by way of secondary evidence. The judgment passed by the learned Rent Controller, therefore, is in consonance with the law laid down by the Hon'ble Supreme Court in the case of **Smt. J. Yashoda v. Smt. K. Shobha Rani** (supra)."*

26. The above decision in '**Smt. J. Yashoda v. Smt. K. Shobha Rani**' (supra) was followed by this Court in '**Harmanjit Kaur Vs. Jarnail Singh**' 2014(13) R.C.R. (Civil) 1638 and the Order of the Trial Court permitting the Appellant to lead secondary evidence to prove a similarly unregistered Will (as in the present case) dated 15.10.2001 was set aside with the following observations -

"5. Plaintiff filed suit for declaration that she was entitled to 1/6th share in the property as described in the plaint. Claim was resisted by the respondents who set-up Will dated 15.10.2001. They contended that original will had

been lost. Thus, they be allowed to lead secondary evidence to prove the same. It appears, father of the plaintiff namely Chetan Singh died while on Army duty. As a result, she filed instant suit claiming her share in the property. However, brothers of deceased Chetan Singh claimed that their father had left a Will dated 15.10.2001 which had been lost. They were, however, entitled to prove the same by leading secondary evidence. Prayer of defendants has been accepted by the court below. However, there is no clear averment as to how and when the original Will was lost.

6. In Smt. J. Yashoda (supra) it has been observed by the apex court that photostat copies of the original cannot be received by way of secondary evidence in terms of Section 63 of the Evidence Act. Moreover, it is well settled that in order to succeed in an application to lead secondary evidence, the pre-requisite is that the applicant has to prove the existence as well as the loss of the document.

7. There is nothing on record to show that out of five defendants, who was in possession of the original Will. Counsel for respondents has not been able to show that secondary evidence can be led to prove photo copy of the Will. I am, thus, of the considered view that impugned order is unsustainable. Same deserves to be set-aside. Ordered accordingly. Revision petition stands allowed.”

27. In 'Mukesh Kumar alias Motta Vs. State of Haryana' 2011

(1) R.C.R. (Civil) 675 this Court dismissed the Revision against rejection of the prayer u/s 65 of the Evidence Act wherein the Petitioner had sought to lead a copy of the original Pronote in view of his contention that he had destroyed the original document (Promissory Pronote) after having paid up the requisite dues to the other side. This Court dismissed the Revision by observing

“Therefore, secondary evidence in such circumstances where document itself has been destroyed by the person in whom it created an enforceable legal right or an obligation is normally not be allowed.”

28. Another decision relied upon by the Petitioner happens to be of this Court in '**Chaman Lal Vs. Davin**' 2010(30) R.C.R. (Civil) 519. But this decision is not of much help to the Petitioner in the present case, because in the matter cited, the secondary evidence led u/s 65(a) had been allowed without issuing the requisite notice u/s 66 of the Evidence Act. But in the present case, the Respondent No.1 had actually filed a separate Application u/s 66 seeking direction upon the Plaintiff to produce the original Will alleged to have been taken away by him. The said Application was disposed off by the Ld. Trial Court separately on the same date, on which, the impugned order was also passed (15.9.2017) with the following observations -

“5. As per the case of the plaintiffs, Will was never executed by Sh. Hardyral Kinger and the same is not in their possession. The said Will dated 08.01.2006 is very material for arriving at a proper and just adjudication of the matter in question. To determine the final question in controversy between the parties, the said Will is a necessary document. Hence, in view of the above and without commenting on the merits of the case, the application of defendant No.1/applicant for producing the Will dated 08.01.2006 stands disposed off as the plaintiff is not in possession of the Will dated 08.01.2006. Application in hand stands disposed off accordingly.”

29. The Application u/s 65 of the Evidence Act was thereafter separately allowed by the Ld. Court below vide the impugned Order.

30. In this background, the specific contentions raised by the

Respondents in their Application u/s 65 of the Evidence Act would require a closure scrutiny in order to determine how far the foundation for leading secondary evidence has been made out in the case. The relevant averments as made in Para 2 of the Respondent No.1's Application u/s 65 are set out as below -

“2. That the defendant No.1 in his written statement specifically stated that the father of plaintiff, defendant No.1 and defendant No.3 had executed a WILL dated 08.01.2006. It is further stated in the written statement that after the death of Sh. Hardyval Kinger, the plaintiff took the original WILL alongwith other documents from the house. It is further stated in the written statement that during the renovation work carried out in the house, the defendant No.2 found certain documents pertaining to Sh. Hardyval Kinger and she handed over all the documents to the defendant No.1 as she is an illiterate lady. During the scrutiny of the documents handed over by defendant No.2 to defendant No.1, the defendant No.1 found a photocopy of WILL dated 08.01.2006 executed by Sh. Hardyval Kinger. Thereafter, the defendant No.1 enquired about the genuineness of the WILL from defendant No.2 and one of its witness namely Sh. Gurdev, who told the defendant No.1 that Sh. Hardyval Kinger had executed this WILL. Even defendant No.2 told the defendant No.1 that the plaintiff had taken away many documents including original of WILL dated 08.01.2006 at the time the plaintiff came to Chandigarh to attend last rites of Sh. Hardyval Kinger. Despite number of requests by the defendant No.1 & 2 the plaintiff refused to hand over or to act upon the WILL executed by Sh. Hardyval Kinger.”

31. After having carefully considered the entire material available on record including Photostat copy of the alleged Will dated 8.1.2006 (Annexure P-5), and considering the summary of the ratio of various Citations relied upon by both sides, as already noted in the preceding

Paragraphs, this Court may observe at this stage that there is a visible chink/infirmity in the version of events leading up to creation, photostating, comparison and subsequent taking away of the original Will by the Petitioner/Plaintiff who had specifically denied such creation, photostating or of having ever seen much less taking away the original document. The decision of this Court in '**Karnail Singh**' (**supra**) as also the highlighted portion of the decision of Madhya Pradesh High Court in Para 12 of its judgment, in '**Aneeta W/o Ramkesh Rajpoot**' (**supra**) already reproduced earlier, would also appear to undermine the credibility of the disputed Will, since there is always the possibility of a copy of the signatures of the deceased having been obtained from some other document and thereafter superimposed upon the Photostat document sought to be led into evidence u/s 65(a) of the Evidence Act. While it is correct that in many cases, as noted above, the party seeking to lead such secondary evidence has been disallowed from doing so, still in view of the emphasized extracts from the decision of Supreme Court in '**U. Sree Vs. U. Srinivas**' (**supra**) as reproduced earlier, this Court is of the opinion that once the Respondents had created the basic foundation for leading secondary evidence by way of filing a separate Application u/s 66 of the Evidence Act, which however, otherwise could not be allowed since the Petitioner had specifically denied being in possession of the original, the applicants did deserve a chance to have the secondary evidence of the disputed document admitted u/s 65(a), by way of leading cogent and credible evidence to prove existence of the original document and the circumstances

regarding its creation, photostating and comparison with the original especially in the backdrop of his own admission that his mother (Defendant No.2) according to whom, the original was allegedly taken away by the Petitioner/Plaintiff, was herself in no position to compare it with the Photostat copy sought to be relied upon, since she is admittedly an illiterate lady as mentioned in the defence case.

32. To sum up therefore, this Court is of the opinion that the Respondents/Defendants at this stage ought to be permitted to provisionally lead into evidence the disputed Photostat copy of the alleged Will (Annexure P-5), subject to objection of Petitioner's side. The Revisional Application is consequently disposed off after affirming the impugned Order, but with a rider that Photostat copy of the disputed document shall be taken in evidence provisionally after recording objection of Petitioner's side, if the Respondent No.1 is able to lead credible evidence to explain the various infirmities apparent in the document, such as non-mentioning of the name of its Scribe, the place and time of its alleged execution, the place, time and circumstances under which it was got photostated, and who thereafter compared the Photostat with the original, as also the details of the repeated demands allegedly made by the Respondents calling upon the Petitioner to produce the original in the past. Needless to mention, the Petitioner in such event would be entitled to an opportunity to rebut the evidence to be thus tendered by the Respondent No.1's side. In case, the Respondent No.1 is able to satisfy the Trial Court with credible evidence pertaining to the above noted points and circumstances, which would in the given case, amount to laying on

the appropriate foundation for accepting secondary evidence u/s 65 of the Evidence Act, the Trial Court may at the stage of arguments treat the same as an admissible document, but shall consider its actual probative value separately and independently on its own merits. In doing so, the Ld. Trial Court shall not be influenced by any observations made anywhere in this Order.

(SUDIP AHLUWALIA)
JUDGE

September 03, 2019
AS

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|--------------------------------|--------|
| 1. Whether speaking/reasoned ? | Yes/No |
| 2. Whether reportable ? | Yes/No |