

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR No.8173 of 2016

Date of decision: 19.07.2019

M/s Devyani Food Industries Pvt. Ltd.

.... Petitioner

Versus

M/s Neelkanth Agencies

..... Respondent

Before: Hon'ble Mr. Justice B.S. Walia.

Present: Mr. Kunal Dawar, Advocate for the petitioner.
Mr. Sumit Gupta, Advocate for the respondent.

B.S. WALIA, J. (ORAL)

[1] Revision petition has been filed under Article 227 of the Constitution of India for setting aside order, Annexure P-1 dated 08.11.2016 passed by the learned Civil Judge (Sr. Div.), Faridabad rejecting in part application (Annexure P-2) moved by the petitioner/defendant for permission to lead secondary evidence under Section 65/66 of the Indian Evidence Act.

[2] Brief facts of the case leading to the filing of the revision petition are that the respondent/plaintiff filed a civil suit dated 16.02.2011 for recovery of Rs.5,91,896 along with future and pendent lite interest on the ground that it was engaged in the business of marketing and trading of Ice Cream and was one of the distributors appointed by the petitioner/defendant-Company, that Distributorship Agreement dated 20.03.2003 was entered

with the petitioner-Company for three years which was extended from time to time against deposit of ₹ 3.00 lacs towards assets and distributorship security in the month of March 2003, that said agreement was orally terminated in March 2010 without assigning any reasons, whereafter the petitioner/defendant was requested to finalize accounts and release outstanding payment and security deposit but instead the petitioner/defendant started raising false and frivolous disputes against the plaintiff/respondent regarding return of 52 push carts and two deep freezers whereupon legal notice dated 31.07.2010 was served by the petitioner/defendant – Company upon the respondent/plaintiff claiming amount of ₹ 17,92,000/-. It needs noticing here that as per paragraph No.7 of the plaint, material against invoice Nos.300 and 301 dated 19.03.2010 and 23.03.2010 respectively was never received.

[3] That the petitioner/defendant-Company filed a written statement along with counter-claim for recovery of ₹ 2,74,033 /- along with future interest and also sought relief of mandatory injunction for directing the respondent/plaintiff to return 54 push carts and two deep freezers in good conditions. In paragraph No.5 of the preliminary submission as well as paragraph No.7 on merits of the written statement, besides, in paragraph No.6 of the counter claim, reference was made to invoices dated 19.03.2010 and 23.03.2010 and copies thereof were also attached. During pendency of the proceedings, application was moved by the respondent/plaintiff under Order 11 Rule 14 CPC in the main suit for directing the petitioner/defendant to place on record copy of agreement dated 18.05.2007 relied upon by the petitioner/defendant in the written statement which as per the plaintiff did not exist.

[4] That in response to application, Annexure P-7 dated 20.10.2012, reply, Annexure P-8 dated 20.05.2013 was filed categorically stating that agreement dated 18.05.2007 was not traceable. Thereafter, application, Annexure P-2 dated 27.09.2016 was moved for leading secondary evidence regarding documents Annexures DD to DG as per details given below:-

Sr. No.	Annexures	Kind	Date
1.	DD	Cooling Equipment Placement Agreement	23.01.2009
2.	DE	Cooling Equipment Placement Agreement	01.03.2004
3.	DF	Invoice No.300 Rs.2,50,932	19.03.2010
4.	DG	Invoice No.301 Rs.1,22,299	23.03.2010

alleging that on 01.09.2016 employees of the petitioner-Company namely Mr. Anuj and Mr. Bhaskar were travelling in the Metro Train and thereafter in three-wheeler for conference with the Company’s Advocate at Faridabad when some of the original documents in the file were lost whereupon lost property report was got registered vide application, Annexure P-9 at Police Station Faridabad Central, Faridabad.

[5] That in reply to the application for leading secondary evidence, stand taken up was that the documents sought to be produced by way of secondary evidence were fabricated. Eventually vide order dated 08.11.2016, the learned trial Court rejected in part the application for permission to lead secondary evidence qua bills/invoices dated 19.03.2010 and 23.03.2010 while allowing the application for other agreements in view of no objection by the respondent/plaintiff by holding that secondary evidence of any original document could be led only if it was proved that the document was in existence , besides, in reply to the application under Order 11 Rule 14 CPC, it had been submitted by the petitioner that agreement

[6] Learned counsel contended that the case of the petitioner was squarely covered under Section 65 (c) of the Indian Evidence Act, that existence of bills dated 19.03.2010 and 23.03.2010 had not been disputed, only plea was that material against said bills was not supplied as was evident from paragraph No.6 of the written statement to the counter-claim filed by the petitioner, that the learned trial Court had failed to appreciate that the ground for leading secondary evidence qua agreements which had been allowed and the bills in question which had not been allowed were one and the same i.e. that all four documents had been lost in transit and DDR got recorded for the same. Besides, the application for secondary evidence was not with regard to agreement dated 18.05.2007, that legal notice, Annexure P-4 issued on behalf of the petitioner to the respondent/plaintiff on 31.07.2010 was before the filing of the civil suit by the respondent/plaintiff wherein reference was clearly made to invoices dated 19.03.2010 and 23.03.2010 but the learned trial Court lost sight of the aforementioned aspect of the matter, that the documents in question had been relied upon even prior to the date of filing of the suit by the respondents and existence of the same were never disputed by the plaintiff, only objection was that material against the said bills was never received by the respondent/plaintiff, besides, the value reflected by said bills was duly included and reflected in Vat Form LS 9 of R1 in quarterly return for the quarter ending dated 31st March 2010 by the petitioner-Company, and whether the petitioner/defendant ultimately succeeded in proving that material was supplied against the said invoices was a question of fact and depended upon the evidence and mere grant of permission to lead secondary evidence would not mean that the bills had been admitted in evidence. Existence of the documents or its loss could not be predetermined and while deciding the application for secondary evidence

only prima facie existence and loss was to be proved and it was for the party which wanted to lead secondary evidence to prove due execution of the said document by leading cogent evidence, but the learned trial Court instead of limiting the question for leading secondary evidence to aforementioned aspects of the matter had gone ahead to consider the admissibility of the bills in question which could be done only after allowing the application.

[7] Per contra, learned counsel for the respondent/plaintiff contended that fraud was sought to be played by seeking to admit fabricated documents in evidence and that original of the bills which were claimed to have been lost i.e. Annexures DD and DG had not been filed along with pleadings, therefore, the petitioner/defendant had no right to produce secondary evidence qua said documents. Accordingly, the application had been rightly dismissed by the learned trial Court qua documents Annexures DF and DG i.e. invoice Nos.300 dated 19.03.2010, and No.301 dated 23.03.2010.

[8] Learned counsel for the respondent/plaintiff further contended that it was necessary for the petitioner/defendant to have proved existence of documents as the very existence of the same was disputed by the respondent/plaintiff. He further contended that on 20.10.2012 an application was filed by the respondent/plaintiff under Order 11 Rule 14 CPC in which it was mentioned that the petitioner/defendant had referred to certain documents which were in possession of petitioner/defendant/counter-claimant but the said documents had not been supplied to the respondent/plaintiff and that the petitioner/defendant had also relied upon the agreement dated 18.05.2007 but to the knowledge of the respondent/plaintiff, no such document existed. Prayer was made that

direction be issued to the petitioner/defendant to produce original documents.

[9] Reply to the aforementioned application was filed on 20.05.2013 pleading that all documents had been supplied to the respondent/plaintiff whereas agreement dated 18.05.2007 was not traceable by the petitioner/defendant, that in the aforementioned manner, it was clear that the documents in question were not traceable in the year 2013 itself, as original documents were never produced by the petitioner/defendant in the Court, that it had been claimed earlier that the documents had been supplied to the respondent/plaintiff but thereafter it was being pleaded that documents had been lost and that in the circumstances, when existence of concerned documents itself was not being proved, no permission could be granted to the petitioner/defendant to file secondary evidence of concerned documents placed on record.

[10] Learned trial Court dismissed the application qua invoice Nos.300 and 301 as also agreement dated 18.05.2007 on the ground that the existence and loss of original documents had not been satisfactorily proved and secondary evidence was not admissible until production of preliminary evidence was satisfactorily proved. Regarding remaining documents, since no objection had been raised by counsel for the respondent/plaintiff, the same were allowed to be tendered in secondary evidence subject to passing of test of admissibility in evidence at the stage of final arguments.

[11] I have considered the submissions of learned counsel for the parties.

[12] As per paragraph Nos.9, 12 and 16 of the petition, documents DD to DG do not refer to agreement dated 18.05.2007 and are only with regard to documents dated 23.01.2009, 01.03.2004, 19.03.2010 and

23.03.2010. Thus, the dispute is only with regard to rejection of the application for leading secondary evidence qua invoice Nos.300 and 301 dated 19.03.2010 and 23.03.2010. A reference to the said documents finds mention in legal notice, Annexure P-4 dated 31.07.2010 served by the petitioner-Company upon the respondent/plaintiff prior to the filing of the suit which was filed on 16.02.2011 vide Annexure P-3.

[13] Secondly, in the plaint, the existence of bills dated 19.03.2010 and 23.03.2010 has not been disputed on the ground of the same having been forged. The case as has been set up therein is that the material against the said bills was never supplied. Besides, the ground for leading secondary evidence qua the agreements which had been allowed and for the bills in question which had not been allowed was one and the same i.e. that all said four documents were lost in transit and DDR Entry got recorded for the same.

[14] Another relevant aspect of the matter is that the value of the bills which is sought to be produced had been duly included and reflected in Vat Form LS 9 of R1 in quarterly return for the quarter ending dated 31st March 2010 by the petitioner-Company. Whether the petitioner/defendant ultimately succeeds in proving that the material was supplied against the said invoices is a question of fact and depends upon evidence. Mere grant of permission to lead secondary evidence does not imply that the bills in question have been admitted in evidence. Reference in this connection can be made to the decision of this Court in **Ashok Kumar Sachdeva v. Harish Malik, 2007 (4) RCR (Civil) 311.** Relevant extract of the same is reproduced as under:-

“5. After hearing learned counsel for the parties, I am of the view that to prove a document by way of primary

or secondary evidence is a rule of evidence. Whether the party seeking leave of the Court to lead secondary evidence ultimately succeeds in proving the document or not is a question of fact and depends upon evidence. Petitioner has pleaded in the application the loss of original document. Under what circumstances, documents was lost is a question of fact and evidence. It is settled rule of pleadings that a party must disclose material facts and need not plead evidence. In the instant case, material fact is loss of document and circumstances leading to loss is a question of evidence. This question can only be decided after providing opportunity to the party concerned to lead secondary evidence. To grant leave to lead secondary evidence does not mean the document is admitted in evidence nor it is a finding of the existence of any of the conditions indicated in Section 65 of the Evidence Act. It only amounts to holding an enquiry regarding existence of document and its loss under some circumstances. Failure or success to prove the existence of document or its loss cannot be pre-determined that too without providing opportunity. Whether it is proved or not, is to be seen after the leave is granted and the material/evidence produced, is evaluated. The question raised by learned counsel appearing for the respondent is premature at this stage.”

[15] A perusal of the decision in Ashok Kumar’s case (Supra) reveals that proving documents by way of primary or secondary evidence is a rule of evidence and the question whether the party seeking leave of the Court to lead secondary evidence ultimately succeeds in proving the document or not is a question of fact and dependent upon evidence. Thus, the question in what circumstances the documents were lost is a question of

fact and evidence and as per law it is well-settled that a party is only required to disclose material facts and not plead evidence. Material fact in the circumstances being loss of documents and circumstances leading to loss of documents a question of evidence and aforesaid question can only be decided after providing opportunity to the party concerned to lead secondary evidence. Mere grant of leave to lead secondary evidence does not mean that the document is admitted in evidence nor is it a finding of the existence of any of the conditions indicated in Section 65 of the Evidence Act. It only amounts to holding an enquiry regarding existence of document and its loss under some circumstances. Therefore, failure or success to prove the existence of documents or its loss cannot be pre-determined that too without providing opportunity. Whether the document is proved or not is to be seen after leave is granted and the material/evidence produced is evaluated and it is only after providing an opportunity to lead secondary evidence that the trial Court can form its opinion regarding existence of documents and circumstances enumerated in Section 65 of the Evidence Act for leading secondary evidence. It is only thereafter that the Court has to decide whether the document is proved in evidence or not. To similar effect is the decision in **Dr. SP Arora v. Satbir Singh, 2010 (5) RCR (Civil) 350.** The aforementioned decision was followed by a Co-ordinate Bench of this Court in **Jatinder Singh v. Jaswant Singh and another, 2019 (1) PLR 680.**

Relevant extract of the same is reproduced as under:-

“8. Whether existence and loss is proved or not will be determined on the basis of evidence to be led by the parties after grant of leave and the material/evidence is evaluated by the Court. The offer of secondary evidence can be best impeached in cross-examination. It is for the Court to examine and decide whether it is appropriate to

rely on such evidence produced by the party in terms of Section 65 of the Evidence Act. In case execution of documents is not proved and the Court finds the secondary evidence legally not reliable, the Court would be at liberty to eschew the same. However, the attempt of a party for production and to exhibit documents cannot be thrown out at the threshold of the technicalities. Reference can be made to Ashok Kumar Sachdeva v. Harish Malik, 2007 (4) RCR (Civil) 311 and Dr. SP Arora v. Satbir Singh, 2010 (5) RCR (Civil) 350.”

[16] Thus, existence and loss of invoices dated 19.03.2010 and 23.03.2010 would have to be proved by the petitioner/defendant by leading evidence and the genuineness and admissibility of the said documents can be determined by the learned trial Court at the appropriate stage. The petitioner has categorically pleaded that the documents in question were lost by its employees while in transit enroute to meet their Advocate at Faridabad. Grant of permission to lead secondary evidence does not amount to holding that the document is admitted in evidence nor does the same amount to a finding with regard to the existence or loss of the document in question nor does it tantamount to holding a finding of existence of any of the conditions enumerated in Section 65 of the Indian Evidence Act. Grant of leave to lead secondary evidence only amounts to holding an enquiry regarding existence of documents and its loss under some circumstance. Failure or success to prove the existence of a document cannot be pre-determined and that too without providing opportunity.

[17] In the circumstances, impugned order dated 08.11.2016 (Annexure P-1) passed by the learned Civil Judge (Sr. Div.), Faridabad dismissing the application for leading secondary evidence qua invoice

petitioner/defendant to lead secondary evidence qua documents (i.e. bills/invoice Nos.300 and 301) dated 19.03.2010 and 23.03.2010. Learned trial Court to proceed in accordance with law in the light of the position as noted above and the decision of this Court in Ashok Kumar Sachdeva's case (Supra).

[18] Revision petition allowed in the aforementioned terms.

(B.S. Walia)
Judge

19.07.2019
amit

1. Whether speaking/reasoned: Yes/No.
2. Whether reportable : Yes/No.