

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

**CR No.14319 of 2018(O&M)
Date of Decision: 27.02.2019**

Savitri

.....Petitioner

Versus

Rishi Raj and others

.....Respondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present:Mr. Sachin Mittal, Advocate
for the petitioner.

RAJ MOHAN SINGH, J.

[1]. This revision petition has been preferred by the petitioner against the orders dated 06.10.2018 (Annexures P4 and P5) and order dated 03.12.2018 passed by Civil Judge (Junior Division), Bhiwani.

[2]. Earlier CR No.7176 of 2018 was filed by the petitioner in the context of two orders of even date i.e. 06.10.2018 having been passed by the trial Court. The grievance of the petitioner was that the application under Section 65 of the Evidence Act was allowed without issuing notice to the petitioner and in the order of even date, concession was recorded that learned counsel for the plaintiff/petitioner opted to argue the application

without filing reply to the same.

[3]. Keeping in view the facts and circumstances of the case, this Court vide order dated 22.10.2018 relegated the petitioner to file an appropriate application for recall of the order in accordance with law. Trial Court was directed to decide the application in accordance with law without being influenced by any statement of fact made by learned counsel for the petitioner before this Court.

[4]. In pursuance of aforesaid order dated 22.10.2018, the petitioner approached the trial Court vide application dated 16.11.2018, wherein para Nos.3, 4 and 5 were pleaded to the following effect:-

“3. That on the same day i.e. 06.10.2018, the application moved by defendants for leading secondary evidence by producing the certified copy of documents, was allowed without giving any notice of application to applicant/plaintiff and without giving any opportunity to reply the said application by applicant/plaintiff.

4. That being aggrieved from it applicant/petitioner approached to the Hon'ble High Court of Punjab and Haryana at Chandigarh by way of Civil Revision bearing CR No.76 of 2018(O&M) and the same was decided by the Hon'ble High Court of Punjab and Haryana at Chandigarh vide order dated 22.10.2018 by view that the petitioner is relegated to approach this Hon'ble Court by way of the present application. Copy of the order is attached herewith.

5. That according to the principle of natural justice and principle of audi alteram partem, it is eminent in the interest of justice to give an opportunity to applicant/plaintiff to reply the application moved by defendants to lead secondary evidence and to give an opportunity of argument on the said application.”

[5]. The aforesaid application came to be considered by the trial Court and order dated 03.12.2018 was passed to the effect that there is no provision for recall of the order.

[6]. Vide order dated 10.01.2019 passed by this Court, copies of interlocutory orders passed by the trial Court were ordered to be requisitioned. In compliance of aforesaid order, short order dated 06.10.2018 and detailed order dated 06.10.2018 were produced on record. In the detailed order, it was recited that instead of filing written reply, learned counsel for the plaintiff opted to argue the application orally. Short order was accordingly passed on record.

[7]. Thereafter, on 04.02.2019, learned counsel for the petitioner made a categorical statement that the order dated 06.10.2018 (Annexure P-4) is still available on the website of the District Court, Bhiwani and detailed order of even date (Annexure P-5) has not been uploaded on the website so far. In this context, a report was requisitioned from District and Sessions Judge, Bhiwani with a direction to specify whether two

orders of even date i.e. 06.10.2018 were passed by the trial Court and what is the status of both the orders as on 04.02.2019.

[8]. In compliance of the aforesaid order, a comprehensive report from District and Sessions Judge, Bhiwani has been received. In view of said report, factum of two orders dated 06.10.2018 was shown. In fact a short order dated 06.10.2018 was passed which was not signed by the Presiding Officer, rather a modified order was passed on the said date, which was signed by the Presiding Officer, which is attached as Annexure A-3 with the report. However, unsigned order was uploaded by the concerned Steno due to some misconception of fact. That is how, the said order was assailed by the petitioner in CR No.7176 of 2018. The short signed order dated 06.10.2018 could not be uploaded.

[9]. In view of detailed status report submitted by the District and Sessions Judge, Bhiwani, I am of the view that uploading of unsigned order was a clerical omission on behalf of the Steno and the petitioner cannot draw any inference out of the same. Even otherwise, I am convinced that the explanation submitted by the trial Court before the District and Sessions Judge, Bhiwani is worth acceptance.

[10]. Vide order dated 22.10.2018 passed by this Court in

CR No.7176 of 2018, the petitioner was directed to bring all the incriminating facts before the trial Court. In view of para Nos.3, 4 and 5 of the application dated 16.11.2018, the petitioner has not mentioned anything about the concession given by the learned counsel for the plaintiff in respect of his arguing the case without filing reply to the application. In view of above, indulgence granted by this Court was not availed by the petitioner in reality. At the same time, the trial Court has again reiterated the earlier order dated 06.10.2018 vide which application under Section 65 of the Evidence Act was accepted. Though the observation in respect of existence of no provision for recalling of the order is somewhat unwarranted, but the fact remains that the petitioner has not mentioned any incriminating fact in the context of giving concession of arguing the case without filing reply to the application under Section 65 of the Evidence Act. Thereafter, the petitioner cannot be heard to say that the order was violative of principles of *audi alteram partem*.

[11]. Even otherwise, I have considered the controversy on merits. The application under Section 65 of the Evidence Act has been allowed by the trial Court. The application was filed on the ground that the parties are related to each other and devolution of property vide the impugned Wills of Har Bilas and Smt. Sarti Devi was illegal, null and void. Mutation on the basis

of Will No.52 dated 30.07.1981 and mutation on the basis of Will No.106 dated 22.06.2001 were sanctioned. On the basis of later Will, Shiv Kumar and Rishiraj became owner in possession of the suit property. The factum of execution of Will was mentioned in the order sanctioning the mutation. The original Wills were handed over to the authorities. Smt. Sarti Devi has already expired. The Will could not be traced. Copies of instruments were kept in the registration record, therefore, the secondary evidence was allowed subject to fulfilling requirement of Section 65 of the Evidence Act.

[12]. The Hon'ble Apex Court in **Bipin Shantilal Panchal vs. State of Gujarat, 2001(1) RCR (Criminal) 859**, laid down that the procedure has been set for receiving the documents when the same is objected to during trial. The Hon'ble Apex Court has castigated the practice of holding up trial on objections taken at the time of tendering documents in evidence. At that stage asking the Court to pass an appropriate order on objections has been categorized as an 'archaic practice'.

[13]. On the basis of aforesaid ratio, the leading of evidence at the stage pursuant to the passing of the impugned order would not crystallize any substantial right in favour of the defendants, rather the evidence led by the parties would be tested at the threshold of admissibility, validity and genuineness

of the document in terms of execution and its nature. Later stage would be an appropriate stage for lawful consideration of such a criteria i.e. validity, admissibility and genuineness of the document. Though there is no provision in law for de-exhibiting the document already exhibited in evidence, but the exhibition of a document, if objected to has to be answered in terms of its admissibility at a later stage. The offer of secondary evidence can be at best impeached in cross-examination. It will be for the Court to examine and decide as to whether it will be appropriate to rely upon such secondary evidence or not for want of compliance of Section 65 of the Act. In case Court finds the secondary evidence not reliable, the Court is at liberty to eschew the same. However, the attempt of a party for production and to exhibit the document cannot be thrown at this threshold. The view expressed in **Dr. S.P. Arora vs. Satbir Singh, 2010(5) R.C.R. (Civil) 350** and **Simar Pal Singh vs. Hakam Singh, 2009(14) R.C.R. (Civil) 273** can be relied in the aforesaid context.

[14]. In terms of ratio as culled out from **H. Siddiqui (dead) by LRs vs. A. Ramalingam, 2011(2) RCR(Civil) 696**, it can be noticed that though the provision permits the parties to adduce secondary evidence, but the same is subject to large number of limitations. The secondary evidence relating to the contents of

the document is inadmissible until non-production is accounted for, so as to bring within one or the other cases provided for in the Section. When there is no factual foundation led for secondary evidence it is not permissible for the Court to allow the party to adduce secondary evidence. It is a settled principle of law that the secondary evidence must be authenticated by fundamental evidence. Mere exhibition of a document does not dispense with the proof of its execution, therefore, it is squarely within the power of the Court to decide the admissibility of a document in secondary evidence at a subsequent stage. Existence of foundation for leading secondary evidence in the written statement would also be taken care by the trial Court at the appropriate stage.

[15]. In ***U. Sree vs. U. Srinivas, 2013 (1) RCR (Civil) 883***, the Hon'ble Apex Court has commented that to permit secondary evidence which has been destroyed by the person in whose possession it was and whose it created an enforceable legal right or an obligation, is normally not to be allowed as secondary evidence. The secondary evidence of such a nature may be tampered with or changed and it would be against public policy to take chance of running the risk of fraud being committed.

[16]. In view of aforesaid legal position, I am of the

considered opinion that the indulgence granted by the trial Court for allowing the application under Section 65 of the Evidence Act cannot be faulted with.

[17]. For the reasons recorded hereinabove, I deem it appropriate to maintain detailed order dated 06.10.2018 (Annexure P-5). This revision petition is accordingly dismissed.

27.02.2019

Prince

(RAJ MOHAN SINGH)
JUDGE

Whether reasoned/speaking
Whether reportable

Yes/No
Yes/No