

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

202

CR No.1503 of 2017 (O&M)

Reserved on : 05.08.2022

Date of Decision : 10.08.2022

Bharat Bhushan Ahuja

....Petitioner

VERSUS

Kiran Sachdeva and Ors.

....Respondents

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Sandeep Kotla, Advocate for the petitioner.

Mr. Jai Singh Yadav, Advocate for the respondents.

ALKA SARIN, J.

The present revision petition under Article 227 of the Constitution of India has been filed challenging the order dated 13.01.2017 whereby the evidence of the defendant-petitioner was closed and order dated 13.02.2017 vide which the application filed by the defendant-petitioner for leading secondary evidence was dismissed.

The brief facts relevant to the present *lis* are that the plaintiff-respondent no.1 filed a petition under Section 372 of the Indian Succession Act, 1925 for issuance of Succession Certificate regarding the detailed debts and securities of Mulakh Raj Ahuja, the father of the defendant-petitioner as well as the plaintiff-respondent no.1. In response to the said petition, the defendant-petitioner filed his written statement propounding a Will. An application was filed by the plaintiff-respondent no.1 for production of the original Will alleged to have been executed by Mulakh Raj Ahuja. In response to the said application, the defendant-petitioner stated that the original Will was kept in Locker No.88 maintained by State Bank of India,

G.T. Road, Main Branch, Panipat in the joint names of Mulakh Raj Ahuja and one Paramjeet Singh. It was further stated that the defendant-petitioner is the only legal heir of Mulakh Raj Ahuja and after his death he approached the Bank, however, he was not allowed to operate the locker and, hence, the defendant-petitioner was unable to produce the original Will. The said application was disposed off by the Trial Court vide order dated 21.09.2016 wherein an undertaking was recorded on behalf of the defendant-petitioner that as and when he comes in possession of the Will after permission to operate the locker is granted, the same would be produced before the Trial Court. The evidence of the defendant-petitioner was closed vide impugned order dated 13.01.2017 since despite numerous opportunities evidence was not led. Thereafter, an application for leading additional evidence by way of secondary evidence was filed by the defendant-petitioner which was also dismissed vide the impugned order dated 13.02.2017.

On 11.10.2018 the following order was passed by this Court :

“The dispute in this case only being with regard to the operation of the bank locker allotted to the father of the parties to this lis, both the parties, i.e. the petitioner as also respondent no.1 (brother and sister), are directed, in terms of the decree of the learned trial court, to go to the State Bank of India, (Main Branch) at G.T. Road, Panipat, on 17.10.2018 at 11.00 a.m., so that the locker is opened.

Mr. Viranjeet Singh, Advocate, who is present in Court, is appointed as a Local Commissioner, who

would, in the presence of the Branch Manager of the Bank, see that the locker is opened, with the entire proceedings videographed by him, also capturing in the video recording the contents of the locker and all contents as are taken out, till the time they are put back and the locker is again locked.

The fee of the Local Commissioner is fixed at Rs.11,000/, to be shared equally by both the parties.

Adjourned to 25.10.2018.

The Branch Manager is also directed that if neither of the two parties produces the key that would have normally been with the father of the parties, he being the operator of the locker, then the locker would be opened by the Branch Manager in the presence of the parties and the learned Local Commissioner, with any master key etc. i.e. by the procedure normally taken by the bank to open a locker when one of the keys is lost.

A copy of this order be given to the learned counsel for the parties, as also to the learned Local Commissioner, under signatures of the Bench Secretary.”

Thereafter in the order passed on 25.10.2018 it was noticed that the locker, which was broken open as directed by this Court, was found containing only one cheque book bearing Sr. No.699821 to 699840, one pay slip in the name of Paramjit Singh and 7 pay-in slips of the State Bank of

India, Punjab National Bank and Bank of India in the names of Sh.Mulakh Raj Ahuja and Paramjit Singh. In the order dated 30.01.2019 it has been specifically noticed that Locker No.88 was operated only on 17.10.2018 and neither before nor after the said operation. It was also noticed that an affidavit had been filed by the Bank Manager wherein it has categorically been stated that between the period 11.10.2018 to 16.10.2018 the locker was never operated.

Learned counsel for the defendant-petitioner would contend that the defendant-petitioner ought to have been allowed to lead secondary evidence since photocopy of the Will is with him.

Per contra learned counsel for the plaintiff-respondent no.1 has contended that permission to lead secondary evidence can be granted only once the defendant-petitioner is able to establish the execution and existence of the original Will and loss of the same. It is further the contention that in case the defendant-petitioner seeks to produce secondary evidence he must prove as to how and from where he obtained the same. In support of his contention he has relied upon judgment of this Court in case of **M/s Parkash Chand Kapoor Chand vs. Inderjit Singh & Ors. [2006 (3) RCR (Civil) 700]**.

In the present case the defendant-petitioner had propounded a Will in the written statement. However, no details of the Will including the date were mentioned. During the pendency of the petition under Section 372 of the Indian Succession Act, 1925, an application was filed by the plaintiff-respondent no.1 for issuance of directions to the defendant-petitioner for producing the original Will. In response to the said application, it was stated

that the original Will was kept in Locker No.88 of State Bank of India and that after the death of his father, Sh. Mulakh Raj Ahuja, he had not been permitted to operate the said locker. It was further stated that the defendant-petitioner would produce the original Will as and when he was able to take the same out of the locker. The said application was disposed off vide order dated 22.09.2015 noting the undertaking by the defendant-petitioner to produce the original Will as and when the same is released from the Bank. Thereafter, an application was filed by the defendant-petitioner for leading additional evidence by way of secondary evidence. Reply to the said application was filed by the plaintiff-respondent no.1 and vide order dated 21.09.2016, the said application was disposed off by the Trial Court with the following observations :

“.....Accordingly, the present application stands disposed of while the applicant/respondent No.1 is directed to verify the fact with regard to the presence of the said original will in the bank locker which can be now operated. In case, the original will is not found, the applicant/respondent No.1 is at the liberty to move a fresh application for adducting the secondary evidence to prove the said will. Now, to come up for the purpose of verification, for 30.09.16.”

Subsequently, an application for additional evidence was filed for leading evidence by way of secondary evidence by the defendant-petitioner. Reply to the said application was filed by the plaintiff-respondent no.1 and vide the impugned order dated 13.02.2017 the same was dismissed.

During the pendency of the present revision petition, under the orders of this Court, the locker was permitted to be operated. However, no Will was found in the said locker.

Learned counsel for the defendant-petitioner contends that the defendant-petitioner should be allowed to lead secondary evidence since he possesses a photocopy of the original Will. This Court in case of **M/s Parkash Chand Kapoor Chand** (*supra*) as held as under :

“6. I have given my thoughtful consideration to the contentions raised by learned counsel for the respective parties. In order to appreciate the same the provisions of Section 65(c) of the Evidence Act which provides for leading of secondary evidence when the original has been destroyed or lost may be noticed. The same reads as under :

“65. Cases in which secondary evidence relating to documents may be given : Secondary evidence may be given of the existence, condition or contents of a document in the following cases: -

a to b. xxx

c. When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

d to g. xxx

In terms of the above, it is evident that the secondary evidence may be given of the existence, condition or contents of a document in the cases enumerated above. In terms of clause (c) thereof it is provided that secondary evidence may be given when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time. 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 contents 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. Therefore, before secondary evidence of a document can be led and proved, the original document i.e. the agreement to sell dated 13.6.1995 has not been shown to exist or accounted for anywhere and it is only for the first time in the written statement dated 10.8,2000 that it has been stated by

defendants No.2 and 3 that Inderjit Singh (defendant No.1) had executed an agreement to sell dated 13.6.1995. The said agreement is also stated to be with the respective husbands of defendants No.2 and 3 and not with the defendants No.2 and 3 themselves. In fact, the stand taken by defendants No.2 and 3 is that on 13.6.1995 i.e. the date of entering into the agreement of sale of land measuring 20 Bighas @ Rs.40,000/- per Bigha the earnest money amounting to Rs.5,49,000/- was received by Inderjit Singh (defendant No.1) and an agreement to this effect was executed in favour of the husbands of the respective defendants No.2 and 3. Therefore, if earnest money amounting to Rs.5,49,000/- had been received on 13.6.1995 and that also in pursuance of the agreement, a mention of the same i.e. regarding existence of the agreement would have been there in the sale deed that was subsequently executed by Inderjit Singh (defendant No.1) in favour of Kulwinder Kaur and Tejinder Kaur (defendants No.2 and 3). Besides, there must be some other material to even otherwise show prima facie as to how the said amount of Rs.5,49,000/- was raised on or some time before 13.6.1995 and how it was expended by Inderjit Singh (defendant No.1). This Court in the case of Mangat Ram v. Prabhu Dayal and others, 2002(4) RCR (Civil) 706 .:

2002(3) CCC .381 (P&H), held that when document is lost, the applicant must show how he procured its photocopy which is produced. The said case was not a case where the documents were required to be kept in duplicate and in triplicate and the applicant having failed to prove as to how he arranged photocopy of the original document, the application for seeking permission to lead secondary evidence was dismissed. In Hari Singh v. Shish Ram and others, 2002(4) RCR (Civil) 830 : 2003 (1) CCC 554 (P&H), in a case where the applicant seeking permission to lead secondary evidence had failed to prove the existence of the document, it was held that before a party is permitted to adduce secondary evidence, it is a sine qua non for him to show that the document was in existence and despite notice, it has not been produced by the party in whose custody the document was kept.”

In the present case, the only ground raised by the defendant-petitioner in his application was that the original Will was lying in the locker. However, it now transpires that there is no Will lying in the locker. In such a situation it would be incumbent on the defendant-petitioner, who is seeking to lead additional evidence by way of secondary evidence, to show that the original document *qua* which the secondary evidence is sought to be produced, was in existence as also in case the original Will is lost to show how the photocopy of the same was procured.

In view of the above, I do not find any merit in the present revision petition which is accordingly dismissed. Pending applications, if any, also stand disposed off.

10.08.2022
jk

(ALKA SARIN)
JUDGE

NOTE : Whether speaking/non-speaking : Speaking
Whether reportable : YES/NO