

S/L 9
27.3.2023
Court No.652
SD

CO 1053 of 2019

Krishna Ghosh
Vs.
Sumitra Saraf & Ors.

Mr. Shuvasish Sen Gupta
Mr. Sushouit Dutt Majumder
Mrs. Ratnadipa Sarkar

...for the Petitioner.

Mr. Probal Kr. Mukherjee
Ms. Shebatee Datta

...for the Opposite Parties.

Being aggrieved and dissatisfied with the order dated 07.01.2019 passed by the learned Civil Judge (Junior Division), 2nd Additional Court, Alipore in Title Suit No.45 of 2012, present application under Article 227 of the Constitution of India has been preferred.

The plaintiff/petitioner's contention is that the plaintiff/petitioner filed aforesaid suit for recovery of possession along with other reliefs in the year 2012. The defendant/tenant/opposite parties contested the suit by filing written statement.

On November 4, 2016, the witness of the plaintiff as P.W.1 filed affidavit-on-evidence along with original power of attorney and other documents before the learned Civil Judge (Junior Division), 2nd Court at Alipore. The said filing of the documents was marked as Sia No.11 before the said learned court. Subsequently, said case was transferred to the learned Civil Judge (Junior Division), 2nd Additional Court at Alipore and it was renumbered as Title Suit No.45 of 2012. The original affidavit on evidence as well as the original power of attorney and other relevant documents were

misplaced while transferring the suit from the court of Civil Judge (Junior Division), 2nd Court, Alipore to the learned Civil Judge (Junior Division), 2nd Additional Court at Alipore.

On February 26, 2018, the plaintiff/petitioner filed an application under Order XXVI Rule 1 of the Code of Civil Procedure for appointment of commissioner for recording of the evidence of P.W.1. The defendant no.1 objected to such application for recording of evidence by commissioner, but the court below allowed the said application. The commission for recording of the evidence commenced on April 16, 2018 when a supplementary affidavit on evidence was filed on behalf of the plaintiff as P.W.1 under Order XVIII Rule 4 of the Code of Civil Procedure. During examination-in-chief, the witness tendered the photocopy of the original power of attorney and the witness categorically stated before the court that the said photocopy has been copied from the original document and prayed for marking the said document, as the original document, has been misplaced during transfer of records.

It was contended on behalf of the P.W.1 that the said document was the photocopy of the original power of attorney and therefore, has fulfilled the ingredients under Section 63(3) of the Indian Evidence Act which provides that secondary evidence means and includes copies made from or compared with the original. Learned commissioner refused to mark the same as exhibit expressing his inability to mark it as an exhibit and marked it as 'X' for identification and

thereafter, the commission was continued and other documents were duly marked as exhibits on various occasions. However, before the closer of the examination-in-chief, the plaintiff filed an application under Section 151 of the Code of Civil Procedure for directing the commissioner to mark his power of attorney as an exhibit and the said application was contested by the defendant no.1 by filing written objection.

By the impugned order dated January 7, 2019, learned court below was pleased to reject the application and directed the advocate commissioner to complete the recording of evidence and to file a report.

Mr. Shuvasish Sen Gupta, learned counsel appearing on behalf of the petitioner, submits that the order passed by the court below is bad and liable to be set aside and has been passed without considering the materials on record. The learned court below failed to appreciate the scope of Section 63 of the Indian Evidence Act. The court below failed to appreciate that Sia number has also been put by the court officers and P.W.1 in his evidence has fulfilled all the ingredients under Section 63 of the Indian Evidence Act.

He has failed to appreciate that the witness has deposed that the photocopy of the power of attorney was made from the original document and the same has been misplaced from the custody of the court. Accordingly, he has prayed for setting aside the order impugned.

Mr. Probal Kr. Mukherjee, learned counsel appearing on behalf of the opposite parties, submits that the court

below was justified in passing the order impugned as during evidence the opposite parties/defendants have raised objection regarding marking the said document as exhibit and as such, the learned commissioner had no other option but to refer the same to the court below for disposal. In this context, he has referred to Order XXVI Rule 16A of the Code of Civil Procedure.

He further submits that the other documents filed by the plaintiff were with the record and it is not understandable how the power of attorney has been detached from the bunch of documents while the aforesaid transfer was made from one court to another. Accordingly, court below was quite justified to reject the plaintiff/petitioner's prayer under Section 151 of the Code and made specific direction to conclude the evidence.

I have considered the submissions made on behalf of the parties.

On perusal of the evidence of P.W.1, it is quite apparent that the P.W.1 in his evidence has categorically stated that the concerned document is the xerox copy of the original document and the original document has been misplaced from the custody of the court and the advocate for the plaintiff submitted before the commissioner for marking the said document as exhibit. From the evidence, it also appears, when the witness was asked as to whether he finds any signature of the executor in the document, he submitted that there are two signatures one by Krishna Ghosh and other by Kamal Kumar Pal.

He also identifies the signature of Krishna Ghosh, Sunita Agwaral and Kamal Kumar Pal. It further appears that the learned court below while rejecting the said application was pleased to observe that the document concerned is a mere photocopy of power of attorney, not even compared with the original one. Therefore, there is big doubt to call this document as secondary evidence. Moreover, secondary evidence of document can be allowed only when original is proved to have existed but was lost or misplaced. However, from the incomplete oral evidence of P.W.1, the court below finds that the fact that the original has been lost or misplaced is not established and he refused to mark the document as exhibit.

In this context, it is to be mentioned that Section 63(3) of the Indian Evidence Act clearly stipulates that secondary evidence means and includes copies made from or compared with the original. Illustration (a) of Section 63 provides that a photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

In the present case, there is no scope to compare the photocopy with the original as the original has been lost according to the plaintiff's case and P.W.1 has categorically stated before the court that the 'photographed document' was photographed from the original. Accordingly, learned court below was not justified in holding that as because it

had not been compared with the original, so Section 63 of the Indian Evidence Act does not attract in the present case.

In the case of ***The Commissioner of Wakfs, West Bengal vs. Khan Jah Shahibzada Syed Kazim Ali Murza & Anr.*** reported in **1954 SCC Online Cal 126** it was held as follows:-

“8. It is quite clear that copies made from the original even though not compared with the original, as also copies which are compared with the original are deemed to be secondary evidence. Copy of a document will not ordinarily be admissible in evidence, but if such a copy be compared with the original and evidence is adduced to prove the same such a copy will be admissible in evidence. If it is proved further that copies had been made from the original without any proof that they had been compared with the original, they will be accepted as secondary evidence. The evidentiary value of particular papers or documents proved in either of the two ways would depend upon the circumstances and on the facts proved. We are not concerned with the value of such papers as evidence, but only whether they are admissible as secondary evidence. Illustration (c) of section 63 of the Indian Evidence Act makes the position clear.”

In another judgment of Patna High Court in the case of ***Harijiwan Sahu vs. Jairam Sahu and Ors.***, it was held that Sub-section (3) of Section 63 does not require that it must be proved that the copies were made from the original as well as compared with the original. Since the evidence on record clearly shows that the said document was made from the original and P.W.1 has stated that it is a true copy, the legal requirement has been fulfilled and this will not affect the legal validity of the said power of attorney as secondary evidence of the original document.

Considering the same, CO 1053 of 2019 is hereby disposed of with a direction upon the court below to hear both the parties afresh in respect of plaintiff's aforesaid application under Section 151 in the light of above

observation and to pass order within a period of four weeks from the date of communication of the order.

There will be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all necessary formalities.

(Ajoy Kumar Mukherjee, J.)