

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

SECOND APPEAL NO. 224 OF 2019

Shri Rameshkumar S/o Mohanlal
Verma, Aged about 74 years, Occ.
Retired R/o Vimla Villa, Daulat Patel
Marg, Bajeria Nagpur, Dist. Nagpur

...Appellant

// VERSUS //

1. Smt. Prabha Wd/o Chandramohan
Kashyap (dead)
2. Jai S/o Chandramohan Kashyap,
Aged about 38 years, Occ. Business
Both R/o Parmanand Villa
Behind Arya Medical Stores, Geeta
Nagar, Zingabai Takli Road, Nagpur
3. Sau. Vijaya W/o Ramesh Umate
Aged about 45 Years, Occ. Household
R/o at Post Koradi, Tah. Kamptee,
Dist. Nagpur

... Respondents

Ms. Sejal Lakhani, Advocate for the appellant.
Shri Kamal K. Gour, Advocate for the respondents.

CORAM : ANIL S. KILOR, J.

DATED : 17th MARCH, 2023.

ORAL JUDGMENT :

In this appeal the challenge is raised to the judgment and decree dated 22nd November, 2018 passed by the District Judge-13, Nagpur, dismissing the appeal and confirming the judgment and decree dated 20th December, 2013 passed by the 3rd Joint Civil Judge, Junior Division, Nagpur in Regular Civil Suit No. 3047/2012 (Old Special Civil

Suit No. 502/2004) dismissing the suit for declaration, possession and permanent injunction.

2. The brief facts of the present case are as follows : (Parties are referred to as per their status before the trial Court).

The plaintiff filed a suit for declaration, possession and permanent injunction. It is the case of the plaintiff that he purchased the suit plot from defendant no.1 vide registered sale-deed dated 17th April, 1984 and he is in possession since then. However, in the month of January, 2003, defendant no.1 illegally removed the board and the compound. Thereupon, a police complaint was lodged. It is the further case of the plaintiff that on 22nd March, 2004 when he applied for mutation of his name in Village Panchayat record, he came to know that the defendant no.1 has executed the sale-deed of the suit plot in favour of third person. On inquiry, he revealed first time that defendant no.1 has illegally and unauthorizedly divided the suit plot in two parts i.e. 14-A and 14-B and also executed the sale-deed in respect of Plot No.14-A on 28th January, 2004. According to the plaintiff, the sale-deed is sham, null, void and not binding upon him and on knowing that the defendants are intending to transfer the suit plot, the suit came to be filed.

3. The defendant resisted the suit by filing written statement.

4. The learned trial Court after scrutinizing of the evidence as well as documentary evidence dismissed the suit vide impugned judgment and decree dated 28th December, 2013, which was carried by

the plaintiff in appeal which also came to be dismissed vide impugned judgment and decree dated 22nd November, 2018. Hence, this appeal.

5. This Court vide order dated 30th August, 2019 has framed substantial question of law:

“Whether in the absence of a specific and categorical denial of ownership, were the Courts below justified in recording a finding that the plaintiff did not prove title to the suit property on the strength of the certified copy of the sale deed Exh.29 ?”

6. Ms. Lakhani, learned counsel for the appellant submits that in this case while leading secondary evidence, the certified copy of sale-deed executed by defendant no.1 in favour of plaintiff was produced and though certified copy is admissible under Section 65 of the Evidence Act, it was discarded by both the Courts below.

7. It is submitted that Section 65 of the Evidence Act permits secondary evidence 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.

8. It is submitted that the original sale-deed was stolen from his vehicle and therefore secondary evidence on the basis of certified copy of sale-deed was brought on record which was discarded contrary to the well settled principle of law in this respect. The learned counsel for the

appellant has placed reliance of *Rakesh Mohindra Vs. Anita Beri and others*¹.

9. On the other hand, Shri Gour, learned counsel for the respondent submits that without permission the secondary evidence was led. It is submitted that the genuineness of the said document was strongly objected by the defendant no.1. He submits that the fact in respect of original sale-deed was stolen from the motor-cycle of the plaintiff was not proved. He, therefore, submits that both the Courts below have rightly discarded the said evidence and dismissed the suit filed by the plaintiff.

10. In light of the rival contentions of the parties, I have perused the record and impugned judgment and decree.

11. In the case of *Marwari Kumhar and others Vs. Bhawanpuri Guru Ganeshpuri and another* (supra) has held thus:

“9. Section 65 of the Evidence Act reads as follows :

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

(a) 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;

¹ (2016) 16 SCC 483

(b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(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) When the original is of such a nature as not to be easily movable;

(e) When the original is a public document within the meaning of section 74;

(f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in (India), to be given in evidence;

(g) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be provided is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f) a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

10. Thus it is to be seen that under sub-clause (c) of Section 65, where the original has been lost or destroyed, then secondary evidence of the contents of the document is admissible. Clause (c)

is independent of clause (f). Secondary evidence can be led, even of a public document, if the conditions as laid down under sub-clause (c) are fulfilled. Thus if the original of the public document has been lost or destroyed then the secondary evidence can be given even of a public document. This is the law as has been laid down by this Court in *Bibi Aisha v. Bihar Subai Sunni Majlis Avaqaf and Others*, reported in AIR (1969) Supreme Court 253. In this case a suit had been filed for setting aside a registered mokarrari lease deed and for restoration of possession of properties. The suit had been filed on behalf of a waqf. The original waqf deed was lost and an ordinary copy of the waqf deed was produced in evidence. The question was whether an ordinary copy was admissible in evidence and whether or not secondary evidence could be led of a public document. The Court held that under section 65 clauses (a) and (c) secondary evidence was admissible. It is held that a case may fall both under clauses (a) or (c) and (f) in which case secondary evidence would be admissible. It was held that clauses (a) and (c) were independent of clause (f) and even an ordinary copy would, therefore, be admissible. As stated above the case that the original was no longer available in Court records and the certified copy was lost has not been disbelieved. Thus the ordinary copy of the earlier judgment was admissible in evidence and had been correctly marked as an exhibit by the trial court.”

12. In the case of *Rakesh Mohindra Vs. Anita Beri and others* (*supra*)

21. In *M. Chandra vs. M. Thangamuthu*, (2010) 9 SCC 712, this Court considered the requirement of Section 65 of the Evidence Act and held as under:- (SCCp 735-36, para 47)

“47. We do not agree with the reasoning of the High Court. It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in

any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party.”

13. From the above referred observations, there is no doubt that the secondary evidence is permissible if the requirement of the provision of Section 65 of Evidence Act, is satisfied.

14. In the present case, the appellant is harping upon Section 65(c) of Evidence Act which says that, 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.

15. In the present matter, the defendant no.1 has raised serious dispute about the genuineness of the sale-deed on the ground that there was no agreement of sale of the suit land between the plaintiff and the defendant but there was an agreement between the plaintiff and one Shri M.L.Sharma who is not a party to the suit. The said fact was admitted by the appellant in his cross-examination and he states that before execution of the sale-deed, agreement to sale was executed between him and Shri M.L.Sharma.

16. Thus, admittedly, said agreement of sale is not between the defendant no.1 and plaintiff. Moreover, it is the case of the plaintiff that the said agreement was also stolen in the year 1998.

17. The plaintiff failed to explain as to why there was an agreement with Shri M.L.Sharma and not with the defendant no.1 who is vendor/owner of the suit property, particularly, when it is the case of the plaintiff that he purchased the suit property from the defendant no.1.

18. Though, the plaintiff has denied the suggestion of the defendant in the cross-examination that, the original sale-deed was not produced because the signature thereon of Shri Kashyap was forged by impersonation. However, undisputably the dispute was raised by the defendant as to genuineness of the sale-deed.

19. In the above referred backdrop, it can be seen that, the learned lower Appellate Court has observed that, the wording of the marking of exhibit to the certified copy of the sale-deed nowhere states that, the certified copy was being exhibited. Therefore, the Appellate Court has observed that it appears that it was exhibited assuming it as original. The said fact further makes it clear at the time of exhibiting the said document the defendant no.1 could not get the opportunity to raise any objection to exhibit the said document.

20. So far as the story of the plaintiff that the original sale-deed was stolen from his motor-cycle and he lodged the report, it was never the case of the plaintiff before leading secondary evidence of the sale-deed.

The said ground first time came in cross-examination of the plaintiff. Further more, the plaintiff has not produced the copy of complaint lodged with the police. Thus, without putting forward any reason as per pre-requisite of Section 65 of the Evidence Act or without satisfying the requirement of Section 65, the document was produced and it was exhibited.

21. In the circumstances, for the above referred reasons recorded, I hold that the plaintiff did not prove the title to the suit property on the strength of certified copy of the sale-deed exhibit 29. Accordingly, the second appeal is dismissed.

[ANIL S. KILOR, J.]

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