

HON'BLE SRI JUSTICE K. LAKSHMAN

CIVIL REVISION PETITION No.2599 OF 2022

ORDER:

Heard Mr. Mirza Safiulla Baig, learned counsel for the petitioners and Mr. Karnam Ramesh, learned counsel for respondent Nos.1 to 6.

2. The present Revision is filed challenging the order dated 10.10.2022 passed in I.A. No.56 of 2022 in O.S. No.54 of 2012 by learned Senior Civil Judge Court, Narayanapet.

3. Respondent Nos.1 to 6 herein are the plaintiffs in O.S. No.54 of 2012. Respondent Nos.7 and 8 are defendant No.1 and 4 and the petitioners herein are defendant Nos.2 and 3. Respondent Nos.1 to 6 herein have filed the suit vide O.S. No.54 of 2012 seeking partition and separate possession in respect of 1/7th share each in the plaint schedule properties situated at Dasardoddy village Shivara of Maktha Mandal. During pendency of the aforesaid suit, the petitioners herein and respondent No.8 herein being defendant Nos.2 to 4 have filed an application vide I.A. No.56 of 2022 under Section - 65(a) of the Indian Evidence Act to permit them to lead secondary evidence of Photostat copy of Will dated 17.07.2010 executed by the wife of

defendant No.1 in respect of suit property in Survey No.242 admeasuring Acs.2-00 guntas, situated at Dasardoddi village of Makthal Mandal. The trial Court vide order 10.10.2022, dismissed the said petition. Challenging the same, the petitioners herein have filed the present revision.

4. For the sake of convenience, the parties will be referred as arrayed in the suit.

5. **FACTUAL BACKGROUND:**

i) Defendant No.1 is the father of the plaintiffs and constituted a Hindu Undivided Family. The land admeasuring Acs.4-20 guntas in Survey No.239/A, situated at Dasardoddy Village Shivar of Makthal Mandal, was succeeded by the father of the plaintiffs from ancestors. He had purchased land admeasuring Acs.2-00 guntas in Survey No.242/UU/2, situated in the very same village with the funds of joint family in the name of the mother of the plaintiffs under a registered sale deed bearing document No.521 of 2006. The aforesaid lands are suit schedule properties in the aforesaid suit.

ii) During her life time, she executed a Will in favour of her husband, defendant No.1. After her demise in the year 2011, the land

was transferred in the name of defendant No.1. Pursuant to the said Will, mutation proceedings were also issued in his favour.

iii) Thereafter, defendant No.1 sold the property to defendant No.2 under a registered sale deed dated 06.06.2011 and further defendant No.2 sold out the same to defendant Nos.3 and 4. In the above suit, defendant No.1 remained *ex parte*.

iv) During further chief-examination of DW1, defendant Nos.2 to 4 sought to mark Photostat copy of Will, whereas the plaintiffs objected for the same.

v) Under the said circumstances, defendant Nos.2 to 4 had issued a notice under Section - 66 of the Act to defendant No.1 to produce original Will. Thereupon, defendant No.1 got issued a reply stating that he did not possess Will and also denied the execution of said Will.

vi) Thereafter, defendant Nos.2 to 4 had filed an application under Section - 65 of Indian Evidence Act, vide I.A. No.56 of 2022 in O.S. No.54 of 2012. Upon hearing both sides, the trial dismissed the said petition vide order dated 10.10.2022 on the following grounds:

a) Foundation for leading secondary evidence was not laid, and unless it is shown that the document is in possession of the other side, defendant Nos.2 to 4 cannot be permitted to lead secondary evidence.

b) The written statement is silent with regard to the possession of original Will with defendant No.1 and rejoinder was filed to the said effect.

c) In usual course, link documents would be handed over along with sale deed. It is not explained as to the circumstances under which the Will was not required and was not delivered by defendant No.1.

6. Contention of the Petitioners:

i) The impugned order suffers from incurable legal infirmities and there is an error apparent on the face of the record. The trial Court erred in dismissing I.A.No.56 of 2022 without considering the pleadings on record.

ii) The trial Court failed to consider that a notice under section - 66 of Indian Evidence Act was issued to defendant No.1 to produce the original will dated 17.07.2010 executed by his wife in his favour.

Even after receiving the notice, defendant No.1 failed to produce the original will.

iii) The trial Court erred in holding that the written statement is silent with regard to the fact that original will is with defendant No.1. The trial Court also did not consider the fact that the defendants have specifically mentioned in their written statement about the execution of the said Will.

7. Contentions of the Respondent 1 to 6:

i) The plea taken by the revision petitioners about handing over of Photostat copy of Will dated 17.07.2010 to them by defendant No. 1 at the time of execution of sale of land is an invented story to avoid partition.

ii) The respondents herein have strongly opposed marking of the Photostat copy of the Will said to have executed in favour of defendant No.1 by his wife.

iii) Further, defendant Nos.2 to 4 have not filed any rejoinder to the reply got issued by defendant No.1 denying the non-existence of the Will. This itself shows that there was no Will in existence.

iv) The contention of defendant Nos.2 to 4 that defendant No.1 acquired the subject land basing on the Will executed by his wife is nothing but self-serving statement as the same is contradictory to ROR proceedings, which would disclose that the mutation has been done pursuant to the succession by inheritance.

v) In view of the settled principles of law that, in order to lead secondary evidence under Section - 65 A of the Indian Evidence Act, proving of existence of original or primary evidence is *sine quo non* apart from laying necessary foundation by appropriate pleadings.

vi) The trial Court was right in dismissing the petition filed by defendant Nos.2 to 4 and there is no error in it.

vii) The learned counsel placed reliance on the decisions in **Keshava Reddy v. Bal Reddy¹**, **U. Sree v. U. Srinivas²**, **Hari Singh v. Shish Ram³** and **Jagmail Singh v. Karamjit Singh⁴**.

8. Analysis and finding of the Court:

i) From the facts and the contentions of the parties, the issue before this Court is whether trial Court was justified in dismissing I.A.

¹. (2016(2) ALT 219 (S.B.)

². (2013 (1) ALT (SC) 18 (D.B.)

³. AIR 2003 P & H 150

⁴. (2020) 5 SCC 178

No.56 of 2002 filed under Section - 65 (a) of the Evidence Act, 1872 to mark Photostat copy of Will dated 17.07.2010 executed by the wife of defendant No.1 in his favour.

ii) In this regard, it is apposite to refer the relevant provisions of the Indian Evidence Act, 1872 which are as under:

“61. Proof of contents of documents.—The contents of documents may be proved either by primary or by secondary evidence.

63. Secondary evidence.—Secondary evidence means and includes—

- (1) Certified copies given under the provisions hereinafter contained
- (2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
- (3) Copies made from or compared with the original;
- (4) Counterparts of documents as against the parties who did not execute them;
- (5) Oral accounts of the contents of a document given by some person who has himself seen it. Illustrations
 - (a) 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.
 - (b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of

the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

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) 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;

(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 1[India] to be given in evidence2; 1[India] to be given in evidence2;"

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved 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.

66. Rules as to notice to produce.—Secondary evidence of the contents of the documents referred to in section 65, clause

(a) , shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, 1[or to his attorney or pleader,] such notice to produce it as is

prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:—Secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, 1[or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case\:" Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

- (1) when the document to be proved is itself a notice;
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;
- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (4) when the adverse party or his agent has the original in Court;
- (5) when the adverse party or his agent has admitted the loss of the document;
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.”

iii) From the law laid above, it is clear that the party relying on secondary evidence under Section - 65 (a) has to issue notice under

Section - 66 of the Act. Defendant Nos.2 to 4 issued a notice under Section - 66 to defendant No.1 directing him to produce the original copy of Will and defendant No.1. Though he remained *ex parte* in the suit, he got issued reply to the notice issued by defendant Nos.2 to 4 denying the existence of Will.

iv) Whether defendant Nos.2 to 4 - the petitioners herein laid the foundation for leading secondary evidence or not has to be examined. In **M. Aruna v. Trilok Kumar Sanghi**⁵ the combined High Court of Andhra Pradesh at Hyderabad held as follows:

“24. It is no doubt true that defendant No.2 specifically denied the very existence of original document, much less custody of such document. This Court is of the considered opinion that these aspects may have to be gone into at appropriate stage. There may be cases where the opposite party may deny the very existence of the document or custody of the original for extraneous reasons and with an ulterior motive. In every such case, necessarily the Court cannot come to the conclusion that such secondary evidence is not genuine and not bona fide. It would be just and proper to go into these aspects at the appropriate stage. It may be true that the learned Judge was not inclined to mark this document on the prior occasions, may be, for the reason that the procedure as contemplated

⁵. (2009) SCC OnLine AP 91

in Sections 65 and 66 of the Act had not been followed or had not been complied with. The only objection, if any, in this regard may be that specifically respondent-defendant denied the same.

25. It is made clear that the reasons which had been recorded touching the other merits and demerits relating to genuineness or otherwise of this document in question, secondary evidence may be gone into at the appropriate stage. It is also pertinent to note that merely because at a particular point of time on some ground, may be twice also, the Court was not inclined to permit the secondary evidence to be received as evidence when the procedure as contemplated by the provisions of the Act had not been complied with, in view of the fact that the other merits and demerits, inclusive of objections if any, may be gone into at the appropriate stage, since the parties are expected to let in oral evidence also in this regard and such parties also would be further cross- examined in this regard it may be just and proper to permit the petitioner to mark the document in question by way of secondary evidence subject to the condition of the learned Judge considering of the other aspects at the appropriate stage while deciding the suit.

v) In **Shaikh Aftab Ahmed v. Bhimrao**⁶, a Division Bench of

Bombay High Court held as under:

“91 . But would an application be precluded referring to facts, circumstances and background, seeking permission to lead secondary evidence in respect of a document not referred to in pleadings.

92. Corollary of Dhanpat's case (supra) discernibly appears to be application would be required if foundational facts have not been referred to in any form and secondary evidence is sought to be led.

93. The Supreme Court has also, in the case of "Jagmail Singh and Another V/s. Karamjit Singh and Others" reported in MANU/SC/0444/2020 : (2020) 5 SCC 178 has considered in paragraphs No. 11, 12, 13, 17 and 19, as under- "

“11. A perusal of Section 65 makes it clear that secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power against whom the document is sought to be produced, 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 notice mentioned in Section 66 such person does not produce it. It is a settled position of law that for secondary evidence to be admitted foundational evidence has to be given being the reasons as to why the original Evidence has not been furnished.

12. The issue arising out of somewhat similar facts and circumstances has been considered by this Court in Ashok Dulichand Vs. Madahavlal Dube and Anr.¹ and it was held as under:-

"7. According to Clause (a) of Section 65 of Indian Evidence Act, Secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in 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

⁶. W.P. No.8442 of 2019, decided on 22.09.2021

Court of any person legally bound to produce it and when, after the notice mentioned in Section 66 such person does not produce it. Clauses (b) to (g) of Section 65 specify some other contingencies wherein secondary evidence relating to a document may be given."

13. In the matter of Rakesh Mohindra Vs. Anita Beri and Ors. this Court has observed as under:- '

15. The preconditions for leading secondary evidence are that such original documents could not be produced by the party relying upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original documents is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot accepted."

17. Needless to observe that merely the admission in evidence and making exhibit of a document does not prove it automatically unless the same has been proved in accordance with the law.

19. The appellants would be entitled to lead secondary evidence in respect of the Will in question. It is, however, clarified that such admission of secondary evidence automatically does not attest to its authenticity, truthfulness or genuineness which will have to be established during the course of trial in accordance with law."

94. From foregoing discussion, it would be seen that scope of answer to question posed is whelmed by decisions of the Supreme Court in the cases of "Dhanpat" (supra) and "Jagmail Singh" (supra). Thus, emerging position is that a party may furnish secondary evidence and filing of an application seeking permission to lead secondary evidence would not be mandatory. However, an application for leading secondary evidence by a party is not precluded. Reference stands answered accordingly.

vi) Bharat Sewa Sansthan v. U.P. Electronics Corporation

Limited⁷, the Hon'ble Supreme Court held as under:

“23. The High Court in writ petition filed by the respondent Corporation against the order of the trial court, allowed the application of the respondent Corporation filed under Section 8(1) of the Arbitration Act. It was the specific case of the respondent Corporation before the High Court that the original agreements are in the possession of the appellant Sansthan, whereas the stand of the appellant Sansthan was that the original agreements are not in its possession.

24. The respondent Corporation placed on record of the trial court b photocopies of the agreements along with an application under Section 8(1) of the Arbitration Act. The High Court, in our view, has rightly held that the photocopies of the lease agreements could be taken on record under Section 8 of the Arbitration Act for ascertaining the existence of arbitration clause. Thus, the dispute raised by the appellant Sansthan against the respondent Corporation in terms of the arbitration clause contained in the lease Cagreement is arbitral.

25. Now, the question pressed before us is whether we should, in exercise of our power and jurisdiction under Article 142 of the Constitution of India as submitted by Shri Shanti Bhushan, grant the payment of balance of arrears of rent, payment of balance arrears of water and sewerage tax and interest on the arrears of rent to the appellant Sansthan, which amounts are disputed by d the respondent Corporation before us. The nature and ambit of the power of this Court under Article 142 of the Constitution of India, no doubt, is meant to do complete justice between the litigating parties, but at the same time this Court has to bear in mind that the power is conceived to meet the situations which cannot be effectively and appropriately tackled by the existing provisions of law.”

⁷. (2007) 7 SCC 737

vii) In **Mangat Ram v. Ashok Kumar Sharma**⁸, the Delhi

High Court held as under:

“3. A perusal of the order of trial Court would show that the trial Court denied permission to lead secondary evidence on the ground that the defendant in his reply to the notice had refused that he was in possession of the documents of title showing that the petitioner was the owner. The trial Court observed that the plaintiff has prima facie failed to prove the averments made in the application and failed to prove the existence of the original documents, which could entitle him to lead secondary evidence.

4. It is argued by Counsel for the petitioner that trial Court wrongly observed in its order that the plaintiff failed to disclose in the plaint that the original documents were in possession of defendant whereas the plaintiff, in his plaint pleaded that the original documents of the property were in possession of the defendant. In the written statement, defendant denied these averments in paras 8 and 9. In replication, the plaintiff reasserted that the original documents were with the defendant. A perusal of record would show that these averments were there in the pleadings.

5. Secondary evidence can be led in the Court under Section 65 of the Indian Evidence Act when the original is shown in power and possession of the person against whom the document is sought to be proved. In the present case, defendant is the son of the petitioner and had been living with the petitioner in the same house and the petitioner after death of his wife has become dependent upon his son. The petitioner's averment that the original documents were in possession of the defendant was a plausible averment. The trial Court in this case did not consider Section 65A of the Indian Evidence Act and did not exercise its jurisdiction that secondary evidence can be allowed in those cases where the originals appear to be in possession of power of

⁸. 2010 SCC OnLine Del. 1270

the opposite party against whom the document is sought to be proved. Bare denial by the opposite, party that it did not have the original document would not disentitle the plaintiff/petitioner to prove his title by way of secondary evidence. The secondary evidence can be allowed if the documents appear to be in possession of the opposite party. It is a clear cut case where the Court should have considered that there was every likelihood of the petitioner's averments being correct and the petitioner, therefore, has a right to prove his ownership by way of secondary evidence. The evidentiary value and weight of the evidence led by the petitioner as secondary evidence would have to be decided by the trial Court after the entire evidence was over.”

9. **Conclusion:**

i) In view of the above findings, the petitioners herein, defendant Nos.2 and 3 have laid the foundation evidence in their written statement about existence of Will and also filed Photostat copy of the Will along with written statement. The petitioners in the affidavit filed by them in support of I.A.No.56 of 2022 also indicated that original Will dated 17.07.2010 was in possession of defendant No.1. Therefore, the petitioners herein have laid proper foundation about existence of Will dated 17.07.2010. Hence, the petitioners herein are entitled for marking of Photostat copy of said Will. Therefore, the impugned order is not on consideration of actual facts and record. Reasons assigned by the trial Court are contrary to the record and principle laid down in the above said judgments.

Therefore, the same is liable to be set aside. However, admission of secondary evidence of Will does not attest to its authenticity, truthfulness or genuineness, and the same has to be proved and established during the course of trial in accordance with law.

ii) The present Civil Revision Petition is allowed setting aside the order, dated 10.10.2022 passed in I.A. No.56 of 2022 in O.S. No.54 of 2012 by learned Senior Civil Judge Court, Narayanapet, by allowing I.A. No.56 of 2022. However, there shall be no order as to costs.

As a sequel, the miscellaneous petitions, if any, pending in the revision shall stand closed.

6th February, 2023
Mgr

K. LAKSHMAN, J