

2023:PHHC:061074

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

**CR-158-2016 (O&M)
Date of Decision: April 13, 2023**

Gomti Devi

...Petitioner

Versus

Balbir Singh and others

...Respondents

CORAM: HON'BLE MRS. JUSTICE ARCHANA PURI

Present: Mr.S.S.Sahu, Advocate
for the petitioner.

Mr.Ashok Arora, Advocate
for respondent No.1.

ARCHANA PURI, J.

Through the present petition under Article 227 of the Constitution of India, the petitioner has assailed the order dated 29.10.2015 (Annexure P-1) passed by learned Civil Judge (Jr. Divn.), whereby, an application filed by the respondent-defendant No.1, to lead secondary evidence, was allowed.

The facts, as culled out from the paperbook are that petitioner-plaintiff Gomti Devi had filed a suit against defendants-respondents-Balbir Singh and others, for seeking declaration that plaintiff along with proforma defendants, being the legal heirs of Sheo Ram s/o Jetha Ram, are owners with possession in equal shares of the land, as detailed in the head note of the plaint, copy whereof is Annexure P-2, on the ground of inheritance of

Sheo Ram and also sought declaration, vis-a-vis, legality and validity of the alleged Will No.7 dated 13.05.1993, obtained by defendants No.1 to 3, who are brothers of the plaintiff and also challenged the mutation No.1744 sanctioned on 02.08.1993, on the basis of the aforesaid Will. Besides the same, also sought issuance of permanent injunction to restrain defendants No.1 to 3 from alienating and transferring the suit land and creating any encumbrance over it.

During the pendency of the suit, at the stage of recording of the evidence, respondent-defendant No.1 Balbir Singh had filed an application for seeking permission to lead secondary evidence to prove the certified copy of the Will No.7 dated 13.05.1993. In the said application, it was averred that while preparing for the evidence, the original Will was not available with respondent-defendant No.1 and he tried his best to search the original Will, but could not find the same. When this fact was brought to the notice of his counsel, it was advised that Will dated 13.05.1993, being registered document, is lying in the office of Sub-Registrar and same can be proved by way of secondary evidence, for which permission from the Court is necessary. In view of the same, respondent-defendant No.1 sought permission to be allowed to prove the Will executed by Sheo Ram, while summoning the original second copy of the Will, lying in the office of Sub-Registrar, by way of secondary evidence, original of which, has been misplaced.

In the application, it has also been asserted that petitioner-plaintiff has also produced the certified copy of Will No.7 dated 13.05.1993 and this Will is now sought to be proved by way of secondary

evidence, for the just decision of the case.

In reply, petitioner-plaintiff had controverted the averments and it was asserted that nowhere, in the written statement as well as other documents, it was mentioned that original Will has been misplaced and defendant No.1 has not got entered rapat or FIR in this pretext with regard to the missing of the alleged Will. It is further stated that defendant No.1 wants to fill up the lacuna and the application has been filed at a belated stage. However, in reply, it was admitted to be correct that the petitioner-plaintiff had produced the certified copy of Will, which is under challenge. In the end, a prayer was made for dismissal of the application.

After hearing learned counsel for the parties and after going through the record of the case, vide impugned order dated 29.10.2015, the aforesaid application for leading secondary evidence was allowed.

Feeling aggrieved by the impugned order, present revision petition has been filed by the petitioner-plaintiff.

Respondent-defendant No.1 has made appearance through counsel.

Learned counsel for the parties heard.

The petitioner-plaintiff, in the suit in hand, had sought declaration, thereby, asserting herself as well as proforma respondents being legal heirs of Sheo Ram, to be owners in possession of equal shares of the land, as detailed in the headnote of the plaint, on the ground of inheritance of Sheo Ram. Defendants No.1 to 3 are the brothers of the plaintiff.

Besides the aforesaid, petitioner-plaintiff had also challenged

the legality and validity of Will No.7 dated 13.05.1993, as allegedly obtained by defendants No.1 to 3, on behalf of Sheo Ram, to be forged and illegal and has been manipulated by way of fraud and misrepresentation and that it is surrounded by suspicious circumstances. Furthermore, also challenged the mutation sanctioned, on the basis of the Will in question. Besides the same, permanent injunction has also been sought.

It is pertinent to mention that the application for leading secondary evidence has been filed by respondent-defendant No.1, at the stage, when the case was fixed for defendants' evidence. Furthermore, undisputedly, as asserted in the application itself, which fact has not been disputed by the petitioner-plaintiff in the reply, the certified copy of the disputed Will No.7 dated 13.05.1993, has already been produced by the petitioner-plaintiff. Considering the aforesaid fact situation, it is to be noted that a perusal of Section 65 of the Evidence Act 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 settled law 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.

Now, reverting to the case in hand. It should be noted that it is specifically claimed by respondent-defendant No.1, in the application, that

at the time of preparing of his evidence, the original Will was not available with him and he tried his best to search the original Will, but could not find the same. Thus, there was misplacement of the Will.

From the tone and tenor of the relief sought in the suit, it becomes evident that the petitioner-plaintiff had admitted about the execution of Will, though, it was alleged to be result of fraud and misrepresentation. The execution of the Will was not disputed by the petitioner-plaintiff, but only proof of the Will, was the subject matter in the Will. Therefore, when the assertion of respondent-defendant No.1 is that the original Will was lost and the certified copy of the same has been produced by the petitioner-plaintiff, then respondent-defendant No.1 has made out sufficient ground for leading secondary evidence.

Moreover, the document sought to be proved by way of secondary evidence, is a registered document and therefore, at this stage, it cannot be presumed that this document was never executed, more particularly, in view of the relief sought by the petitioner-plaintiff in the suit in hand.

In view of the aforesaid observations, the impugned order does not call for any interference. As such, the revision petition sans merit and is hereby dismissed.

April 13, 2023
Vgulati

(ARCHANA PURI)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
Yes/No