

CR-5906-2018 (O&M)

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR-5906-2018 (O&M)

Reserved on : 29.05.2023

Date of Decision : 04.07.2023

Phool Kumari

....Petitioner

VERSUS

Satnarain & Others

....Respondents

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Sanjiv Kumar Aggarwal, Advocate for the petitioner.

Mr. I.S. Pabla, Advocate for respondent Nos.1 and 3 to 5.

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ALKA SARIN, J.

1. The present revision petition under Article 227 of the Constitution of India has been preferred by the plaintiff-petitioner challenging the order dated 10.08.2018 whereby an application filed by defendant-respondent No.1 on behalf of defendant-respondent Nos.1, 3 to 5 for leading secondary evidence qua Will dated 18.07.1988 (Ex.P/13) has been allowed.

2. The brief facts relevant to the present *lis* are that the plaintiff-petitioner filed a suit for declaration to the effect that the plaintiff-petitioner and the proforma-defendant/respondent Nos.3 to 5 are joint owners in possession to the extent of 1/12th share each and that defendant-respondent Nos.1 and 2 to the extent of 1/3rd share each in respect of land measuring 171 Kanal 07 Marlas as fully described in the plaint as well as for

declaration that Will dated 18.07.1988 (Ex.P/13) and the revenue entries and the mutation (Ex.P/2) made on the basis of the Will are illegal, null and void and not binding on the rights of the plaintiff-petitioner. A written statement was filed on behalf of defendant-respondent Nos.1, 3, 4 and 5 wherein it has been stated that Badlu had executed a Will dated 18.07.1988 (Ex.P/13) in favour of defendant-respondent Nos.1 and 2 and that the said Will was in possession of defendant-respondent No.2 whereas photostat copy of the Will was in possession of defendant-respondent No.1. An application was filed for leading secondary evidence to prove the Will dated 18.07.1988. In the application it is stated that the original Will was with defendant-respondent No.2. It is further averred that an application has been filed by defendant-respondent Nos.1, 3 to 5 directing defendant-respondent No.2 to produce the original Will dated 18.07.1988. However, a reply was filed by defendant-respondent No.2 stating that the Will was not in his possession and that the Will was forged and fabricated. Hence, defendant-respondent Nos.1, 3 to 5 sought to prove the Will by way of secondary evidence. A reply was filed to the said application. Vide the impugned order the application was allowed. Hence, the present revision petition.

3. Learned counsel for the plaintiff-petitioner would contend that the Will sought to be produced as secondary evidence is only a photocopy and the original has never seen the light of the day. It is further the contention that photostat copies of the original cannot be received as secondary evidence in terms of Section 63 of the Evidence Act, 1872. In support of his argument, learned counsel has placed reliance on **Smt. J.**

Yashoda Vs. Smt. K.Shobha Rani [2007 (2) RCR (Civil) 840],

Harmanjit Kaur Vs. Jarnail Singh [2014 (3) RCR (Civil) 1638], Hira Singh & Anr. Vs. Ajit Singh [2017 (4) PLR 446] and M/s Parkash Chand Kapoor Chand Vs. Inderjit Singh & Ors. [2006 (3) RCR (Civil) 700).

4. *Per contra*, learned counsel for defendant-respondent Nos.1, 3 to 5 has contended that the original Will is in possession of defendant-respondent No.2 and that an application has also been filed by the defendant-respondent Nos.1, 3 to 5 for production of the Will. However, it was denied that the Will was in possession of defendant-respondent No.2. It is further the contention that in view of the fact that the original Will was in possession of some other person, the defendant-respondent Nos.1, 3 to 5 were well within their right to file an application for secondary evidence for proving the document.

5. I have heard the learned counsel for the parties.

6. Section 63 and 65 of the Evidence Act, 1872 read as under :

“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 ensure 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 India to be given in evidence;

(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.”

7. Secondary evidence can be led if it is shown that the original document existed or is accounted for anywhere. There is nothing on the record to even remotely show that the original of the Will sought to be proved by way of secondary evidence was ever produced before the authority. Merely by saying that the same is in possession of defendant-respondent No.2, which fact is also denied, would not absolve defendant-respondent Nos.1, 3 to 5 of the duty to prove that the original existed.

8. The Supreme Court in the case of **Smt. J. Yashoda** (supra) has held as under :

“7. Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through

failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents.

8. *Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the Section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence.*

9. *The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in*

the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section.”

9. Yet again, it has been held in the case of **Harmanjit Kaur** (supra) as under :

“5. Plaintiff filed suit for declaration that she was entitled to 1/6th share in the property as described in the plaint. Claim was resisted by the respondents who set-up Will dated 15.10.2001. They contended that original will had been lost. Thus, they be allowed to lead secondary evidence to prove the same. It appears, father of the plaintiff namely Chetan Singh died while on Army duty. As a result, she filed instant suit claiming her share in the property. However, brothers of deceased Chetan Singh claimed that their father had left a Will dated 15.10.2001 which had been lost. They were, however, entitled to prove the same by leading secondary evidence. Prayer of defendants has been accepted by the court below. However, there is no clear averment as to how and when the original Will was lost.

6. *In Smt. J. Yashoda (supra) it has been observed by the apex court that photostat copies of the original cannot be received by way of secondary evidence in terms of Section 63 of the Evidence Act. Moreover, it is well settled that in order to succeed in an application to lead secondary evidence, the pre-requisite is that the applicant has to prove the existence as well as the loss of the document.*

7. *There is nothing on record to show that out of five defendants, who was in possession of the original Will. Counsel for respondents has not been able to show that secondary evidence can be led to prove photo copy of the Will. I am, thus, of the considered view that impugned order is unsustainable. Same deserves to be set-aside. Ordered accordingly. Revision petition stands allowed.”*

10. In the case of **M/s Parkash Chand Kapoor Chand** (supra), it has been held that :

“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 xxxx xxxx

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 xxxx xxxx"

In terms of the above, it is evidence 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 produced 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.”

11. In order to enable the defendant-respondent Nos.1, 3 to 5 to produce secondary evidence in regard to the Will dated 08.07.1988 it was necessary for them to prove the existence and execution of the original Will which they have failed to do. During the course of arguments, learned counsel for the plaintiff-petitioner also pointed out that at the time of mutation on the basis of the alleged Will dated 08.07.1988 only defendant-respondent No.1 was present and hence the argument that the original was with defendant-respondent No.2 cannot be believed. The requirements of Section 65 of the Evidence Act, 1872 not having been met, the impugned order is perverse and suffers from material irregularity.

12. In view of the discussion above the present revision petition is allowed and the impugned order dated 10.08.2018 (Annexure P-1) is set aside. Pending applications, if any, also stand disposed off.

13. It is made clear that any observation made herein-above shall not be treated as an expression of any opinion on the merits of the case.

04.07.2023
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(ALKA SARIN)
JUDGE

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