

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

FAO No. 7819 of 2017 (O&M)

Date of Decision: 26.07.2023

Bharat Dixit

..... Appellant

Versus

Smt.Usha Dixit

..... Respondent

CORAM : HON'BLE MR. JUSTICE RAJ MOHAN SINGH
HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Ajay Ghangas, Advocate for the appellant.

Mr.Abhilaksh Grover, Advocate for the respondent

HARPREET SINGH BRAR, J.

1. The present appeal is preferred against the judgment and decree dated 13.02.2017 passed by learned District Judge, Family Court-I, Faridabad, whereby a civil suit number 34 of 2016/2012 titled as '*Bharat Dixit v. Mrs. Usha Dixit*' for declaration with consequential relief of permanent and mandatory injunction filed by the plaintiff/appellant against respondent, was dismissed.

FACTUAL BACKGROUND

2. Brief facts of the case are that plaintiff was married to defendant on 12.02.1996 according to Hindu rites and ceremonies. Two daughters namely Kajal and Akansha were born out of the wedlock. It is averred that plaintiff is the absolute owner of Plot No. 94, Block A, SGM Nagar, Faridabad measuring 200 sq.yards i.e. 30 ft x 60 ft. forming part of Khasra

No.132/4, situated within the revenue estate of village Badkhal, Tehsil and District Faridabad. The said property was purchased by him from various persons by making payment of the entire sale consideration. General Power of Attorney was also executed in his favour. Thereafter the plaintiff executed sale deed No. 14969 dated 29.12.2015 in favour of the defendant and she became owner in possession of the same. Construction was raised on the said plot and after getting electricity connection, he started his business under the name and style of M/s Bharat Engineering Works therein.

3. Further averments made by the plaintiff are that he had tried to maintain the defendant comfortably but she refused to perform her household chores. She used to treat him with cruelty and even used filthy language in the presence of his friends and relatives. She also threatened to implicate him in a false dowry case and he was constrained to file a divorce petition under Section 13 of the Hindu Marriage Act against her but she did not put in appearance deliberately in that case which resulted in dissolution of marriage between them vide *ex parte* judgement and decree dated 19.07.2011. She moved an application for setting aside the said judgment and decree levelling false allegations of cheating and misrepresentation against the plaintiff/appellant and the same is still pending.

4. It is further averred that the plaintiff has also taken financial assistance from various banks and if he fails to repay the loan amount, banks would repossess his property. The prices of the aforesaid property have risen with the passage of time and the defendant became greedy. With an ulterior motive to cause financial loss to the plaintiff, she, in connivance with her family members and mafia element, had taken possession of the aforesaid property in the absence of plaintiff who has virtually been thrown out of

employment. He has further averred that defendant has been regularly making false allegations against him and one such complaint was thoroughly investigated and found to be false by the police. Since defendant has forcibly taken possession of the suit property, she is liable to pay damages for use and occupation thereof at the rate of Rs.10,000/- per month which is the minimum prevailing rate of rent in the locality.

Further, on 20.03.2012, defendant has openly declared that she would sell the property to some mafia. The sale deed in her favour is null and void as the entire sale consideration was paid by the plaintiff and he alone had been in possession of the same till her forcible entrance therein. He has thus sought a decree of declaration declaring the sale deed in favour of the defendant to be null and void and further declaring him to be the absolute owner of the suit property. As a consequential relief, he has sought a decree of permanent injunction restraining the defendant, her agents, employees, workers and persons working on her behalf from selling, transferring, alienating or creating any third party interest in the suit property in any manner. He has also sought a decree of possession directing the defendant to deliver the peaceful and physical possession of the suit property to him. A mandatory injunction has also been sought directing the defendant to pay damages to him at the rate of Rs. 10,000/- per month for use and occupation of the suit property from the date of filing of the suit till delivery of possession of the same.

5. Upon notice, defendant filed written statement taking preliminary objections that the suit is not maintainable. The entire suit property is exclusively owned and possessed by the defendant thus, suit for declaration with consequential relief of permanent and mandatory injunction

is not maintainable. The suit has been filed by the plaintiff without payment of Court fee. He is seeking declaration of sale deed as null and void together with consequential relief of possession but assessed the valuation of suit just Rs. 50/- whereas, it is settled law that if plaintiff is claiming declaration of sale deed to be null and void and claiming possession as well, he has to pay *ad valorem* court fee. The ownership of the suit property is being claimed by the plaintiff on the basis of benami transaction which is prohibited under the provisions of the Prohibition of Benami Property Transactions Act, 1988. He can not claim the ownership of suit property as the same was purchased by the defendant with her own sources and funds. Plaintiff has misrepresented and concealed the real facts.

6. The factum of marriage and birth of two daughters out of the wedlock is admitted. It is pleaded by the defendant that for the past one year she observed the abnormal behaviour of the plaintiff as he used to make calls from his phone to some lady and was spending lavishly. Defendant is a housewife and taking care of her both daughters. Plaintiff used to obtain her signatures on some papers on the pretext of filing income tax return but used to submit the said papers with the bank for obtaining loan. She used to sign those papers in a good faith and this was continuing for the past several years. He also obtained her signatures on some summons and when she enquired, he disclosed that there was some problem with the income tax department. He resided with her till 27.09.2011 and they were cohabiting with each other as husband and wife. She was suspecting some foul play as plaintiff used to talk to one lady namely Tannu @ Taruna, who was his employee and he developed illicit relations with her. For this reason, the plaintiff obtained ex parte decree of divorce against the defendant without

even disclosing this fact to her and she had come to know about this in the intervening night of 27th and 28th of September 2011. The defendant is also possessing some blank papers duly signed by her in good faith and she apprehends that he can misuse the same.

7. It is further averred by the defendant that she is absolute owner and in possession of House No. 94, Block-A, SGM Nagar Faridabad and plaintiff has no concern with the same. He has filed the suit just to harass her which is a counter blast of the petition filed by her under Domestic Violence Act and under Section 125 Cr.P.C. against him. She has also averred that since plaintiff has dragged her into unnecessary litigation so she is entitled to receive special compensation under Section 35-A CPC.

8. On merits, it is pleaded by the defendant that she is the absolute owner and in possession of the suit property and plaintiff has no concern with the same. The firm M/s Bharat Engineering Works was being run by plaintiff as well as defendant. Said firm is lying closed for the last 1^{1/2} years. Plaintiff has developed illicit relations with said Tannu @ Taruna by playing fraud upon the defendant. However, he had been residing with the defendant and having physical relations with her as well even after obtaining decree of ex parte divorce and thus is guilty of committing rape upon her. Plaintiff had earlier filed a suit on the same subject matter which was dismissed by the court of Civil Judge (Jr. Division), Faridabad vide order dated 16.08.2012 and the suit filed by the plaintiff on the same subject is liable to be dismissed.

ISSUES

9. On the basis of pleadings of the parties, learned trial Court

framed the following issues:-

1. Whether the plaintiff is entitled for relief of injunction, as prayed for? OPP
- 1A. Whether the plaintiff is entitled to a decree for declaration to the effect that sale-deed dated 29.12.2005 in favour of the defendant is null and void? OPP (framed on 13.02.2017)
- 1B. Whether the plaintiff is entitled to a decree for declaration that he is absolute owner of suit property and defendant has no right, title or interest therein? OPP (framed on 13.02.2017)
2. Whether the plaintiff is entitled for possession of property bearing no. 94 Block A, SGM Nagar, Faridabad measuring 200 sq yards? OPP
3. Whether the suit is not maintainable? OPD
4. Whether the suit has not been assessed properly for the purposes of court fee and jurisdiction? OPD
5. Whether the plaintiff has no cause of action to file the present suit? OPD
6. Whether the defendant is entitled to receive the special compensation from the plaintiff under Section 35-A CPC?
7. Relief.

CONTENTIONS

10. Learned counsel for the appellant/plaintiff contends that the impugned judgment and decree passed by the learned trial Court suffers from illegalities and infirmities. As such, the same is liable to be set aside. Learned counsel for the appellant/plaintiff further asserts that the learned trial Court has failed to consider that the appellant/plaintiff had purchased the suit property measuring 200 square yards in the name of the respondent/defendant and the entire sale consideration of Rs. 3 lacs was paid by the appellant/plaintiff out of love and affection and that the learned trial Court has not considered the fact that the appellant/plaintiff had constructed a building for his factory over the suit property and had been running his

business in the name and style of M/s Bharat Engineering Works. A registration certificate with regard to running of the said business was duly proved on record as Ex.P4. The plaintiff had also installed electricity meter in his name on the suit property and also proved on record the electricity bills to show that he was in possession of the same.

11. Learned counsel for the appellant/plaintiff has vehemently argued that the respondent/defendant has not taken a categorical stand in the written statement that amount of sale consideration was paid to her by her father when admittedly, while deposing as DW1 she has, for the first time, stated that the sale consideration for purchasing the suit property was given to her by her father. The impugned judgment and decree of the learned trial Court has been passed by disbelieving the receipts of the sale consideration as mark 'B' and mark 'C' signed by Balbir Singh and Rashil Singh. Learned trial Court has erred in recording a finding in this regard when the respondent/defendant, while appearing as DW1, is not able to explain whether the part of the suit property was earlier purchased through GPA by the appellant/plaintiff before the registration of the sale deed.

12. Learned counsel for the appellant/plaintiff has further drawn the attention of this Court that when receipts mark 'B' and mark 'C' were produced on 03.01.2017, an objection was raised by learned counsel representing the respondent/defendant but the learned trial Court has not allowed the said objection. As such, the learned trial Court has fallen into grave error by passing the impugned judgment and decree without deciding the objection. Reliance has been placed on the decision of a two Judge Bench of the Hon'ble Supreme Court in **R.V. E. Venkatachala Gounder v.**

Arulmigu Viswesaraswami & V.P. Temple & others, (2003) 8 SCC 752,
speaking through Justice Ashok Bhan, observed as follows:- .

*“19. The learned counsel for the defendant-respondent has relied on **The Roman Catholic Mission v. The State of Madras & Anr., AIR 1966 Supreme Court 1457** in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes :- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object*

allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons; firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court.”

13. On the other hand, learned counsel for the respondent/defendant has contended that the respondent/defendant is the exclusive owner in possession of the suit property and there is no evidence led by the appellant/plaintiff to prove to the contrary and the firm M/s Bharat Engineering Works is lying closed and the learned trial Court has passed a well reasoned judgment by dismissing the suit filed by the appellant/plaintiff. Learned counsel for the respondent/defendant has fervently argued that the appellant/plaintiff has never filed any application for leading secondary evidence under Section 65 (c) of the Indian Evidence Act. As such, the learned trial Court has rightly proceeded to pass the impugned judgment and decree dismissing the suit of the appellant/plaintiff.

OBSERVATION AND ANALYSIS

14. We have heard learned counsel for the parties and have perused the record with their able assistance. The following questions emerge which require adjudication in the present appeal:-

- (i) Whether the appellant/plaintiff had discharged his burden of proof within the meaning of Section 102 of the Indian Evidence Act?
- (ii) Whether the trial Court was required to decide the objection with regard to admissibility of the receipts mark 'B' and mark 'C' as secondary evidence before further proceeding with the trial?
- (iii) Whether the appellant/plaintiff was required to file an application under Section 65(c) of the Indian Evidence Act for the purpose of leading secondary evidence?

15. The Latin maxim "*onus probandi*" means 'burden of proof' to prove a fact is on the person who asserts it in affirmative. The burden of proof as to any particular fact lies on the person who seeks the Court to believe in its existence in terms of the Rule of 'Best Evidence'. Chapter VII of the Indian Evidence Act deals with the burden of proof, Sections 101 to 103 are relevant for the consideration of this Court and the same are reproduced here-in-below:-

"Section 101 Burden of proof."

Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Section 102 On whom burden of proof lies.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 103 Burden of proof as to particular fact.

The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Section 114 Court may presume existence of certain facts. —

The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume—

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

xxxx

as to illustration (g) -- a man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family;”

16. The Best Evidence Rule is invariably insisted upon as evidence of high probative value and if it is not possible to produce the best evidence the law requires production of next best evidence as secondary evidence. A two Judge Bench of the Hon’ble Supreme Court in ***Narbada Devi Gupta Vs. Birendra Kumar Jaiswal and another, 2003 (8) SCC 745***, speaking through Justice D. M Dharmadhikari, held as follows:-

“16. ...The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the ‘evidence of those persons who can vouchsafe for the truth of the facts in issue...”

17. If the plaintiff discharges the initial onus with high degree of probability then the onus shifts. A two Judge Bench of the Hon’ble Supreme Court in **Anil Rishi v. Gurbaksh Singh, 2006 (5) SCC 558**, speaking through Justice S.B.Sinha, observed as follows:-

“10. Pleading is not evidence, far less proof. Issues are raised on the basis of the pleadings. The defendant-appellant having not admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship between the parties itself would be an issue. The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side.

19. There is another aspect of the matter which should be borne in mind. A distinction exists between a burden of proof and onus of proof. The right to begin follows *onus probandi*. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule is Section 101 is inflexible.

In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.”

20. *In R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and Anr., 2003(4) RCR (Civil) 705 : 2003(2) RCR (Rent) 579 : [JT 2004(6) SC 442], the law is stated in the following terms:*

"29. In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in A. Raghavamma v. A. Chenchamma there is an essential distinction between burden of proof and onus of proof : burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title."

18. Sections 101 to 103 of the Indian Evidence Act provide for the burden of proof in general. Under the Best Evidence Rule if the plaintiff fails to produce the best evidence in his possession, then illustration ‘g’ of

Section 114 of the Evidence Act enables the Court to presume that the

evidence has been withheld as it would have been unfavourable to the plaintiff. A three Judge Bench of the Hon'ble Supreme Court in **Gopal Krishanji Ketkar v. Mohamed Haji Latif and others** , AIR 1968 SC 1413, speaking through Justice V. Ramaswami, held as under:-

‘5.Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue.....’

19. A two Judge Bench of the Hon'ble Supreme Court in **Mohanlal Shamji Soni v. Union of India and another** AIR 1991 SC 1346, speaking through Justice S. Ratnavel Pandian, observed as follows:-

“10. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties with-holds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions-whether discretionary or

obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done....”

20. It is settled law that the contents of a document are required to be proved in evidence by the document itself as primary evidence when it exists and oral evidence to prove the contents of a document is only admissible in rare scenarios.

“Section 59.Proof of facts by oral evidence.

All facts, except the contents of documents or electronic records, may be proved by oral evidence.

Section 61. Proof of contents of documents.

The contents of documents may be proved either by primary or by secondary evidence.

Section 62. Primary evidence.

Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1. Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2. -- Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the

contents of the original.

Section 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.

Section 64. Proof of documents by primary evidence.

Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Section 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,

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 consist 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.”

Only the certified copies of the public documents require no proof as provided under Sections 77 & 79 of the Evidence Act.

21. A three Judge Bench of the Hon'ble Supreme Court in **Kalyan Singh Vs. Smt. Chhoti**, AIR 1990 SC 396, speaking through Justice K. Jagannatha Shetty, refused to accept 'just an ordinary copy' as there was

‘also no evidence regarding content of the original and observed as under:-

“25...Section 63 of the Evidence Act mentions five kinds of secondary evidence. Clause (1), (2) and (3) refer to copies of documents; clause (4) refers to counterparts of documents and clause (5) refers to oral accounts of the contents of documents. Correctness of certified copies referred to in clause (1) is presumed under Section 79; but that of other copies must be proved by proper evidence. A certified copy of a registered sale deed may be produced as secondary evidence in the absence of the original. But in the present case Ex.3 is not certified copy. It is just an ordinary copy. There is also no evidence regarding content of the original sale deed. Ex.3 cannot therefore, be considered as secondary evidence. The appellate Court has a right and duty to exclude such evidence.”

22. A two Judge Bench of the Hon’ble Supreme Court in **Roop Kumar Vs. Mohan Thedani, AIR 2003 SC 2418**, speaking through Justice Arijit Pasayat, held as follows:-

“21. The grounds of exclusion of extrinsic evidence are (i) to admit inferior evidence when law requires superior would amount to nullifying the law, (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory.”

23. Similarly, a two Judge Bench of the Hon’ble Supreme Court in **Smt. J. Yashoda Vs. Smt K. Shobha Ram, AIR 2007 SC 1721**, speaking through Justice Arijit Pasayat, held as follows:-

“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.”

24. A two Judge Bench of the Hon'ble Supreme Court in **M. Chandra Vs. M Thangamuthu and another, 2010 (9) SCC 712**, speaking through Justice H. L. Dattu, held as follows:-

“30....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.”

25. A two Judge Bench of the Hon'ble Supreme Court in **H. Siddiqui (D) by LRs Vs. A Ramalingam, AIR 2011 SC 1492**, speaking through Dr. Justice B. S. Chauhan, held as follows:-

“10. Provisions of Section 65 of the Act 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non production of the original is accounted

for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide: The Roman Catholilc Mission & Anr. v. The State of Madras & Anr., AIR 1966 Supreme Court 1457; State of Rajasthan & Ors. v. Khemraj & Ors., AIR 2000 Supreme Court 1759; Life Insurance Corporation of India & Anr. v. Ram Pal Singh Bisen, 2010(2) RCR (Civil) 459 : 2010(2) S.C.T. 217 : 2010(2) R.A.J. 351 : (2010) 4 SCC 491; and M. Chandra v. M. Thangamuthu & Anr., 2010(4) RCR (Civil) 696 : 2010(5) R.A.J. 551 : (2010) 9 SCC 712).”

26. As far as the argument of learned counsel for the appellant/plaintiff with regard to non-deciding the objection dated 03.01.2017 regarding admissibility of the receipts mark ‘B’ and mark ‘C’ is concerned, he relied upon the ratio of law as laid down in **R.V.E. Venkatchala Gounder (supra)** which is clearly distinguishable. Rather, the approach of the learned trial Court is in consonance with the ratio of law laid down by a three Judge Bench of the Hon’ble Supreme Court in **Bipin Shantilal Panchal v. State of Gujarat AIR 2001 SC 1158**, wherein directions have been issued with regard to the procedure to be followed by the trial Court at the evidence taking stage when any objection is raised regarding the admissibility of any document. It was held that deciding the

objection raised regarding admissibility of any material evidence at the threshold is an archaic practice and if during the trial the learned Court finds the objection valid, such evidence should be excluded from consideration. Speaking through Justice K.T.Thomas, the Hon'ble Supreme Court observed as under:-

“13. It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such objection. But the fall out of the above practice is this: Suppose the trial Court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or revisional court, when the same question is re-canvassed, could take a different view on the admissibility of that material in such case the appellate court would be deprived of the benefit of that evidence, because that was not put on record by the trial court. In such a situation the higher court may have to send the case back to the trial Court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or re-moulded to give way for better substitutes which would help acceleration of trial proceedings.

14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part

of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the judge or magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.

15. The above procedure, if followed, will have two advantages. First is that the time in the trial court, during evidence taking stage, would not be wasted on account of raising such objections and the court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior court, when the same objection is re- canvassed and reconsidered in appeal or revision against the final judgment of the trial court, can determine the correctness of the view taken by the trial court regarding that objection, without bothering to remit the case to the trial court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.”

27. Learned trial Court has ostensibly returned a finding in para 23 of the impugned judgment on the basis of the detailed discussion that the appellant/plaintiff has not succeeded in proving the receipts as mark ‘B’ and mark ‘C’. As such, the approach of the learned trial Court is correct in terms of the directions issued in **Bipin Shantilal Panchal (supra)**.

28. As far as the argument of learned counsel for the respondent/defendant with regard to non-filing of application by the plaintiff for leading secondary evidence is concerned, the same is liable to be rejected in view of the law laid down by a two Judge Bench of the Hon’ble Supreme

Court in **Dhanpat v. Sheo Ram(Deceased) through Lrs and others**
2020(2) RCR(Civil) 437, speaking through Justice Hemant Gupta, held as follows:-

“20. There is no requirement that an application is required to be filed in terms of Section 65(c) of the Evidence Act before the secondary evidence is led. A party to the lis may choose to file an application which is required to be considered by the trial court but if any party to the suit has laid foundation of leading of secondary evidence, either in the plaint or in evidence, the secondary evidence cannot be ousted for consideration only because an application for permission to lead secondary evidence was not filed.”

29. In view of the aforesaid discussion the following parameters are summarised below for the purpose of taking secondary evidence:-

- (i) the party seeking to lead documentary evidence must lay down some foundational evidence either in the plaint or in the written statement as the case may be that the alleged copy is in fact the true copy of the original;
- (ii) the party seeking to lead secondary evidence should demonstrate the exact inability in producing the original;
- (iii) that there is no requirement that an application for leading secondary evidence is filed in terms of Section 65 (c) of the Indian Evidence Act before such evidence is led;
- (iv) that the trial Court is not required to pass detailed order allowing or rejecting the objection with regard to the admissibility of secondary evidence at the time when such objection is taken;
- (v) that the trial Court can proceed further by marking the document and decide the admissibility of such document on the

basis of the evidence led at the time of passing of the final judgment;

(vi) that if the trial Court finds that the party seeking to lead secondary evidence has failed to prove the document in accordance with law such document should be eschewed from evidence;

(vii) that the authenticity of the copy shall be established on oath by executant or by the person who prepared such copy from the original.

30. The scrutiny of the record reveals that the appellant/plaintiff has neither mentioned the exact amount of sale consideration in the plaint nor he has made any mention with regard to the existence of receipts as mark 'B' and mark 'C'. As such, the foundational evidence required for leading secondary evidence is completely missing. The appellant/plaintiff has failed to prove the receipts in accordance with law. The photocopies of the receipts were not proved by the executants of the same namely Balbir Singh and Rashil Singh as they have not been examined and the learned trial Court has rightly observed that it cannot be believed as to whether these receipts were actually executed by them or not. Mark 'B', photocopy of the receipt dated 21.09.2000 was not even pleaded in the plaint and mark 'C' is undated. The appellant/plaintiff has not discharged the initial onus. Mere placing on record the photocopies of the receipts as mark 'B' and mark 'C' would amount to failure in discharging the burden of proof. We find that the learned trial Court has passed the impugned judgment and decree on the basis of cogent and sufficient reasons. Therefore, no ground for interference is made out.

CONCLUSION

- 31. Accordingly the present appeal is dismissed with no order as to costs.
- 32. The record of the trial Court be sent back.
- 33. Pending application(s), if any, shall also stand disposed of.

(RAJ MOHAN SINGH)
JUDGE

(HARPREET SINGH BRAR)
JUDGE

26.07.2023

sunita Whether Reasoned/Speaking : Yes/No
 Whether Reportable : Yes/No