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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment delivered on: 20.03.2023

+ CM(M) 451/2023

SH RAMESHWAR JAISWAL & ANR. Petitioners

versus

SH JAYADITTYA PALIT & ANR. Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Swastik Singh and Mr. Atul Singh,
Advs.

For the Respondent : Mr. Kamal Mehta and Mr. Abhishek
Chauhan, Advs. for R-1

CORAM:

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

TUSHAR RAO GEDELA, J. (ORAL)

[The proceeding has been conducted through Hybrid mode]

CM APPL. 13385/2023 (Exemption)

1. Exemption is allowed, subject to all just exceptions.
2. Application stands disposed of.

CM(M) 451/2023 & CM APPL. 13386/2023

3. The petitioner challenges the order dated 22.12.2022 in CS 82548/2016 titled "*Sh. Rameshwar Jaiswal Vs. Sh Jayadittyia Palit & Anr.*" whereby the application under Section 65 of the Indian Evidence Act, 1872 seeking permission to lead secondary evidence of the

Property Development Agreement dated 08.05.2010, was disallowed.

4. Learned counsel appearing for the petitioners/plaintiffs submit that the petitioners for abundant precaution sought permission of the learned Trial Court to lead secondary evidence on a photocopy of the aforesaid agreement since one of the core issues regarding the suit arises therefrom.

5. Learned counsel appearing for the petitioners/plaintiffs submits that even before the permission to lead secondary evidence was considered by the learned Trial Court, vide the impugned order, the learned Trial Court had already concluded that, had the original purportedly un-stamped document been produced before the Court, it would have been impounded in accordance with law.

6. Learned counsel appearing for the petitioners/plaintiffs submits that further observations of the learned Trial Court on the aforesaid aspect that the purported original agreement would itself have been impounded, and therefore, there is no question of the photocopy being taken on record and no further opportunity of leading secondary evidence could be allowed at all, is also unwarranted and prejudging the issue.

7. Learned counsel on the aforesaid basis submits that the learned Trial Court has, even without giving permission to show the circumstances under which the application under Section 65 of the Indian Evidence Act, 1872 was filed, had already pre-decided the admissibility of the said photocopy. Learned counsel appearing for the petitioners/plaintiffs submits that the aforesaid observations without even having tested in trial, prejudices the case of the petitioners/

plaintiffs.

8. *Per contra*, learned counsel appearing for the respondent No.1 vehemently opposes the submissions made by learned counsel appearing for the petitioners and drew the attention of this Court to para 15 of the impugned order to submit that the learned Trial Court has clearly observed that as and when the documents, if and when produced, shall be considered in accordance with law. He submits that the learned Trial Court has permitted, in a way, the petitioners to show the circumstances on the basis of which the ingredients of Section 65 of the Indian Evidence Act, 1872 can be made applicable to the document sought to be produced.

9. According to the learned counsel appearing for the respondent No.1, the application itself was pre conceived and was not maintainable on that ground alone.

10. Learned counsel appearing for the respondent No.1 submits that the impugned order is in accordance with law and has considered all the relevant judgments rendered by the Hon'ble Supreme Court and the various High Courts to come to the conclusion that no such permission could have been granted.

11. Learned counsel appearing for the respondent No.1 in support of his submission from the judgment rendered by the Coordinate Bench of this Court in ***Prem Chandra Jain Vs. Sri Ram*** in CM (M) 1764-66/2005 decided on 12.10.2009 reported in (2009) 113 DRJ 617 to submit that the unless and until the petitioners in their evidence show or try to establish the circumstances in which the original of the document sought to be proved via Section 65 of the Indian Evidence Act, 1872 is

not available, the document cannot be considered under the application under Section 65 of the Indian Evidence Act, 1872.

12. This Court has considered the rival submissions of the parties as also the judgment rendered by the Coordinate Bench of this Court.

13. It would be apposite to extract paras 3 to 5 of the aforesaid judgment in ***Prem Chandra Jain (supra)*** hereunder:-

“3. Section 61 of the Evidence Act provides for proof of documents either by primary or by secondary evidence. Section 64 provides that documents must be proved by primary evidence, except in cases "hereinafter mentioned" i.e. in Section 65 & Section 65 A and Section 65 B. Section 65 permits secondary evidence to be led in the contingencies mentioned therein. Thus a litigant without seeking any permission from the court if satisfies the ingredients of Section 65 of the Evidence Act i.e. of the existence of the contingency or situation when secondary evidence is permitted to be led is entitled to lead such evidence. Such evidence will have to be two fold. Firstly, as to the existence of the contingency or situation in which secondary evidence is permissible, viz that the original document is in possession or power of the person against whom it is sought to be proved etc. or that the existence, condition or contents of original have been proved to be admitted by person against whom it is sought to be proved or that the original has been lost or destroyed or when original is not moveable etc. i.e. of the various situations mentioned in Clause (a) to (g) of Section 65. Secondly, such evidence will have to be in proof of document as also prescribed in Section 65 r/w Section 63.

4. *It is only after such evidence has been led can the court form an opinion whether the circumstances/situation in which it is permissible to lead secondary evidence exist or not. For instance, whether a document has been lost or destroyed is a question of fact. It is only after the person claiming so has been cross examined, can a decision be taken as to the existence and loss or destruction of the original.*
5. *The court, on an application seeking permission to lead secondary evidence, even if setting out reasons as contained in either of the clauses of [Section 65](#), cannot take a decision on the correctness of the reasons. The application thus serves no purpose except delaying the proceedings. It is however often found that the courts allow or disallow the applications, without giving an opportunity to the parties for laying a foundation for reception or rejection of secondary evidence. Such procedure is impermissible in law. Factual controversies cannot be adjudicated on applications. That is however not to be understood as allowing a mini-trial on this aspect. The party seeking to prove document by secondary evidence is to lead evidence of the existence of circumstances/situations in which secondary evidence is permissible, during leading its evidence, whether by way of examination of witnesses or cross examination of opponents witnesses, in the suit/other proceeding itself. It will be decided at the stage of disposal of suit only, whether case for leading secondary evidence has been made out or not and if so, whether document stands proved by secondary evidence.”*

14. The reading of the paragraphs of the aforesaid judgment brings to

fore the fact that the permission, which a party can seek under Section 65 of the Indian Evidence Act, 1872, would be concomitant upon the fact that during evidence, the party is able to attempt and to establish that there were circumstances or contingencies or situations which contributed to the non-production of the original document, the photocopy whereof, is sought to be proved in accordance with Section 65 of the Indian Evidence Act, 1872.

15. In the present case, the petitioners/plaintiffs are yet to commence their evidence.

16. Having regard to the aforesaid observations of the Coordinate Bench, this Court is of the considered opinion that the petitioners may, if so advised, lead evidence on the issue covering the Property Development Agreement, the photocopy whereof is placed on record. Once the evidence on the ingredients of Section 65 are satisfied, the learned Trial Court may consider applying Section 65 of the Indian Evidence Act, 1872 to the photocopy of the Property Development Agreement.

17. The other aspect which needs consideration of this Court is observation of the learned Trial Court on the lack of requisite stamping on the document and the registration thereof. This Court is of the considered opinion that the said observations, while considering an application under Section 65 of the Indian Evidence Act, 1872, ought not to have been rendered by the learned Trial Court, without first permitting the petitioners/plaintiffs to discharge its onus with regard to the ingredients under Section 65 of the Indian Evidence Act, 1872.

18. Having said that, so far as the issue with respect to the un-

stamped document and the non-registration thereof is concerned, the same stands set aside, subject to the contentions and objections to be raised by the respondents during evidence at the appropriate stage.

19. Learned Trial Court is directed to consider those objections in accordance with law and dispose of the same.

20. In view of the aforesaid directions, the present petition along with applications, if any, is disposed of with no order as to costs.

TUSHAR RAO GEDELA, J .

MARCH 20, 2023

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