

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.214 of 2020**

Janardan Kumar, Son of Late Laldeo Kuvar, Resident of Village and Post Office- Kolhua, Police Station- Baniapur, District- Saran at Chapra.

... .. Petitioner/s

Versus

1. Chandan Pratap Singh, Son of Sri Bateshwar Nath Singh, Resident of Village- Pipra, Post Office- Mahmadpur, Police Station- Siwan, District- Siwan.
2. Shailendra Kumar Ojha, Son of Sri Kanhaiya Prasad Ojha, Resident of Village and Post Office- Kolhua, Police Station- Baniapur, District- Saran at Chapra.
3. Purnendu Ojha, Son of Late Ram Bilas Ojha, Resident of Village and Post Office- Kolhua, Police Station- Baniapur, District- Saran at Chapra, at present residing at House No. B-2, Patrakar Nagar, Kankarbag, Patna, Police Station- Patrakar Nagar, District- Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr.Arun Kumar, Advocate
For the Respondent/s : Mr.Anil Kumar Tiwary, Advocate

**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT**

Date : 03-12-2024

The present petition has been filed under Article 227 of the Constitution of India challenging the order dated 26.06.2019 passed by learned Munsif 1st, Chapra in Title Suit No. 03/2016 whereby and whereunder the petition dated 03.06.2019 filed by the plaintiff/petitioner for marking as exhibit photocopy of the attested true copy of *Taksimnama* (Memorandum of Partition) dated 29.09.1984, stated to be the true copy of its original dated 12.03.1974, has been rejected.

2. Briefly stated, the facts of the case are that the



plaintiff/petitioner filed Title Suit No. 03 of 2016 for declaration of deed of *Bainama* dated 01.12.2009 executed by respondent no.2 in favour of respondent no.1 as void and sham document and also for declaration of his title and confirmation of his possession over the suit land. The plaintiff/petitioner claims to have purchased the land in question from the respondent no.3 through a registered sale deed dated 26.09.2015 and came in possession over the land in question. He also made some structure over the suit land. However, the respondent no. 1 threatened the tenants of the petitioner that they should pay rent to the respondent no.1 as he had got the registered deed of *Bainama* dated 01.12.2009 from the respondent no.2 and he was having right, right over the suit land. The plaintiff/petitioner made inquiry into the matter and filed the suit on the ground that land in question came into possession of respondent no. 3 on the basis of deed of *Taksimnama* dated 11.03.1974 which is registered document of Memorandum of Partition among co-sharers of the father of the respondent no. 3 and part land in question was also acquired by the respondent no. 3 on the basis of registered deed of *Bainama* from one Tilak Manjhi. Thus, the plaintiff/ petitioner claim that the respondent no. 2 has no right to execute any deed of *Bainama* in favour of respondent no.1.



Notices were issued to the defendants/respondents, but they did not appear in the suit and, as such, the suit proceeded *ex-parte* against the defendants. The plaintiff/petitioner examined eight witnesses from his side. Since original copy of *Taksimnama* dated 12.03.1974 has been misplaced by the respondent no.3, but photocopy of true attested copy of *Taksimnama* dated 29.09.1984 has been provided to the petitioner by the respondent no. 3 in support of his claim over the suit land, the plaintiff/petitioner filed a petition dated 03.06.2019 to get the photocopy of true attested copy of *Taksimnama* dated 12.03.1974 to be marked as exhibit. However, the learned trial court rejected the aforesaid petition vide order dated 26.06.2019 and the said order has been challenged before this Court.

3. The learned counsel appearing on behalf of the petitioner submitted that the impugned order has been passed by the learned trial court completely overlooking the provisions of secondary evidence under Section 63 (2) of the Indian Evidence Act (hereinafter referred to as 'the Act') and hence, the impugned order is not sustainable. The learned trial court also overlooked the fact that the petitioner has already examined two witnesses to prove the said document as they stated that photocopy of the said document was made in their presence



which fulfills the requirement of Section 63 (2) of the Act for taking secondary evidence as copies made from original by mechanical processes which in themselves ensure the accuracy of the copy and copies compared with such copies are to be taken as secondary evidence. The learned trial court has also not considered the fact that the vendor of the petitioner has specifically stated on oath that original deed of *Taksimnama* has been misplaced but he has handed over the petitioner one photocopy of the true attested copy of *Taksimnama* dated 29.09.1984 in support of his claim and marking of such document as exhibit is permissible under the Act as secondary evidence. The learned counsel further submitted that the learned trial court committed jurisdictional error in coming to the conclusion that the document is not admissible to be marked as exhibit ignoring the oral evidence brought on this point by the petitioner. The learned counsel further submitted that whether the said document is genuine or not will be looked into at the time of final disposal of the suit and marking a document as exhibit does not mean that document has to be treated as genuine document and genuineness and relevancy will be considered at the proper stage. The learned counsel further submitted that in similar situation, the learned Single Judge of



this Court in the case of *Ganga Sagar Gond & Ors. vs. Ganesh Gond & Ors.* reported in *(2002) 2 PLJR 772* has allowed the photocopy of the original sale deed of the year 1890 to be taken on record subject to other formalities to be completed for treating the document as genuine. Thus, learned counsel submitted that in the aforesaid facts and circumstances, the impugned order could not be sustained and hence, the same needs to be set aside.

4. On the other hand, learned counsel appearing on behalf of the respondent no. 1 vehemently contended that there is no merit in the present petition as there is no infirmity in the impugned order and hence, the impugned order needs to be affirmed. The learned counsel further submitted that the document sought to be marked as exhibit on behalf of the plaintiff/petitioner is stated to be photocopy of certified/true copy of the original *Taksimnama*. But the plaintiff/petitioner has nowhere stated that the original *Taksimnama* has been lost as only averment which has been made on behalf of the plaintiff is that the vendor of the plaintiff told him that he has misplaced the original *Taksimnama* dated 12.03.1974. Thereafter, the photocopy which is being sought to be exhibited is the photocopy of the certified copy of the registered *Taksimnama*.



But again the plaintiff/petitioner has nowhere stated that the certified copy of the original registered document was not available in the registry office. Unless the certified copy is not available, the photocopy could not be taken into consideration for marking it as exhibit. The learned counsel further submitted that when there is specific provision under the Act for marking the document as exhibit and admissibility of such document, the provisions could not be ignored and inadmissible document could not be taken on record. The learned counsel for the respondent no.1 in support of his contention relied on the decision of the Hon'ble Supreme Court in the case of ***Rakesh Mohindra vs. Anita Beri and Ors.*** reported in ***(2016) 16 SCC 483***.

5. I have given my thoughtful consideration to the rival submission of the parties and perused the record.

6. Admittedly, the document sought to be exhibited is not the copy of original *Taksimnama* dated 12.03.1974. The photocopy is said to be the copy of true/certified copy of original *Taksimnama* dated 29.09.1984.

7. As a general rule, documents are proved by leading primary evidence. Section 64 of the Evidence Act provides that documents must be proved by the primary



evidence except in cases mentioned in Section 65 of the Evidence Act. In the absence of primary evidence, documents can be proved by secondary evidence as contemplated under Section 63 of the Act which reads 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 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.”

8. Now, Section 65 of the Act deals with the circumstances under which secondary evidence relating to documents may be given to prove the existence, condition or contents of the documents. For better appreciation, Section 65 of the Act is quoted hereinbelow:

“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 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.”

9. The Hon’ble Supreme Court in the case of **Rakesh Mohindra** (supra) has held in paragraphs 15, 20 and 21 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 document 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 be accepted.

20. It is well settled that if a party wishes to lead secondary evidence, the court is obliged to examine the probative value of the document produced in the court or their contents and decide the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. It is equally well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its



proof, which is otherwise required to be done in accordance with law.

21. In M. Chandra v. M. Thangamuthu [M. Chandra v. M. Thangamuthu, (2010) 9 SCC 712 : (2010) 3 SCC (Civ) 907] , this Court considered the requirement of Section 65 of the Evidence Act and held as under: (SCC pp. 735-36, para 47)

“47. We do not agree with the reasoning of the High Court. 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.”

10. In the facts of the instant case, the document sought to be marked as exhibit by the plaintiff/petitioner is not covered under any of the clauses of Section 65 of the Act. The document is not the photocopy of the original which has been destroyed or lost. The original document is not a public



document within the meaning of Section 65 (e) of the Act. Neither the document is certified copy of the original which could be given in evidence in terms of Section 65 (g) of the Act. If none of the conditions prescribed under Section 65 of the Act for giving secondary evidence is fulfilled by the document sought to be adduced by the plaintiff/petitioner, the same cannot be marked as exhibit. The plaintiff/petitioner has failed to establish that despite his best effort, he could not produce the original from which the photocopy was made. Moreover, the document is a photocopy of the certified copy and the plaintiff/petitioner has not brought on record a single chit of paper to show that despite his best efforts, he was not able to obtain the certified copy of the original from the registry office and has, thus, failed to show that he is not able to produce the original document from which the photocopy has been made. In these circumstances, it is not possible to take such document on record which is merely a photocopy of the certified copy of the original document.

11. Thus, in the light of the discussion made hereinbefore, I do not think the learned trial court committed any error of jurisdiction and it has rightly rejected the petition of the plaintiff/petitioner for marking exhibit the photocopy of the



certified copy of the original registered document. Finding no infirmity in the impugned order, the same is affirmed.

12. As a result, this petition stands dismissed.

13. However, the petitioner is at liberty to produce the certified copy of the original *Taksimnama* before the learned trial court. If original *Taksimnama* is not traceable, then the learned trial court would consider such prayer for taking the same on record having due consideration to the existence, authenticity and genuineness of the document and its contents thereof in accordance with law.

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	AFR
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