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

CR-1611-2019 (O&M)
Date of Decision: 11.02.2026

VINAY SHARMA AND ORS

.... Petitioners

VERSUS

RISHI KISHAN AND ORS

.... Respondents

CORAM: HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Vikas Sharma, Advocate for the petitioners.

Mr. Kanwal Goyal, Advocate for respondent No.1.

ALKA SARIN, J. (ORAL)

1. The present revision petition has been filed under Article 227 of the Constitution of India for setting aside the order dated 08.02.2019 (Annexure P-5) passed by the learned Additional Civil Judge (Senior Division), Chandigarh whereby an application filed by the plaintiff-respondent No.1 under Section 65 of the Indian Evidence Act, 1872 read with Section 151 Code of Civil Procedure, 1908 was allowed and the witnesses PW4 and PW2 have been allowed to be recalled and re-examined.

2. Brief facts relevant to the present *lis* are that the plaintiff-respondent No.1 filed a suit for declaration claiming that he is owner in possession of 50% share in House No.3063, Sector-37D, Chandigarh on the basis of the registered Will dated 24.08.1999 as also for permanent injunction and recovery of a sum of ₹1,52,000 received as rent by defendants No.2 and 3 (petitioners No.1 and 2 herein) from the tenants on the top floor and also for

mandatory injunction seeking possession of the house. In para No.5 of the plaint, it was averred that Smt. Kaushalaya Devi executed a registered Will dated 24.08.1999 bequeathing her property in favour of the plaintiff-respondent No.1 and defendant No.2 (petitioner No.1 herein). Copies of the death certificate of Smt. Kaushalaya Devi and the Will dated 24.08.1999 were annexed as Annexures P-3 and P-4 with the plaint. It is apt to note that in the entire plaint there was not a word regarding the Will having been lost or being in possession of any other person. Written statement was filed by defendants No.2 and 3 (petitioners No.1 and 2 herein) wherein the execution of the Will was denied on the ground that there was already a family settlement dated 30.08.1996. Issues were framed on 26.08.2015 and issue No.1 reads as *'Whether the plaintiff is entitled for relief of declaration to the effect that he is owner in possession of 50% share in H.No.3063, Sector-37D, Chandigarh on the basis of duly registered Will dated 24.08.1999? OPP'*. The plaintiff-respondent No.1 closed his evidence on 06.04.2017 and defendant No.5 (petitioner No.3) herein closed the evidence on 11.07.2018. It is to be noted that no application was ever moved by the plaintiff-respondent No.1 under Order XI Rule 12 CPC for production of any document alleged to be in possession of the defendants in the suit. On 16.08.2018 the arguments were partly heard in the matter and thereafter on various dates the matter was listed for arguments. On some dates further arguments were addressed and on some dates no arguments were addressed. On 10.09.2018 the case was transferred and taken up by the Court. Thereafter the matter was fixed for arguments on various dates. On 09.10.2018 for the first time the counsel for the plaintiff-

respondent No.1 had pointed out that an application was filed by the plaintiff-respondent No.1 on 17.01.2018 seeking directions to defendant No.3 (petitioner No.2 herein) to produce the original Will. It is stated that the said application was not decided till date. The case was thereafter adjourned for arguments on the application to 12.10.2018. On 12.10.2018 the application was disposed off holding that defendant No.3 (petitioner No.2 herein) had taken a categorical stand that the Will was not in his possession and as such he cannot be directed to produce any such Will on the record. Subsequently, on 17.10.2018 the present application was filed under Section 65 of the Indian Evidence Act, 1872 which was allowed vide the impugned order dated 08.02.2019. Hence, the present revision petition by defendants No.2 to 5 (petitioners herein).

3. Learned counsel for defendants No.2 to 5 (petitioners herein) would contend that the present application was filed at the stage of arguments and that at no stage was any foundation laid qua the said document being lost. Infact, it was never the case set up by the plaintiff-respondent No.1 in the plaint that the original Will was not available with him or that the said document was in possession of defendant No.3 (petitioner No.2 herein). Learned counsel has further contended that the plaintiff-respondent No.1 could have filed an application under Order XI Rule 12 CPC after the filing of the plaint had it been the case where the document was in possession of defendant No.3 (petitioner No.2 herein) or the plaintiff-respondent No.1 thought that the document was in possession of defendant No.3 (petitioner No.2 herein). However, the plaintiff-respondent No.1 chose not to file any

such application. Learned counsel has further pointed out that during the evidence, through power of attorney, the plaintiff-respondent No.1 had clearly stated in his cross-examination that he did not possess the original Will. Despite having stated so in his cross-examination, the plaintiff-respondent No.1 made no effort to file any application for production of the original Will.

4. *Per contra*, learned counsel for the plaintiff-respondent No.1 would contend that the certified copy was produced and the concerned person had also appeared from the Sub-Registrar's Office as PW2. It is further the contention that an objection was now raised during the course of arguments that the original Will was not put to the attesting witnesses and as such the necessity to file the present application. In support of his arguments, learned counsel for the plaintiff-respondent No.1 has relied upon the judgment in the case of **K.K. Velusamy V/s N. Palanisamy, [2011 (2) RCR (Civil) 875]**.

5. Heard.

6. In the present case the plaintiff-respondent No.1 has filed the suit for declaration qua the registered Will dated 24.08.1999. It is not the case set up by the plaintiff-respondent No.1 in the plaint that the original Will was with defendant No.3 (petitioner No.2 herein) or that the same had been lost. The issues in the present case were framed on 26.08.2015. Issue No.1 was qua the Will and the onus to prove the same was on the plaintiff-respondent No.1 and it was incumbent upon him to lead his evidence in that regard in the affirmative. During the course of evidence, attorney of the plaintiff, namely, Karnail Singh stepped into the witness box as PW-1, who in his affidavit (Ex.PW1/A) tendered the copy of the Will as Mark-A. In his cross-

examination, PW1 Karnail Singh has stated that *'he does not possess the original Will (Mark-A) as the same is lying with Harikishan. He volunteered that he has obtained the certified copy of the said Will from the office of Sub Registrar, Chandigarh'*. The plaintiff-respondent No.1 closed his evidence in affirmative on 06.07.2017 and till that date, despite availing almost one year and eight months for concluding his evidence, no efforts were made either to call for the original Will or file any application for production of the original Will on the record. When the suit was fixed for evidence of the defendants, the plaintiff-respondent No.1 filed an application seeking directions to defendant No.3 (petitioner No.2 herein) for production of the original Will alleging the same to being in his possession. That application was disposed of by the learned Trial Court vide order dated 12.10.2018 with the observation that the original will was not in custody/possession of defendant No.3 (petitioner No.2 herein) and no direction can be passed for production thereof. The observation of the Trial Court as regards the custody/possession of the original Will being not with defendant No.3 (petitioner No.2 herein) attained finality since the plaintiff-respondent No.1 did not prefer to challenge the order dated 12.10.2018. Nevertheless, on 17.10.2018, the plaintiff-respondent No.1 filed an application under Section 65 of the Indian Evidence Act, 1872 read with Section 151 CPC for leading secondary evidence, which at that stage of the suit was not even maintainable.

7. Further, in the application under Section 65 of the Indian Evidence Act, 1872 read with Section 151 CPC, the plaintiff-respondent No.1 has categorically pleaded that at the time of filing the suit he had handed over

the attested copy of the Will dated 23.08.1999 to his Advocate, who only attached the photocopy thereof with the plaint, and accordingly sought recalling/re-examination of PW2 Dinesh Devgan and PW4 Dharamvir Sharma, Advocate by way of secondary evidence to prove the Will as per requirement of the law. It is not understandable as to how at that stage of the suit, secondary evidence under Section 65 of the Indian Evidence Act, 1872 was admissible especially when PW2 Dinesh Devgan, Registry Clerk and PW4 Dharamvir Sharma already stood examined on 12.07.2016 and 17.12.2016 respectively. Had the attested copy of the Will been available with the plaintiff-respondent No.1 as alleged, the same would have been got proved on record at the time when the above said witnesses were examined.

8. In **Vijay V/s Union of India & Ors. [2023 LiveLaw (SC) 1022 = (2023) 17 SCC 455]** the Hon'ble Supreme Court has laid down the following principles relevant for examining the admissibility of secondary evidence :

'33. After perusing various judgments of this Court, we can deduce the following principles relevant for examining the admissibility of secondary evidence:

33.1 Law requires the best evidence to be given first, that is, primary evidence.

33.2 Section 63 of the Evidence Act provides a list of the kinds of documents that can be produced as secondary evidence, which is admissible only in the absence of primary evidence.

33.3 If the original document is available, it has to be produced and proved in the manner prescribed for primary evidence. So long as the best evidence is within the possession or can be produced or can be reached, no inferior proof could be given.

33.4 A party must endeavor to adduce primary evidence of the contents, and only in exceptional cases will secondary evidence be admissible. The exceptions are designed to provide relief when a party is genuinely unable to produce the original through no fault of that party.

33.5 When the non-availability of a document is sufficiently and properly explained, then the secondary evidence can be allowed.

33.6 Secondary evidence could be given when the party cannot produce the original document for any reason not arising from his default or neglect.

33.7 When the copies are produced in the absence of the original document, they become good secondary evidence. Still, there must be foundational evidence that the alleged copy is a true copy of the original.

33.8 Before producing secondary evidence of the contents of a document, the nonproduction of the original must be accounted for in a manner that can bring it within one or other of the cases provided for in the section.

33.9 Mere production and marking of a document as an exhibit by the Court cannot be held to be due proof of its contents. It has to be proved in accordance with the law.'

9. In view of the above principles, the secondary evidence can be presented as a substitute when the original document/primary evidence is in possession of the opposing party or held by a third party or such a person refused to produce the document even after due notice and it must be ensured that the alleged copy is true copy of the original. In the present case it is not a case of the plaintiff-respondent No.1 that the original Will stood lost or that the same has been held by a third party. Admittedly, no notice under order XII Rule 8 CPC was served upon the opposing party for production of the original Will and when an order dated 17.10.2018 was passed by the Trial Court observing that the original Will was not in custody/possession of defendant No.3 (petitioner No.2 herein), the same was also not challenged by the plaintiff-respondent No.1. Thus, the case of the plaintiff-respondent No.1 does not fall within the above principles for leading the secondary evidence laid down by the Hon'ble Supreme in the case of **Vijay** (supra).

10. The judgment relied upon by the learned counsel for the plaintiff-respondent No.1 in the case of **K.K. Velusamy** (supra) would not come to his aid as it is not a case which falls within the parameters of Section 65 of the Indian Evidence Act, 1872. So far as recalling of the witnesses is concerned, there can be no quarrel with the proposition that the witnesses can be recalled, however, the said provision cannot be invoked routinely for reopening evidence or recalling witnesses. Certain parameters have been laid down in

the judgment of **K.K. Velusamy** (supra) relied upon by the learned counsel for the plaintiff-respondent No.1 which were considered by the Hon'ble Supreme Court in the case of **Ram Rati Vs. Mange Ram (D) thr LRs & Ors. [2016 (2) RCR (Civil) 464]** wherein it was held as under :

“12. In Vadiraj Naggappa Vernekar (Dead) Through LRs. v. Sharadchandra Prabhakar Gogate 2009(2) RCR (Civil) 508: (2009) 4 SCC 410, this principle has been summarised at paragraphs- 25, 28 and 29:

“25. In our view, though the provisions of Order 18, Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said Rule is to enable the court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined.

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28. The power under the provisions of Order 18, Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is

not the scheme or intention of Order 18, Rule 17 CPC.

29. It is now well settled that the power to recall any witness under Order 18, Rule 17 CPC can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit, but as indicated herein above, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination.”

13. In K.K. Velusamy v. N. Palanisamy 2011(2) RCR (Civil) 875 : 2011(3) Recent Apex Judgments (R.A.J.) 83 : (2011) 11 SCC 275, the principles enunciated in Vadiraj (supra) have been followed, holding at paragraphs 9 and 10:

“9. Order 18, Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18, Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit

requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. (Vide Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate.)

10. Order 18, Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18, Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo motu, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.”

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18. The settled legal position under Order 18, Rule 17 read with Section 151 of the CPC, being thus very clear, the impugned orders passed by the trial court as affirmed by the High Court to recall a witness at the instance of the respondent “for further elaboration on the left out points”, is wholly impermissible in law.”

The present case does not fall within the parameters as noted above. Rather, the application under Section 65 of the Indian Evidence Act, 1872 moved by the plaintiff-respondent No.1 appears to be an attempt at the fag end of the suit to recall a witness for further elaboration on the left-out points/lacunae, which is wholly impermissible in law.

11. In view of the above, the impugned order dated 08.02.2019 passed by the Trial Court cannot be sustained and the same is accordingly set aside. The application filed by the plaintiff-respondent No.1 (Annexure P-4) stands dismissed. Since the suit is now at the stage of arguments, the Trial Court is requested to conclude the matter within a period of two months from the date of receipt of the certified copy of this order.

12. The present revision petition stands disposed off accordingly. Pending applications, if any, also stand disposed off.

11.02.2026
Aman Jain

(ALKA SARIN)
JUDGE

*NOTE: Whether speaking/non-speaking: Speaking
Whether reportable: Yes/No*