Smt. Santosh Kumari Vs Shadi Lal Manchanda and Others

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Nov. 16, 2010

Acts Referred: Evidence Act, 1872 â€" Section 64, 65, 66

Citation: (2011) 162 PLR 241

Hon'ble Judges: Alok Singh, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Alok Singh, J.
Defendant No. 4/petitioner is assailing the order dated 15.1.2010, passed by Civil Judge (Junior Division), Jagadhri,

whereby application moved by defendant No. 4/petitioner, seeking permission to lead secondary evidence to prove "Will" dated 5.6.1970, was

rejected.

2. Brief facts of the case are that defendant No. 4/petitioner is claiming title over the property in dispute on the basis of sale deed dated 6.12.2000

executed by defendant No. 2. The further case of defendant No. 4/petitioner is that defendant No. 1 has acquired title over the entire property,

including the property purchased by defendant No. 4/petitioner from defendant No. 1 on the basis of "Will" dated 5.6.1970 allegedly executed by

father of defendant No. 1 Yog Raj. The further case of defendant No. 4/petitioner is that at the time of sale deed dated 6.12.2000, photocopy of

the "Will" was handed over to defendant No. 4 by the executant of the sale deed defendant No. 1. Plaintiffs are challenging authority of defendant

No. 1 to transfer the property in question in favour of defendant No. 4 saying father Yog Raj never executed "Will" dated 5.6.1970, hence in the

suit sole question involved is, as to whether defendant No. 1 has acquired any title from his father Yog Raj pursuant to the "Will" dated 5.6.1970

and has validly transferred the property in favour of defendant No. 4/petitioner pursuant to the "Will" dated 5.6.1970. In the suit, defendant No.

4/petitioner has earlier moved an application asking defendant No. 1 to produce original "Will" on the record. However, in reply to the application,

defendant No. 1 has stated that while transferring other half of the portion of the property in favour of Inderjit Kaur, the original "Will" was handed

over in favour of Inderjit Kaur, hence he is not in possession of the original "Will". Thereafter, defendant No. 4 has move3d the present application

seeking permission from the Court to prove the photocopy of the "Will" dated 5.6.1970 by secondary evidence. The application of defendant No.

4/petitioner came to be dismissed, hence this petition.

3. I have heard the learned Counsel for the parties and perused the record. Undisputedly, in the present case the sole question revolves around the

"Will" dated 5.6.1970 allegedly executed by Sh. Yog Raj, father of defendant No. 1 in favour of defendant No. 1. The case of defendant No.

4/petitioner is that she has purchased the property from defendant No. 1 and at the time of the sale deed by defendant No. 1 in favour of

defendant No. 4, original "Will" was retained by defendant No. 1, however, photocopy thereof was delivered to defendant No. 4. Undisputedly,

defendant No. 4/petitioner has also moved earlier application calling defendant No. 1 to produce original "Will" on the record. Undisputedly, in

reply to that previous application defendant No. 1 has contended in the Court that he was having original "Will" in his possession, however, when

he transferred half of the property in favour of Inderjit Kaur, he has delivered the original "Will" as well as the earlier sale deed to Inderjit Kaur-

purchaser. Now, case set up by defendant No. 4/petitioner is that on the contact Inderjit Kaur has stated that original "Will" has been lost

somewhere from her possession.

4. Learned Counsel for respondents/plaintiffs vehemently argued that secondary evidence can be permitted only when a notice u/s 66 of the

Evidence Act has been given to the party said to be in possession of the original document. He has placed reliance on the judgment of the learned

Single Judge of this Court in the matter of M/s Enn Ess Electronics Jalandhar and Ors. v. Smt. Harbans Kaur and Ors. 2009 (1) CCC 237.

5. Learned Single Judge of this Court while interpreting Sections 65 and 66 of the Evidence Act has held that Section 66 of the Evidence Act

stipulates, a positive act on the part of the party seeking to lead secondary evidence to issue a notice to the party in whose possession the said

document is and thereafter an application can be moved for leading secondary evidence.

6. I have carefully perused Section 66 as well as para 22 of the judgment in the matter of M/s Enn Ess Electronics (supra). Undisputedly, Smt.

Inderjit Kaur, in whose possession original "Will" was delivered by defendant No. 1 at the time of execution of the sale deed pertaining to half

portion of the property, is not a party in the litigation. Issuance of the notice u/s 66 is required only to the party to the suit. Word used u/s 66 is

''party'' not ''person''. Had intention of the Legislature being to issue notice u/s 66 to the person in whose possession original document is, the

Legislature would have used the word ''person'' in Section 66 instead of ''party'', hence in the opinion of this Court, no notice is required to be

served on Inderjit Kaur, who is not party to the suit.

7. As observed hereinabove, petitioner has already moved an earlier application calling defendant No. 1, in whose possession original ''Will'' was,

to produce it before the Court, hence in the opinion of this Court that application amounts a notice u/s 66. In reply to that application/notice

defendant No. 1 has stated that he has delivered the original ''Will'' in favour of Inderjit Kaur and Inderjit Kaur on the contact has said that ''Will''

is not in her possession and has lost somewhere. In the opinion of this Court, as to whether ''Will'' has been lost from the possession of Inderjit

Kaur, can be proved only by way of secondary evidence.

8. Learned Single Judge of this Court in the matter of Ashok Kumar Sachdeva v. Harish Malik 2008 (3) CCC 397 in paragraphs No. 5 and 6 has

observed as under: -

5. On the circumstance under Clause (c) is loss of the original document. The copy of the document is already on record. The petitioner

specifically pleaded that the original documents has been lost. The circumstances under which it was lost and other related fators are all questions

which can only be established once the applicant is allowed to lead secondary evidence in respect of the document in question. Learned Counsel

appearing for the respondent has referred to Akkam Laxmi v. Thosha Bhoomaiah and Anr. 2003(1) CCC 452 (A.P), Hira and Anr. v. Smt.

Gurbachan Kaur (1998)94 PLR 173, Banarsi Dass Vs. Om Parkash and Others, , Bhagwan Sarup Vs. Jagdish Kumar Jain and Others, .

Learned Counsel has particularly, relied upon the judgment in Banarsi Dass Vs. Om Parkash and Others, , wherein Co-ordinate Bench of this

Court has observed that the applicant must first prove the loss of the document and to establish further as to why the photocopy was obtained if

the duplicate of the document was not required to be maintained under any law. He has also referred to the other judgments, as noted above,

indicating that the secondary evidence can be led under the circumstances enumerated in Section 65 of the Evidence Act. There is no dispute with

regard to the proposition as referred to in the above judgments that the secondary evidence is permissible only when essential ingredients u/s 65 of

the Evidence Act are proved. The question that needs consideration is whether the loss is to be proved first and then only leave is to be granted for

secondary evidence. The Counsel appearing for the petitioner has referred to Raj Kumar v. Daljit Kumar Punj and Ors. 1989 Civil Court Cases

10 (P and H), Indian Overseas Bank v. Shyama and Co. and Ors. 1993 CCC 390 (P&H) : (1993)103 PL 630, Smt. Prem Lata Vs. Smt. Kamla

Devi and Others, , Shangara Singh Vs. Jawala Singh, , Raj Kumari Vs. Prem Chand, , Smt. Sobha Raam v. Ravi Kumar and Ors. 1998(3) CCC

637 (P&H), and Som Parkash v. Prabhati Lal 1991 CCC 794 (P&H): (1991) 100 PLR 611, delivered by the Co-ordinate Benches of this Court

wherein it is held/observed that loss is not required to be proved in absolute terms.

6. After hearing learned Counsel for the parties, I am of the view that to prove a document by way of primary or secondary evidence is a rule of

evidence. Whether the party seeking leave of the Court to lea secondary evidence ultimately succeeds in proving the document or not is a question

of fact and depends upon evidence. Petitioner has pleaded in the application the loss of original document. Under what circumstances document

has lost is a question of fact and evidence. It is settled rule of pleadings that a party must disclose material facts and need not plead evidence. In the

instant case material fact is loss of document and circumstances leading to loss is a question of evidence. This question can only be decided after

providing opportunity to the party concerned to lead secondary evidence. To grant leave to lead secondary evidence does not mean the document

is admitted in evidence nor it is a finding of the existence of any of the conditions indicated in Section 65 of the Evidence Act. It only amounts to

holding an enquiry regarding existence of document and its loss under some circumstances. Failure or success to prove the existence of document

or its loss cannot be pre-determined that too without providing opportunity. Whether it is proved or not is to be seen after the leave is granted and

the material/evidence produced is evaluated. The question raised by learned Counsel appearing for the respondent is premature at this stage.

9. From the dictum of learned Single Judge of this Court, it is now established that unless and until party is permitted to lead additional evidence, it

would not be possible for the party to prove loss of original document. In the present case, in the application seeking permission to lead secondary

evidence and in the affidavit in support thereof petitioner has prima facie stated loss of the original document hence secondary evidence ought to

have been permitted to prove loss as well as to prove lost document as secondary evidence.

10. Learned Counsel for respondents No. 1 to 3 has placed reliance on the judgment of Hon''ble Apex Court in the matter of Smt. J. Yashoda Vs.

Smt. K. Shobha Rani, . Hon''ble Apex Court in the matter of J. Yashoda (supra) in paragraph No. 9 has held as under: -

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. u/s 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. In Ashok Dulichand Vs. Madahavlal Dube and Another, , it was inter alia held

as follows:

After hearing the learned Counsel for the parties, we are of the opinion that the order of the High Court in this respect calls for no interference.

According to Clause (a) of Section 65 of Indian Evidence Act, Secondary evidence may be given of the existence, condition or contents of a

document when the original is shown or appears to be in 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 of any person legally bound to produce it, and when, after the notice

mentioned in Section 66 such person does not produce it. Clauses (b) to (g) of Section 65 specify some other contingencies wherein secondary

evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present

case is not covered by those clauses. In order to bring his case within the purview of Clause (a) of Section 65, the appellant filed applications on

July 4, 1973, before respondent No. 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript

of which, according to the appellant, he had filed Photostat copy.

Prayer was also made by the appellant that in case respondent No. 1 denied that the said manuscript had been written by him, the photostat copy

might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was however, nowhere stated in

the affidavit that the original document of which the Photostat copy had been filed by the appellant was in the possession of Respondent No. 1.

There was also no other material on the record to indicate the original document was in the possession of respondent No. 1. The appellant further

failed to explain as to what were the circumstances under which the Photostat copy was prepared and who was in possession of the original

document at the time its photograph was taken. Respondent No. 1 in his affidavit denied being in possession appeared to the High Court to be not

above suspicion.

In view of all the circumstances, the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion

that no foundation had been laid by the appellant for leading secondary evidence in the shape of the Photostat copy. We find no infirmity in the

above order of the High Court as might justify interference by this Court.

11. From the dictum of the Apex Court it is, thus, clear that to permit the secondary evidence the conditions laid down u/s 65 and 66 must be

fulfilled. In the present case, as observed herein above, petitioner/defendant No. 4 has successfully proved that while purchasing the property from

defendant No. 1, defendant No. 1 has retained the original ''Will'' with him and has handed over photocopy thereof to the purchaser/defendant

No. 4. In the present case, defendant No. 1 himself has stated in the reply to the application, yes he was in possession of the original ''Will'',

however, he has delivered the original ''Will'' to Smt. Inderjit Kaur, purchaser of other half portion of the property. In the present case, petitioner

has prima facie proved that on contact being made Inderjit Kaur has stated loss of the ''Will''. Now, facts of the loss of the ''Will'' and proof of the

original ''Will'' can be permitted by way of secondary evidence in view of the judgment of learned Single Judge of this Court in Ashok Kumar

(supra).

12. Consequently, petition is allowed. Application moved by defendant No. 4/petitioner also stands allowed. Parties are directed to appear before

the trial Court on the next date fixed by the trial Court for the further direction. Trial Court shall be at liberty to consider the prayer of the plaintiffs

to lead evidence in rebuttal to the secondary evidence. Learned trial Court is further directed to expedite the hearing of the case.