

(2013) 11 P&H CK 0212

High Court Of Punjab And Haryana At Chandigarh

Case No: CR No. 1011 of 2013

Smt. Rekha Rani

APPELLANT

Vs

Vineet Kumar and Others

RESPONDENT

Date of Decision: Nov. 26, 2013

Citation: (2014) 174 PLR 75

Hon'ble Judges: Paramjeet Singh, J

Bench: Single Bench

Advocate: Parminder Singh, for the Appellant; P.C. Chaudhary, Advocate, for the Respondent

Final Decision: Disposed Off

Judgement

Paramjeet Singh, J.

Instant civil revision has been filed under Article 227 of the Constitution of India for setting aside the order dated 07.02.2013 (Annexure P-6) passed by learned Civil Judge (Jr. Divn.), Karnal whereby application moved by petitioner-defendant No. 1 u/s 65 of the Indian Evidence Act, 1872 (in short "the Act") seeking permission to prove photostat copy of Will dated 23.11.1981 allegedly executed by Krishan Lal, by way of secondary evidence, has been dismissed. Shorn of unnecessary details, the facts relevant for disposal of the present petition are to the effect that plaintiffs filed suit for declaration and possession with consequential relief of permanent injunction. The plaintiffs being legal heirs of Krishan Lal have sought the possession of the property in dispute and claimed that the sale deed dated 26.05.2009 executed by defendants No. 2 and 3 in favour of defendant No. 1 regarding the property in dispute and alleged Will dated 23.11.1981 executed by Krishan Lal are null and void and not binding on the rights of the plaintiffs. During the pendency of suit, defendant No. 1 filed application for leading secondary evidence in shape of photostat copy of Will dated 23.11.1981 executed by Krishan Lal. It was mentioned in the application that defendant No. 1 filed list of witnesses and summoned the record i.e. probation petition No. 358/88, instituted on 05.12.1998 from Delhi Court

wherein the probation was sought on the basis of Will dated 23.11.1981. Defendant No. 1 inspected the relevant record and found that original Will is not there and photostat copy of the same is placed on record. On enquiry being made from defendants No. 2 and 3, defendant No. 1 came to know that original Will dated 23.11.1981 has been lost and they could not find the same. The case of the petitioner is totally based upon the alleged Will dated 23.11.1981 as well as the sale deed dated 26.05.2009. Therefore, the application was filed by defendant No. 1 for proving the photostat copy of the alleged Will dated 23.11.1981 by way of secondary evidence. The said application was contested by the plaintiffs. It was averred that the alleged Will dated 23.11.1981 is a forged and fabricated document. The loss of alleged Will dated 23.11.1981 has not been reported to the police. It was also mentioned that the alleged sale deed dated 26.05.2009 is also a forged and fabricated document. Vide impugned order dated 07.02.2013, the trial Court after considering the pleadings dismissed the said application. Hence, this revision petition.

2. I have heard learned counsel for the parties and perused the record.

3. Learned counsel for the petitioner has vehemently contended that the petitioner is entitled to prove the alleged Will dated 23.11.1981 by leading secondary evidence as the original of the same has been lost. Factum with regard to the loss of alleged original Will need not be strictly proved but a foundation has to be laid which has been laid down in the application. The learned counsel has further contended that existence of alleged Will dated 23.11.1981 is *prima facie* proved on the basis of register of deed writer, probate proceedings and sale deed executed by defendants No. 2 and 3. The loss of alleged Will dated 23.11.1981 is apparently proved. However, the trial court has dismissed the application in mechanical manner only on the ground that case of probate proceedings have not matured and has been adjourned *sine die* and without affording adequate opportunity.

4. Per contra, learned counsel for respondent No. 1 has contended that the alleged Will is a forged and fabricated document. The petitioner has failed to prove the existence and loss of the same. As such, photostat copy of the alleged Will cannot be allowed to be produced by way of secondary evidence unless its authenticity is proved.

5. I have considered the rival contentions of learned counsel for the parties and perused the record.

6. Before I deal with the rival contentions of learned counsel for the parties, it would be appropriate to understand the basic idea behind the provisions of the Act relating to relevancy and evidentiary value of the documentary evidence in proving or disproving the claim. Since the power of documentary evidence in either proving or disproving a claim is undeniably, therefore, determination of question of admissibility of document is crucial in any trial for it can change the course of entire

trial and consequently fate of parties. The Act entails elaborate provisions relating to admissibility of documents. "Best Evidence Rule" is a golden thread which runs through the provisions relating to admissibility of evidence, and when seen in context of documentary evidence such rule is enshrined in section 64 of the Act which provides that documents must be proved by primary evidence. The best evidence rule requires that if the contents of a writing are to be proved, the document must be proved. Some documents are self-authenticated such as ancient documents, recorded deeds and other documents over 30 years old. However other documents are required to be proved in accordance with the provisions of the Act. Needless to say that in cases where the document cannot be proved by primary evidence secondary evidence to prove the same is permissible under the Act. While the photostat copy of a document which is accurate reflection of original document is accepted as secondary evidence but it has to be shown that the photostat copy is authentic and accurate reproduction of the original. This is so because a photostat copy may be result of manipulation as it is susceptible to purposeful or accidental alteration or incorrect processing. The potential of fraud exists with all photostat copies as they can be altered through redacting information performing cut and paste job, transparency tape lift-off method, electronic editing etc. It is in this background that issue of admissibility of photostat copy of a document is to be determined which can be done in better manner by analysing the paradigms of law on secondary evidence and the laws dealing with ancillary issue like admissibility of photostat document.

7. This issue has arisen before the Hon'ble Supreme Court and various High Courts on various occasions and has been answered in different but mutually reconcilable ways based on facts of each case. Thus, it is desirable to figure out the basic principles enunciated by the courts in this regard with a view to answer following questions:

1. In what circumstances Photostat Copy can be tendered in evidence?
2. Whether photostat copy of a document comes within the meaning & definition of "secondary evidence" as contained in section 63 of the Act?
8. Since, the questions are inextricably linked these will be answered together. However, before discussing the judgments on the issue, it would be appropriate to examine the relevant provisions of the Act reproduced below wherein in fact the answer to questions raised above lies:

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 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 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.

9. Photostat copy of a document is generally sought to be admitted as secondary evidence by virtue of Section 63(2) of the Act which provides that copies of original made from mechanical process ensuring in itself the accuracy of such copies are

admissible as secondary evidence. While the photostat copies can be used for court purposes as evidential documentation but it is desirable that original be examined in all possible cases but when original is not available for reasons beyond one's control, photostat copy of a document may be examined to reach definite conclusions. However, before that the party seeking to produce the same must show that any of the circumstances mentioned in Section 65 of the Act exists warranting leading of secondary evidence. The controversy is generally with regard to cases falling under clauses (a) or (c) of Section 65 of the Act wherein the original is alleged to be lost or in the possession of opposite party.

10. The Hon"ble Supreme Court in Ashok Dulichand Vs. Madahavlal Dube and Another, while dealing with a case under clause (a) of Section 65 of the Act, upheld the decision of the High Court wherein it recorded a finding that the photostat copy did not appear to be above suspicion and could not be admitted. In arriving at this finding, the High Court considered the facts that there was no other material on the record (except the affidavit of appellant himself) to indicate that the original document was in the possession of respondent No. 1, the appellant 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 of or having anything to do with such document. Thus, it was held that no foundation had been laid by the appellant for leading secondary evidence in the shape of the photostat copy.

11. In Smt. J. Yashoda Vs. Smt. K. Shobha Rani, the Hon"ble Supreme Court while dealing with issue of admissibility of photocopy of a document, original whereof was in possession of third party, came to a conclusion that since, the conditions mentioned in Section 65 of the Act were not fulfilled, photostat copy could not be allowed to be produced as secondary evidence. The court relied on Ashok Duli Chand"s case (supra) and observed as under:

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.

12. The Hon"ble Supreme Court in [H. Siddiqui \(dead\) by L.Rs. Vs. A. Ramalingam](#), while dealing with Section 65 of the Act opined that though the said provision permits the parties to adduce secondary evidence, yet such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid 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. It has been further held that mere admission of a document in evidence does not amount to its proof. Therefore, it is the obligation of the Court to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.

13. Recently in [U. Sree Vs. U. Srinivas](#), the Hon"ble Supreme Court has held that mere denial by the party to produce the original document in whose possession it is stated to be does not lay down foundational facts for producing secondary evidence.

14. Likewise in cases falling under clause (c) of Section 65 of the Act wherein the original document is alleged to be lost or destroyed and a photostat copy is sought to be produced, the courts have cautioned against eager admissibility of such copies, specifically when it is lost or destroyed by the party in whom it created an enforceable right and who seeks to produce photostat copy of the same whereas, on the other hand, if a photostat copy is produced by a party who has no interest in manipulating it, it is generally admitted as secondary evidence.

15. While dealing with a case falling under clause (c) of Section 65 of the Act, the Hon"ble Supreme Court in [Benga Behera and Another Vs. Braja Kishore Nanda and Others](#), wherein the Will was sought to be proved by way of secondary evidence, observed that it was obligatory on the part of first respondent to establish the loss of original will beyond all reasonable doubt. Since his testimony in this regard remained uncorroborated, therefore, photocopy could not be admitted as secondary evidence. This Court in [Mukesh Kumar alias Motta Vs. State of Haryana](#), while relying on Division Bench judgment of Patna High Court in [Chaudhuri Janardan Parida and Others Vs. Prandhan Das](#),) observed as under:

Therefore, it may be noticed that to permit secondary evidence of such a document which has been destroyed by a person in whose possession it was and in whose favour it created an enforceable legal right or an obligation is normally not to be allowed as secondary evidence. The secondary evidence of such a document may be tampered with or changed and it would be against public policy to take a chance of

running the risk of fraud being committed. Besides, the destruction of the instrument may make a party liable for a contract which had either not been agreed to or had been rescinded with the destruction of document. Therefore, secondary evidence in such circumstances where document itself has been destroyed by the person in whom it created an enforceable legal right or an obligation is normally not be allowed.

16. These observations were made in a case where the person seeking to produce the photostat copy could not explain that from where he got the photostat. A doubt was, thus, created on authenticity of the photostat copy. It was therefore observed:

Photostat copies of documents can be prepared by manipulation and presented as original. Therefore, it would normally be unsafe on the mere asking to allow production of photostat copies as secondary evidence. These are admittedly not certified copies of the original and it is not clear as to whether these are copies of the original.

Thus it may be said that before being admitted as secondary evidence being copies prepared by mechanical process, the authenticity of the Photostat document has to be established where photostat copy of a document is produced and there is no proof of its accuracy or of its having been compared with or its being true reproduction of the original, it cannot be considered as secondary evidence. In other words, photostat copy of a document is not admissible as secondary evidence unless proved to be genuine or is admitted by opposite party. Clause (2) of section 63 has two requirements first - the copies should be prepared from a mechanical process and second - the process should be such which in itself ensures accuracy of copy. While every Photostat copy is prepared by mechanical process however, it may or may not be accurate, therefore its admissibility as secondary evidence in view of clause (2) of Section 63 of the Act is subject to proof of the fact that it was a correct copy of original document. Similar observations have been made by this Court in *Prem Lata v. Dwarka Prasad and Ors. CR No. 4913 decided on 23.08.2013* and [Rajasthan Golden Transport Company Vs. LRs. of Amritlal](#), Therefore, even when the permission to produce photostat copy of a document as secondary evidence is granted, it is open for the parties to argue about the probative value attached to it. When it is shown that photostat copy by itself is a suspicious document, it cannot be relied upon. Following observations of the Hon'ble Madhya Pradesh High Court in *Kanchan Malhotra v. Yashvir Singh 1986 (1) HLR 387* are relevant in this regard:

Now, it may be stated that the photostat copy could not just be readily accepted as a reliable piece of secondary evidence unless there was clinching proof that (i) this photostat copy truly represented some original or its counter-foil, (ii) this photostat copy was prepared by mechanical process by someone at some particular place on any particular date and at any particular time and (iii) the original or its counter-foil from which this photostat copy was prepared, was produced at the relevant time by any person in custody of such document.

17. Since the aforesaid requirements were not met in that case, it was held that Photostat copy itself being suspicious document, no probative value could be attached to it.

18. The proposition of law laid down in aforesaid judgments provides answers to the questions raised above. Thus a Photostat copy of a document can be produced in evidence only when it is alleged and proved that the original was in existence and is lost or destroyed or is in possession of opposite party who failed to produce it or in any other circumstances mentioned in section 65 of the Act. These foundational facts, however, are to be proved by leading cogent evidence. As regards the question whether photostat copy of a document comes within the meaning & definition of "secondary evidence" as contained in section 63 of the Act, there cannot be absolute answer because every photostat copy may not be accurate. For this purpose the probative value of the Photostat copy has to be proved independently.

19. The principles culled out from the aforesaid discussion are summarized below:

- a) Photostat copy of a document can be allowed to be produced only in absence of original document.
- b) When a party seeks to produce Photostat copy it has to lay the foundational facts by proving that original document existed and is lost or is in possession of opposite party who failed to produce it. Mere assertion of the party is not sufficient to prove these foundational facts.
- c) The objections as to non existence of such circumstances or non existence of foundational facts must be taken at earliest by the opposite party after the photostat copy is tendered in evidence.
- d) When the opposite party raises objection as to authenticity of the Photostat copy its authenticity has to be determined as every copy made from a mechanical process may not be accurate. Both the requirements of clause (2) of section 63 are to be satisfied.
- e) Allowing production of Photostat copy in evidence does not amount to its proof. Its probative value has to be proved and assessed independently. It has to be shown that it was made from original at particular place and time.
- f) In cases where the Photostat copy is itself suspicious it should not be relied upon. Unless the court is satisfied that the Photostat copy is genuine and accurate it should not be read in evidence.
- g) The accuracy of photostat copy shall be established on oath to the satisfaction of court by the person who prepared such copy or who can speak of its accuracy.

20. The abovesaid principles must be followed by the courts while admitting a photostat copy as secondary evidence and assessing its probative value.

21. In the case in hand, the photostat copy of the alleged Will is sought to be produced by way of secondary evidence. It is pertinent to mention here that sale deed has been executed on the basis of alleged Will, however, without appreciating the said fact, the trial Court has dismissed the application on the only ground that case of probate proceedings have not matured and has been adjourned sine die. Proper opportunity has not been afforded to the petitioner to lay down foundation for leading secondary evidence.

22. In view of above, the impugned order dated 07.02.2013 (Annexure P-6) is set aside. The petitioner-defendant No. 1 would be afforded an opportunity to lead evidence to prove existence and loss of the alleged Will dated 23.11.1981 and plaintiffs shall also be afforded an opportunity to rebut it. Thereafter, the trial Court shall decide as to whether the photostat copy of the alleged Will should be admitted as secondary evidence. Its probative value shall be independently assessed by the trial Court in accordance with the settled principles of law. Disposed of in the aforementioned terms.