
(2015) 09 CAL CK 0076
In the Calcutta High Court
Case No : C.O. 3049 of 2015

Devshar Fashion Private Limited

APPELLANT

Vs

State Bank of India and Others

RESPONDENT

Date of Decision : 29-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 16 Rule 6, Order 18 Rule 4
Evidence Act, 1872 — Section 63, 63(1), 65, 65(c), 65(f)

Citation : (2015) 09 CAL CK 0076

Hon'ble Judges : Harish Tandon, J.

Bench : Single Bench

Advocate : Jibon Ratan Chatterjee, Sibasish Ghosh and Sandip Kumar Tiwari,
for the Appellant; A.K. Routh, for the Respondent

Final Decision : Allowed

Judgement

Harish Tandon, J.—This revisional application is directed against an Order No. 28 dated 31st October 2014 and Order No. 39 dated 29th June 2015 passed by learned Judge, Small Causes Court at Sealdah in Title Suit No. 35 of 2014 by which the certified copy of the sale deed was not marked as exhibit but kept for identification and a subsequent application to adduce evidence by producing other witnesses on behalf of the plaintiff/petitioner are rejected.

2. Shorn of unnecessary details, the plaintiff/petitioner filed a suit for recovery of vacant and khas possession of the suit premises on expiration of lease by efflux of time. Admittedly, the entire ground floor comprising of 1800 square feet at premises No. P-36, C.I.T.H.S-12 Scheme M-VII, Manicktala Main Road, Kolkata-700054 was demised unto and in favour of the opposite party No. 1 on the basis of indenture of lease dated 21st November 2000 for a period of five years with an option for renewal for a further period of five years at consolidated lease rent of Rs. 14,728/-.

3. The plaintiff/petitioner purchased the suit premises from the erstwhile owner who executed and registered a deed of sale on 30.3.2007 in the office of

Additional Registrars of Assurance, Kolkata.

4. It is alleged in the plaint that after the expiration of the initial term, the lease was not renewed as the erstwhile owner of the defendant/opposite party could not agree on mutual terms. By a letter dated 19th May 2007, the incident of acquiring the property by the plaintiff/petitioner was intimated to the defendant No. 2 which was sent by registered post with acknowledgement due. By letter dated 6th August, 2007 the defendant No. 2 asked the plaintiff/petitioner to submit the title deed for verification so that the rent could be paid in respect of the demised premises. It is alleged that despite several discussions, the parties could not arrive at the consensus and subsequently the plaintiff/petitioner asked the defendant/opposite parties to vacate the premises. In the written statement, the defendants not only challenged the legality and validity of the sale deed having executed without following the terms and conditions as required under Transfer of Property Act but also averred that all attempts to get the renewal of the lease were exhausted either with the vendor of the defendant/opposite party and subsequent to purchase with the plaintiff/petitioner. However, the defendant denied to vacate the suit premises and maintained the stand to remain in possession.

5. After the completion of the pleadings, the suit was posted for trial. In terms of Order 18 Rule 4 of the Code of Civil Procedure, the first witness of the plaintiff filed affidavit as to examination in chief annexing several documents including the certified copy of the sale deed dated 31.3.2007. It is not in dispute that the certified copy of the sale deed was not received in evidence having not properly proved and was kept as "X" for identification. Subsequently, the said witness filed a supplementary affidavit as to examination in chief with an intent to get the certified copy of the said sale deed to be marked as exhibit. By order No. 28 dated 31st October, 2014, the Court refused to accept the supplementary evidence as there was no provision in the Code of Civil Procedure provided therefor. It is observed that there is no provision in law to mark the document as exhibit which has already been marked as "X" for identification at the time of tendering the same by the first witness of the plaintiff. After the closure of the evidence of the said witness, an application was taken out by the plaintiff/petitioner for adducing further evidence by citing another witness with the sole intention to mark the certified copy of the sale deed as exhibit in the suit. The Court rejected the said application on two fold grounds: firstly, by on Order No. 28 dated 31st October, 2014 the prayer for exhibiting the said document was refused and therefore is hit by principle of res judicata, secondly, the outsiders to the document has no authority to prove the same.

6. The learned advocate for the petitioner submits that the certified copy of the registered sale deed can be received as secondary evidence under Section 63(1) of the Evidence Act. It is further submitted that Section 65(c) permits the party to adduce secondary evidence on existence, condition and contents of the original public document with the certified copy of the same. It is further

submitted that if the existence of an original document is not in dispute, the Court ought to have admitted the certified copy of the said document in evidence and should have marked as exhibit and placed reliance upon a judgment rendered in case of Dwarika Prasad Bajpai Vs. Kedar Prasad Bajpai and Another, .

7. On the other hand, the learned advocate for the defendants/opposite parties submits that the original document in question is not a public document. The provision contained under Section 65(f) of the Evidence Act is not attracted. He further submits that the certified copy of a sale deed cannot be received in evidence and placed reliance upon a judgement of the Hon"ble Supreme Court in case of Dr. Gurmukh Ram Madan Vs. Bhagwan Das Madan, . Lastly, it is submitted that the said document has already been marked exhibit as "X" for identification and therefore there cannot be a question of marking the said document again.

8. It is no doubt true that the primary evidence in relation to documents is a best piece of evidence of transaction. It is a best attainable evidence which generally excludes the secondary evidence as but by way of exception the secondary evidence of a particular nature is also admissible under Section 63 of the Evidence Act provided the ingredients laid down therein are satisfied. Section 65 of the Act is further incorporated in the statute book to safeguard the interest of a person who is not in a position either to produce original or the secondary evidence of such nature as contemplated under Section 63 of the act.

9. The principles behind the inclusion of Section 65 of the Act is that if the original document is lost, destroyed and detained by the other side or a third party who failed to produce the same after notice, the right of the person cannot be taken away to lead a secondary evidence on existence, condition or contents of the document. Clauses "a" to "g" of Section 65 have illustrated certain eventualities for giving a secondary evidence relating to document wherein clause "e" and "f" are applicable in case of certified copy of the document of such nature and its admissibility as secondary evidence. The secondary evidence as distinct from primary evidence can only be permitted after satisfactorily proving the non-production of the primary evidence and does not relieve the obligation of a party to prove the execution of the original document.

10. It is, therefore, imperative on the part of the party before permitted to lead secondary evidence to prove that the document is in existence or have been lost and/or destroyed or detained by a person who is a third party to the proceedings. Even the Court under Order 16 Rule 6 of the Code of Civil Procedure may issue summons to any person either suo motu or an application to the party to a proceedings to produce the document provided the Court is satisfied that the document is in his possession.

11. In the instant case, the existence of a sale deed executed by the vendor of the plaintiff/petitioner is not in dispute. Rather the letter of the defendant No. 2

indicates the existence thereof as they asked for the production of the same for inspection and verification. The affidavit as to the examination in chief contains the statement that the original sale deed is lying with the Axis Bank in hypothecation to secure the loan obtained by the plaintiff/petitioner.

12. A reliance can be placed on a judgment of the Hon''ble Supreme Court in case of Nanni Bai and Others Vs. Gita Bai, , in support of the contention that if the sale deed which is the primary evidence on the interest sold is not available for some reasons the secondary evidence can be adduced by production of the certified copy thereof provided the foundation has been laid in the pleading for reception of the certified copy as secondary evidence. If the document is permitted to remain on record for identification, this Court does not find any impediment on the part of the party for applying to adduce further evidence through another witness to dispel the objection raised at the time of tendering the same by another witness.

13. It would be burdensome on the party to wait for determination of the objection as the document is admitted for identification and shall preclude him from removing such objection at the threshold of the objection raised at the time of tendering the same to be decided at the final stage of the proceedings.

14. The point is not whether the sale deed is a public document or not and therefore the certified copy thereof can be received in evidence in view of Section 65(f) of the Evidence Act but whether the objection as to the admissibility of the certified copy of the sale deed can be postponed till the final stage of the proceedings having kept the same for identification.

15. The judgment rendered in case of Dr. Gurmukh Ram Madan (Supra) lends support to the aforesaid proposition and it is relevant to quote the excerpts therefrom which runs thus:

"4. Strong reliance had been placed in the trial court as well as in the High Court on Section 65(f) of the Evidence Act, 1872. Section 65(f) states that secondary evidence is permissible when the original is a document of which a certified copy is permitted by the Evidence Act or by any other law in force in India, to be given in evidence. All that it means is that secondary evidence is admissible notwithstanding the existence of the original when it is a document of which a certified copy is permitted to be produced by the Act or any other law. The document in question is not a public document and the document could not have been let in in evidence except after explanation as to the non-availability of the original in an appropriate manner. Therefore, the view taken by the High Court in this regard that Section 65(f) was not attracted to the case is justified."

16. The judgment rendered in case of Dwarika (Supra) is not pointer to an issue involved in the instant case, but the support to the proposition that in absence of an original document, a party can lead the secondary evidence to prove the contents, condition and existence of the original document by secondary evidence. As indicated above, the Trial Court refused to permit the plaintiff/

petitioner to cite another witness to prove the certified copy of the sale deed as secondary evidence which this Court feels cannot be supported at all.

17. In view of the discussions as above, the Order No. 28 dated 31st October, 2014 and Order No. 39 dated 29th June, 2015 are hereby set aside.

18. The plaintiff is permitted to adduce further evidence by citing another witness for proving the certified copy of the sale deed as secondary evidence and it is open to the Court to consider the objection if raised either admitting the same in evidence and making exhibit or refusing to receive the same in evidence by recording reasons.

19. With these observations, the revisional application is allowed.

20. However, there shall be no order as to costs.