

(2018) 12 CHH CK 0001

In the Chhattisgarh High Court

Case No : Writ Petition (Art. 227) No. 459 of 2017

Harun Rasid, S/o Abdul Rajjaq

APPELLANT

Vs

Rajkumar Chopra, S/o Shantilal Chopra

RESPONDENT

Date of Decision : 01-12-2018

Acts Referred:

Evidence Act 1872 — Section 65, 66

Code of Civil Procedure, 1908 — Order 11 Rule 12, Order 11 Rule 14

Citation : (2018) 12 CHH CK 0001

Hon'ble Judges : Sanjay K. Agrawal, J

Bench : Single Bench

Advocate : D.N. Prajapati, Harsh Wardhan, Rahul Tamaskar

Final Decision : Dismissed

Judgement

1. The petitioners / defendants take exception to the order dated 27-4-2017 passed by the trial Court granting an application under Sections 65 and 66 of the Evidence Act, permitting the plaintiff to lead secondary evidence of the true copy obtained under the Right to Information Act, 2005, of the agreement dated 15-5-2006.

2. Mr. D.N. Prajapati, learned counsel appearing for the petitioners / defendants No.1, 2 & 4, relying upon the decision of the Supreme Court in the matter of J. Yashoda v. K. Shobha Rani (2007) 5 SCC 730 would submit that existence and execution of the agreement dated 15-5-2006 executed by the parties is in serious doubt, therefore, the trial Court was absolutely unjustified in granting the said application. He would also rely upon the decision of the M.P. High Court in the matter of Haji Mohd. Islam and another v. Asgar Ali and another 2006(4) M.P.H.T. 87.

3. Mr. Harsh Wardhan, learned counsel appearing for the plaintiff / respondent No.1, would submit that the defendants while filing written statement have not disputed the existence and execution of the original agreement dated 15-5-2006,

even in the application filed under Order 11 Rule 14 of the CPC, they have denied the possession of the same and as such, the document having been lost, the trial Court is absolutely justified in granting the said application.

4. I have heard learned counsel for the parties and considered their rival submissions.

5. Section 65 of the Evidence Act, 1872, reads as under: -

"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 consists 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."

6. In the instant case, admittedly, the certified copy of agreement dated 15-5-2006 issued by the competent authority under the Right to Information Act,

2005 was sought to be produced before the trial Court under Order 11 Rule 12 of the CPC by defendants No.1 to 4 and they have filed reply before the trial Court on 2-1-2017 that the document is not in their possession leading to filing of application under Sections 65 and 66 of the Evidence Act which has been granted by the trial Court allowing the plaintiff to lead secondary evidence of that document.

7. The Supreme Court in *J. Yashoda* (supra) has clearly held that secondary evidence, as a general rule is admissible only in the absence of primary evidence and 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. The conditions laid down in Section 65 of the Evidence Act, 1872 must be fulfilled before secondary evidence can be admitted and observed 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. Under Section 64, documents are to be provided (sic proved) 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 v. Madahavlal Dube* (1975) 4 SCC 664, it was inter alia held as follows: (SCC pp. 666-67, para 7)

"7. 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 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 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, of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it. ..."

8. Reverting to the facts of the present case in light of the principles of law laid down in *J. Yashoda* (supra), it is quite vivid that in the present case, the plaintiff in para 11 of his plaint has averred about the execution of agreement dated 15-5-2006 between the parties and the defendants have filed their written statements on 4-1-2016 separately, but they have denied the contents of para 11 of the plaint for want of knowledge, they have not branded the said document either forged or fabricated or did not express any doubt about the execution and

existence of the said document. Even reply to the application under Sections 65 and 66 of the Evidence Act was filed in which they did not dispute the existence and execution of the said document between the parties. As such, before this court, the said plea of non-execution of the document cannot be permitted to be raised.

9. The decision of the M.P. High Court in Haji Mohd. Islam (*supra*), cited by learned counsel for the petitioners herein / defendants No.1, 2 & 4, is not applicable, as in that case, photocopy of the document was filed. In the present case, it is the true copy that has been filed duly issued under the Right to Information Act, 2005.

10. In view of the above, I do not find any perversity or illegality in the impugned order permitting the plaintiff to lead secondary evidence of the said document. Consequently, the writ petition is dismissed. No order as to cost(s). However, this will not bar the present defendants to raise any objection during the course of trial regarding execution and existence of the said document, in accordance with law.

11. Copy of written statement be placed on record.

12. A copy of this order be sent to the trial Court.