

(1992) 12 P&H CK 0078
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 1101 of 1992

Indian Overseas Bank

APPELLANT

Vs

Shayama and Co. and Others

RESPONDENT

Date of Decision : 09-12-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Evidence Act, 1872 — Section 65

Citation : (1993) CivCC 390 : (1993) 103 PLR 630

Hon'ble Judges : G.C. Garg, J

Bench : Single Bench

Advocate : O.P. Goel, Parmod Goyal and S.S. Saler, for the Appellant; Rakesh Garg, for the Respondent

Final Decision : Allowed

Judgement

G.C. Garg, J.—Dismissal of an application by the trial Court, for production of some documents by way of secondary evidence is what has given rise to this revision petition.

2. The plaintiff bank filed a suit for the recovery of Rs. 18,32,406.29 paise with interest at the rate of 19.5% per annum against the defendants including M/s. Kartar Goods Transport Company defendant No. 9 and M/s Friends Road Lines-defendant No. 10. It was alleged that defendant No. 1 submitted various bills accompanied by Lorry Receipts/Goods Receipts and Hundies duly endorsed in favour of the plaintiff in respect of the goods despatched through defendants 9 and 10. The details of the Lorry Receipts/Goods Receipts were detailed in the plaint itself and these documents are already available on the record of the suit. Defendants 9 and 10, were informed of the dishonouring of the bills and they were called upon to preserve the goods. A notice u/s 10 of the Carriers Act was also served on March 27, 1984.

3. In the written statement filed by defendants 9 and 10, the issuance of Lorry Receipts/Goods Receipts was denied by averring that these are false and

fabricated. It was the case of these defendants that the Lorry Receipts/Goods Receipts did not bear the signatures of any of their authorised agents and the goods were never banded over to them against these receipts. The receipt of notice u/s 10 of the Carriers Act was also denied.

4. Learned counsel for the plaintiff closed the evidence of the plaintiff on October 28, 1991 after making the following statement:-

"I tender into evidence copy of the notice served upon Kartar Goods Transport Co. by the plaintiffs through Sh. Manmohan Gupat, Advocate, exhibit P-82 and the AD receipts regarding acknowledgement thereto, copy of notice exhibit P-83 served to M/s Friends Road Lines, Sriganaganagar through Sh. Manmohan Lal Gupta and AD exhibit P-84 and special power of attorney exhibit P-85. I close the evidence of plaintiff in affirmative except for leading secondary evidence, if allowed on the basis of application filed by me today."

At this stage, it may also be noticed that one of the issues framed on June 8, 1990 reads as under :-

"Whether defendants No. 9 and 10 did not issue the lorry receipts in question, if so, its effect ?"

5. In this backdrop, the plaintiff moved an application dated October 28, 1991 for permission to adduce secondary evidence. It was stated that defendants 9 and 10 illegally and with mala fide motive denied that the Lorry Receipts/Goods Receipts were issued by them or by their authorised agents. It was also stated that Jagdish Rai, a partner of defendant No. 10 had authorised one Rajesh Kumar to sign the Goods Receipts on its behalf and the attested signatures of Rajesh Kumar were supplied to the bank. Similarly, Charanjit Singh, a partner of defendant No. 9 authorised Bhagwan Dass as its authorised agent to issue Goods Receipts on its behalf and his attested signatures were supplied to the bank. Photo copies of these documents were filed with the application. These two documents were sought to be produced and proved by way of secondary evidence, the original thereof having been lost or misplaced by the plaintiff bank. By way of reply to the application, these documents were alleged to be bogus and fabricated. It was also stated that the originals of these documents have not been lost,

6. The production of these documents by way of secondary evidence was declined by the trial Court on the grounds, viz. the application had been moved at a belated stage with the only purpose to delay the case, especially in the context of denial by the defendants in the written statement about the factum of the goods having been handed over to them against the Lorry Receipts/Goods Receipts which do not bear the signatures of their authorised agents; that the loss of the originals had not been proved, the allegations regarding loss or search having not been supported by an affidavit of the person who made the search; and lastly the documents are neither 30 years old nor registered.

7. It is how the present revision petition has been filed by the plaintiff.

8. The trial Court has acted with material irregularity and illegally in declining on the above grounds, the prayer for production of two documents by the plaintiff by way of secondary evidence. There is no manner of doubt that the suit was filed in the year 1986 but one cannot lose sight of the fact that issues were framed on June 8, 1990 and the plaintiff completed its evidence on October 28, 1991. It was on that very day, the application was filed. It thus, cannot be said that the application was moved at a belated stage and with a view to delay the disposal of the suit. The plaintiff is not to gain by the delay in the decision of the suit. It took about four years to serve the defendants. Even otherwise, these documents, if proved, would be relevant for the disposal of Issue No. 12. This apart, the plaintiff has obviously a right to produce evidence in rebuttal as the onus of this issue is on the defendants. The Lorry Receipts have already been produced on the record which are alleged to have been signed by the authorised agents of defendants 9 and 10. It is true that no reliance was placed on the two documents despite denial in the written statement but defendants 9 and 10 can be compensated therefore by award of costs. In the circumstances it cannot be said that the application was filed at a belated stage or to delay the decision of the suit.

9. Section 65 of the Evidence Act provides for situation where secondary evidence may be given of the existence of documents. Under clause (c) secondary evidence of the existence of documents is permitted where the original has been destroyed or lost. This clause also provides the production of secondary evidence when the party offering evidence of the contents of a document has not been able to produce the same in a reasonable time for any reason but not arising from his own neglect. In this case the prayer for production of secondary evidence has also been declined by observing that the loss is not proved. There is force in the contention of the learned counsel for the petitioner, that the plaintiff was not afforded an opportunity to prove the loss of the documents. If such an opportunity had been provided, the plaintiff may have proved the loss of these documents and may have further proved that the Lorry Receipts/Goods Receipts already placed on the record, were issued by the authorised agents of these defendants. Adverse inference has been drawn from the fact that affidavit of the persons who made the search was not filed and the application did not disclose as to what attempts were made to search the original documents. It would have been far better for the plaintiff if these matters had been taken care of at the time of making the application, but can the production of secondary evidence be denied on this ground. In my view an opportunity ought to have been afforded to the petitioner to prove the loss and if the loss was then proved, an opportunity ought to have been afforded to produce/prove these documents by way of secondary evidence. If the plaintiff then failed to prove the loss, the non-production of documents by way of secondary evidence would have been perfectly justified. If the Lorry Receipts/Goods Receipts had not been pleaded and produced on the record, then these documents would have

been wholly irrelevant. The documents sought to be produced and proved by way of secondary evidence are certainly relevant to the point in issue in this case. There can be no manner of doubt that the plaintiff was remiss in not producing/proving these documents at the initial stage and also in not relying upon them, but for that the defendants, as already stated, can be compensated by award of costs, this is so especially in the context of Issue No. 12, the burden of proof of which is on the defendants. The reliance placed on *Hira v. Smt. Gurbachan Kaur* 1938 94 P. L. R. 173, and *Krishan Kumar v. Pal Singh* 1989 95 P. L. R. 55, by the learned counsel for respondents 9 and 10, in no way helps him. The facts of the two reported cases are entirely different and have no bearing on the facts of the present case.

10. Again production of documents by way of secondary evidence cannot be denied merely on the ground that the documents sought to be produced are either not registered documents or 30 years old. This is not the requirement of section 65 of the Evidence Act.

11. For the reasons recorded above, this revision petition succeeds and is allowed. The trial Court shall now afford one opportunity to the plaintiff to produce evidence to prove the loss of the two documents sought to be produced by way of secondary evidence and if the trial Court is satisfied that the loss is proved, it shall afford further opportunity to the plaintiff to prove the same in accordance with law and for this purpose only two opportunities shall be afforded. The production of the said documents will be subject to payment of Rs. 1,000/- payable by the plaintiff to defendants 9 and 10. The parties through their counsel have been directed to appear before the trial Court on January 20, 1993. No costs.