

(2017) 09 P&H CK 0019
In the Punjab And Haryana At Chandigarh
Case No : 4372 of 2015 (O&M)

Jaspal Singh Tiwana and another

APPELLANT

Vs

Mohinder Singh Sandhu and others

RESPONDENT

Date of Decision : 12-09-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 18Rule 4](#), [Order 13Rule 4](#), [Order 7Rule 17](#), [Order 13Rule 5](#)

Citation : (2017) 09 P&H CK 0019

Hon'ble Judges : Raj Mohan Singh

Bench : SINGLE BENCH

Advocate : Vikas Singh, H.S. Virk, Umesh Kumar

Final Decision : Disposed

Judgement

1. . The petitioners have assailed the order dated 25.05.2015 passed by the Civil Judge (Jr. Divn.) Chandigarh whereby photostat copies of the documents were only allowed to be marked instead of exhibiting them.

2. . Brief facts are that plaintiff/respondent No.1 filed a suit for declaration challenging the sale deed in favour of defendant Nos.1, 3 and 4. Defendant Nos.1 and 3 are the present petitioners, whereas defendant No.4 is proforma respondent No.3. As per pleaded case Ujagar Singh was the original owner of the house in dispute. He executed a registered Will dated 20.08.1996 in favour of his wife Gian Kaur. Ujagar Singh died on 02.07.2002 and thereafter Gian Kaur sold the house in question to the petitioners vide sale deed dated 08.08.2002. Gian Kaur also died on 25.11.2006. The suit came to be filed by respondent No.1 on 29.09.2009/12.12.2009.

3. . Defendant Nos.1, 3 and 4 filed an application under Section 65 of the Indian Evidence Act (for short "the Act") for permission to produce secondary evidence. Defendants/ petitioners summoned officials from Canara Bank, Sector 44-D,

Chandigarh with the record pertaining to original demand draft Nos.073105 and 073106 both dated 30.07.2002 for Rs.14.80 lacs each and demand draft No.073107 dated 30.07.2002 in a sum of Rs.38.40 lacs which were allegedly issued in the name of Gian Kaur and statement of joint account No.1478 in the names of Satwant Kaur, Pritpal Singh, Jaspal Singh and Daisy for the period of 01.07.2002 to 30.09.2002 duly certified under the Banker's Book Evidence Act and from concerned official of the Canara Bank, Sector 17-C, Chandigarh, comprising statement of account of Gian Kaur having SB Account No.34475 for the period from 01.07.2002 to 30.09.2002 and to bring the details of two FDRs of Rs.11 lacs which were made on 19.08.2002 from the aforesaid account of Smt. Gian Kaur and details of payments on maturity of the said FDRs. The officials appeared as witness and stated that the summoned record had been destroyed. Defendant No.3 was in possession of photostat copies of original three demand drafts amounting to Rs.68,00,000/- which she had got made before handing over the drafts to Smt. Gian Kaur towards consideration of house and also in possession of photostat copies of two cheques which Gian Kaur had issued in favour of the plaintiff and her daughter for Rs.23 lacs each and documents relating to FDR amounting to Rs.22 lacs which had been given by Gian Kaur on 19.08.2002. Since the original record had been destroyed, therefore, application was moved for leading secondary evidence.

4. . Trial Court vide order dated 30.03.2015 allowed the application and the petitioners along with respondent No.3 were permitted to produce secondary evidence to prove the aforesaid documents.

5. . On 02.05.2015, learned counsel for the defendants wanted to tender affidavit of defendant No.3/petitioner No.2. Objection with regard to exhibition of document in the affidavit of petitioner No.2 was taken by learned counsel for the plaintiff/respondent No.1. The objection was that the photostat copies of the documents cannot be allowed to be exhibited at that stage as the execution of the documents was not proved, so far in terms of Order 18 Rule 4 CPC read with Order 13 Rule 4 CPC.

6. . Trial Court vide order dated 25.05.2015 only allowed the documents to be marked at that stage without exhibiting the same. The objections raised by the plaintiff were sustained. That is how the present revision petition came to be filed before this Court.

7. . Learned counsel for the petitioners submitted that the prayer for leading secondary evidence was already allowed subject to existence of documents and loss thereof. Leading of secondary evidence is like an enquiry to be conducted for establishing existence of document and thereof loss of the same as per pleadings of the party. Granting leave to lead secondary evidence does not mean that the document has to be admitted in evidence, nor it is a finding in respect of existence of any conditions indicating in Section 65 of the Act. It amounts to holding an enquiry regarding existence of document of 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 any opportunity. Existence and loss of document would be proved with reference to the evidence likely to be led after the leave is granted and evidence is produced and evaluated by the Court. Section 63 of the Act deals with secondary evidence which means and includes:-

- (1) Certified copies given under the provisions hereinafter contained;
- (2) Copies made from the original by mechanical processes which in themselves ensure 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.

8. . Learned counsel further submitted that the aforesaid definition is exhaustive as it declares that secondary evidence "means and includes" and then to follow the five categories of secondary evidence. In Smt. J. Yashoda vs. Smt. K. Shobha Rani, (2007) 5 Supreme Court Cases 730, the Hon'ble Apex Court held that photostat copies of the original documents cannot be received as secondary evidence in terms of Section 63 of the Act. The secondary evidence as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible the party relying upon the same is not entitled to introduce by way of secondary evidence. The Hon'ble Apex Court in para No.9 of its judgment 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. 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 and Another [1975(4) SCC 664], 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 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."

9. . Learned counsel further submitted that in view of the facts on record, present case falls under the category of Section 65(c) of the Act. In terms of Order 13 Rule 4 CPC there shall be endorsement on every document which has been admitted in evidence in the suit. The endorsement shall contain the following particulars:-

- (a) the number and title of the suit;
- (b) the name of the person producing the document;
- (c) the date on which it was produced;
- (d) a statement of its having been so admitted and the endorsement shall be signed and initialled by the Judge.

10. . Learned counsel contended that where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original, the particulars shall be endorsed on the copy and signed and initialed by

the Judge. The admissibility of a document has to be tested at the stage of admission itself instead of moving it to be decided subsequently. In view of law laid by the Hon''ble Apex Court in *Shalimar Chemicals Works Ltd. vs. Surendra Oil & Dal Mills*, 2010(8) RCR (Civil) 423, the photocopy of the documents cannot be taken on record as evidence by leaving the plaintiff to support its case in terms of proving existence of a document at a later stage i.e. by leaving the issue of admissibility of that evidence open and hanging by marking them as exhibits subject to objection of proof and admissibility. In terms of Order 13 Rule 8 CPC the Court has power to impound the documents notwithstanding anything contained in Rules 5 and 7 of Order 13 CPC and Order 7 Rule 17 CPC till such time as may be considered fit by the Court.

11. . Learned counsel vehemently submitted that in view of ratio laid down by the Hon''ble Apex Court in *Bipin Shantilal Panchal vs. State of Gujarat*, 2001(1) RCR (Criminal) 859, the procedure was set for receiving the documents when an objection is taken during trial. The Hon''ble Apex Court has castigated the practice of holding up trial on objections taken at the time of tendering documents in evidence. Inviting the Court to pass orders on objections has been termed by the Hon''ble Apex Court as "archaic practice". The said analogy was duly adopted in civil matters.

12. . On the basis of aforecited ratio, learned counsel submitted that the offer of secondary evidence permitted though there is no provision in law for de-exhibiting the documents already exhibited in evidence, but the offer of the secondary evidence can be at best impeached in cross-examination. It will be for the Court to examine and decide as to whether it will be appropriate to rely upon such secondary evidence or not for want of compliance of Section 65 of the Act. In case the Court finds the secondary evidence not reliable, the Court is at liberty to eschew the same. However, the attempt of a party for production and to exhibit the documents cannot be thrown out at this threshold. In support of his contention, learned counsel relied upon *Dr. S.P. Arora vs. Satbir Singh*, 2010(5) R.C.R. (Civil) 350 and *Simar Pal Singh vs. Hakam Singh*, 2009(14) R.C.R. (Civil) 273.

13. . On the other hand, learned counsel for respondent No.1 vehemently submitted on the strength of *Smt. J. Yashoda's* case (supra) that the photostat copies of the documents cannot be allowed to be exhibited in the absence of their proof of execution, particularly in view of the fact that there is no provision available for de-exhibiting of a document at a later stage.

14. . I have considered the rival submission made by learned counsel for the parties.

15. . The issue in question has been raked up before the Hon''ble Apex Court as well as before various High Courts on various occasions. The issue has also been answered by the Courts differently by mutually reconcilable ways based on facts of each case. Therefore, it is desirable to figure out issues involved in the present

case. The present case falls under the category of Section 65(c) of the Act. Now the following question arises for consideration:-

1. Whether photostat copies of the documents can be allowed to be exhibited in the absence of any proof of execution at this stage?

2. In what circumstances the photostat copy can be tendered in evidence.

16. In terms of Section 63 of the Act, a photostat copy of the original document is the outcome of mechanical process and, therefore, falls under Section 63(2) of the Act and the secondary evidence relating to such photostat copy would again fall under Section 65(c) of the Act. As per the prayer made in the application for secondary evidence, the original record had been destroyed by the Bank. Photostat copies of the documents were available with the defendants and they sought to lead secondary evidence by seeking to summon officials from the Bank in order to prove existence and loss on account of destruction by the Bank itself. At this stage, the issue is only with regard to production of photostat copies till leading of such evidence by the Bank officials in order to prove existence and loss of the original record. When the photostat copies of the documents are not proved to be above suspicion, the same cannot be admitted. The issue of admissibility of photostat copy of a document, the original whereof was in possession of third party came to be considered by the Hon''ble Apex Court in Smt. J. Yasodha's case (supra). The Court in view of facts and circumstances involved in the case came to the conclusion that the conditions mentioned in Section 65 of the Act were not fulfilled.

17. In H. Siddiqui (dead) by LRs vs. A. Ramalingam, 2011(2) RCR(Civil) 696, the Hon''ble Apex Court held that though the provision permits the parties adduce secondary evidence, yet such a course is subject to a large number of limitations. The secondary evidence relating to the contents of a document is inadmissible until the non-production of the original is account for, so as to bring it within one or the other cases provided for in the Section. In a case where original documents are not produced at any time, or has any factual foundation being led for secondary evidence, it is not permissible for the Court to allow a party to adduce secondary evidence. The secondary evidence must be authenticated by fundamental evidence that the alleged copy is in fact a true copy of the original. Mere exhibition of a document does not dispense with proof of its execution, therefore, it is an obligation on the Court to decide the issue of admissibility of a document in secondary evidence before making endorsement thereon.

18. In U. Sree vs. U. Srinivas, 2013 (1) RCR (Civil) 883, the Hon''ble Apex Court held that mere denial by the party to produce the original documents in whose possession it is stated to be does not lay down fundamental facts for producing secondary evidence. Even in case of falling under Section 65(c) of the Act, the Court has to see admissibility of such copy specifically where it is lost or destroyed by the party in whose favour it created an enforceable right and who

seeks to produce the same. Therefore, it may be noticed that to permit secondary evidence of such document which has been destroyed by person and in whose possession it was and 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 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 whose favour it created an enforceable legal right or an obligation is normally not to be allowed.

19. The facts of the present case are different wherein the documents in possession of the Bank was destroyed by the Bank itself. The officials summoned by the Court categorically deposed in the context of such destruction of the documents by the Bank, therefore, the exception carved out by the aforesaid analogy is not applicable to the present case, still it can be visualized in view of prayer that the photostat copies of the alleged original document could be readily accepted at this stage as a reliable piece of secondary evidence in the absence of clinching proof of the same being true copy of the original or its countefoil, the photocopy was prepared by mechanical process by someone at some particular place or on particular date, at particular time and the original or its counterfoil from which the photostat copy was prepared was produced at the relevant time by any person in custody of such documents.

20. In the light of aforesaid discussions, the photostat copies of the documents 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 fundamental facts are to be proved by leading cogent evidence and such a stage is in offing as the inquiry in terms of Section 65 of the Act is pending. Every photostat copy of a document may or may not come within the definition of secondary evidence contained in Section 63 of the Act. There cannot be any defined answer because the photostat copy may not be accurate. The probative value of the photostat copy has to be proved independently, therefore, the case relating to photostat copy to be considered as a secondary evidence has to be considered on some different parameters than the other sub-Sections of Section 63 and 65 of the Act.

21. In view of different precedents given by the Hon''ble Apex Court and various High Courts from time to time by mutually reconciling the issue on the basis of facts of each case, the following principles were culled out by the co-ordinate Bench of this Court in CR No.4646 of 2013 titled "Surinder Kaur vs. Mehal Singh and others" decided on 04.12.2013:-

"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."

22. Considering the totality of facts and circumstances involved in the present case, it can be seen that the proceedings after acceptance of application under Section 65 of the Act are pending before the trial Court. At this stage, exhibition of photostat copies of documents in the absence of proof of execution may lead to some anomalous situation in the light of ratio of Smt. J. Yashodha's case (supra) but at the same time the ratios of Bipin Shantilal Panchal and Dr. S.P. Arora's cases (supra) are to the effect that it will amount to practice of holding up trial on objections taken at the time of tendering the documents in evidence. Passing of order on the objection would amount to "archaic practice" and, therefore, the Court cannot disregard the attempt of the party for production and exhibition of document and such attempt cannot be thrown out at the threshold of this technicality.

23. In view of aforesaid, particularly in view of nature of evidence available as on date with the defendants i.e. photostat copies of the alleged original documents the existence and loss thereof are still to be inquired by the trial Court and till such time the exhibition of such documents is the moot point between the parties. Since it is a settled principle of law that mere exhibition of document does not dispense with proof of its execution, therefore, photostat copies of the documents are required to be proved in terms of their execution at later stage. At this juncture, it would just and expedient to direct the trial Court to adhere to the provisions in terms of Order 13 Rule 8 CPC till such time the execution of

photostat copies of the alleged documents is proved in accordance with law before the trial Court. The trial Court shall decide the issue of admissibility of photostat copies of the original documents at the earliest.

24. In view of above, the impugned order is modified to the above extent and the revision petition is disposed of accordingly.