
(2018) 03 MP CK 0136
In the Madhya Pradesh High Court
Case No : M.P.NO. 1184 OF 2018

Ku. Saishree Soori & Ors

APPELLANT

Vs

State Of Madhya Pradesh

RESPONDENT

Date of Decision : 23-03-2018

Acts Referred:

Civil Procedure Code, 1908 — Order 11 Rule 12, 13, 14
Indian Evidence Act, 1872 — Section 63, 65
Constitution of India — Article 227

Citation : (2018) 03 MP CK 0136

Hon'ble Judges : VIVEK RUSIA, J

Bench : Single Bench

Advocate : Sandeep Kochatta

Final Decision : Dismissed

Judgement

The petitioner has filed the present petition being aggrieved by the order dated 13.01.2018, passed by the Civil Judge, Class-II, Ratlam by which

application filed under Section 65 of the Evidence Act, 1961 has been rejected.

Facts of the case are as under:

The petitioner/plaintiff has filed the suit seeking relief of declaration and permanent injunction to the effect that the defendants be restrained from

interfering in her possession over the Municipal House No.5/647, Mohalla Ghanchho Ka Vas, Shamshan Road, Ratlam.Â She entered into the

agreement to sale on 21.02.2011 with Late Radheshyam S/o Sagarmal Rathore, .Â She paid an amount of Rs.28,50,000/- and agreed to pay the

balance consideration on or before 20.07.2011 and Radheshyam has also agreed to execute the registered sale deed. According to the plaintiff,

Radheshyam has also executed registered power of attorney in favour of the

plaintiff on 20.07.2011 in respect of same suit property.Â The defendant No.2 has signed as a witness in the said power of attorney, therefore, he is well aware of agreement to saleÂ Â as well as power of attorney.Â

According to the petitioner, she has handed over the original copy of agreement to sale and power of attorney to defendant No.3 in order to secure loan to purchase another house by her husband.Â In the month of October, 2012 the defendant No.2 along with family members started pressuring the petitioner for eviction of the suit property as he has purchased the same. Thereafter, the plaintiff filed civil suit seeking relief of permanent injunction to protect her possession.Â The defendant No.1 to 3 upon service of summons appeared and filed written statement.Â Thereafter, the plaintiff has filed the suit for specific performance of agreement to sale against the defendants as well as Radheshyam.Â In the said suit, she has also claimed relief of cancellation of the sale deed.

The plaintiff filed application under Order 11 Rule 14 of the CPC seeking direction against the defendant No.3 to produce sale agreement dated 21.02.2011.Â Learned Trial Court vide order dated 21.02.2011 has allowed the application.Â The defendants being aggrieved by the aforesaid order filed W.P.No.1699/2014 before this Court. Vide order dated 02.05.2014 this Court has set aside the order of the Trial Court and remanded the case to decide afresh application filed under Order 11 Rule 14.Â After the remand the plaintiff filed another application under Order 11 Rule 12 of the CPC for discovery of the documents i.e. agreement to sale , which he ought not have filed the same.

The defendants filed the reply denying the averments and prayed for rejection of the application.Â Learned Trial Court vide order dated 14.05.2015 has directed the defendant to file affidavit in appendix ""C"", Form-5 under Order 11 Rule 13 of the CPC. The petitioner has not disclosed the final outcome of the aforesaid applications.

Thereafter, the plaintiff has filed another application under Section 65 of the Evidence Act contending that the defendant has filed an affidavit denying that the original copy of the agreement to sale is not in his possession, therefore, he may be permitted to prove the agreement to sale as a secondary evidence.Â The aforesaid application was replied and objected by the defendants.Â Learned Trial Court vide impugned order dated 13.01.2018 has

rejected the application, hence, present petition before this Court.

I have heard Shri Sandeep Kochatta, learned counsel for the petitioner.

Shri Sandeep Kochatta, learned counsel for the petitioner submits that learned Trial Court has wrongly rejected the application filed under Section 65

of the Evidence Act. The defendants are in possession of the original agreement to sell but they have wrongly filed affidavit, therefore, in such

situation the learned Trial Court ought to have allowed the appellant to produce and prove the agreement to sale as secondary evidence, as the

photocopy is admissible as secondary evidence, hence, the impugned order is liable to be set aside.

In recent judgement of the Apex Court, passed in case of Rakesh Mohindra Vs. Anita Beri, reported in (2016) 16 SCC 483 , it has been held that in

order to invoke the provisions of Section 63 and 65 of the Evidence Act. The parties must plead and establish that the copy made by copying

machine was made and compared from the original. The relevant part of the aforesaid judgement is reproduced below:

13. As a general rule, documents are proved by leading primary evidence. Section 64 of the Evidence Act provides that documents must be proved

by the primary evidence except in cases mention in Section 65 of the Evidence Act. In the absence of primary evidence, documents can be proved by

secondary evidence as contemplated under Section 63 of the Act which reads as under: -

“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 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; and

(5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustration:

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing

photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original.

14. Section 65 of the Act deals with the circumstances under which secondary evidence relating to documents may be given to prove the existence, condition or contents of the documents. For better appreciation Section 65 of the Act is quoted herein below:-

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 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, 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.â??

15. The pre-conditions for leading secondary evidence are that such original documents could not be produced by the party relied upon such

documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must

establish for the non-production of primary evidence. Unless, it is established that the original documents is lost or destroyed or is being deliberately

withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot be accepted. "â??

In the entire plaint, the plaintiff has not pleaded that while handing over the original copy of agreement to sale to the defendant No.3, she has kept

photocopy of it with her.â?? In application under Section 65 of the Evidence Act also she has not disclosed who has prepared the photocopy and

whether she has compared the same with the original copy.â?? In absence of these pleadings, learned Trial Court has rightly rejected the application.

This Court in the case of Rashid Khan s/o Yasin Khan Musalman and another reported in 2011(3) MPLJ 575 has specifically considered in detail

whether the photocopy can be accepted as secondary evidence. In another case of Smt.Aneeta Rajpoot vs. Smt.Saraswati Gupta passed in

W.P.No.11990/2012 decided on 16.08.2012 this High Court has considered the scope of section 65 of the Indian Evidence Act in detail and held that

the photocopy is not admissible as secondary evidence. Para- 11,12,13 7 14 of the said judgment is reproduced below:

11. Learned counsel for petitioner/defendant rightly submitted that secondary evidence would include categories mentioned in Clauses (1) to (5) to

Section 63. Learned counsel further rightly submitted that if conditions embodied in Section 65(a) and (b) of the Evidence Act exist, secondary

evidence relating to document can be given. In support of (6) W.P. No.11990/2012 his forceful submissions, learned counsel has placed reliance on

two decisions of Supreme Court Nawab Singh (supra) and Smt. J. Yashoda (supra) and also of learned Single Bench of Rajasthan High Court Smt.

Ratan Sharma (supra). But, to me, even then in the facts and circumstances of the present case the photocopy of the document of receipt cannot be

admitted in secondary evidence. On bare perusal of the application under Section 65 of the Evidence Act which has been rejected by the impugned

order it is found that although it has been mentioned that under the false pretext the plaintiff and her husband obtained the original receipt from

petitioner/defendant, but, nowhere it has been so stated in the application that the photocopy was made from the original and it was compared with

original. The name of the person, who had obtained the photocopy by mechanical process has also not been mentioned in the application and further

who compared the same with original his name is also not mentioned nor any affidavit in that regard has been filed.

12. So far as the applicability of Clause (2) of Section 63 Evidence Act placed reliance by the learned counsel for petitioner is concerned, according to

me, it can be said that by some mechanical process a photocopy of original receipt was obtained, but, there cannot be any surety of its correctness and

accuracy in absence of supporting material on record. Again in this regard there is no averment in the application that the photocopy which has been

obtained by mechanical (7) W.P. No.11990/2012 process was never tempered and it ensures its accuracy. Even if accurate photocopy is obtained by

a mechanical process, it is a matter of common parlance that after inserting some words on a document which is already a photocopy and by

interpolating the same, another photocopy of the said interpolated photocopy may be obtained and thus the accuracy of photocopy is always

surrounded by dark clouds of doubt. In the present case since there is no averment in the application under Section 65 that photocopy was compared

with the original and it is an accurate photocopy of the original and further by not filing any affidavit of person who obtained the said photocopy is on

record, it is difficult to hold the hallmark and authenticity and accuracy of the photocopy.

13. The decision of Nawab Singh (supra) placed reliance by the learned counsel for petitioner is not subject to context since it does not relate to admissibility of a photocopy of the document to be admitted in secondary evidence. Similarly another decision of Smt. J. Yashoda (supra) is also not applicable because the photocopy was not compared with the original and therefore photocopy was not admitted as secondary evidence in that case (see para 7 of the said decision). According to me, not only the satisfaction of Clause (a) to Section 65 is required, but simultaneously it is also required that the photocopy was compared with the original in terms of section 63(3) of the Evidence Act.

14. The Supreme Court in United India Assurance Co. Ltd. V. (8) W.P. No.11990/2012 Anbari and other 2000(10) SCC 523 while dealing with the photocopy of licence of a driver expressed the view as under :-

3. Learned counsel for the appellant submitted that the point regarding validity of the driver's licence was raised by the appellant before the Motor

Accidents Claims Tribunal and the Tribunal in accepting photocopy of a document purporting to be the driver's licence and recording a finding that the

driver had a valid licence, has committed a grave error of law. He also submitted that the High Court has not dealt with the said contentions of the

appellant and without giving any reason has dismissed the appeal. The Tribunal and also the High Court have failed to appreciate that production of a

photocopy was not sufficient to prove that the driver had a valid licence when the fact was challenged by the appellant and genuineness of the

photocopy was not admitted by it. Thus, the Apex Court has held that photocopy was not sufficient to prove that driver had a valid licence. By

following the aforesaid decision of Supreme Court, Shri Justice Dipak Misra, J (as His Lordship then was) in Haji Mohd. Islam and another v. Asgar

Ali and Another AIR 2007 MP 157 has held that when a photocopy without any reasonable source has been filed, it is not permissible as secondary

evidence. Yet there is another decision of this Court in W.P. No.8224/2010 (Sunil Kumar Sahu v. Smt. Awadharani) decided on 31.08.2010 wherein it

has been held that photocopy of a document is not admissible as secondary evidence under Section 65 of the Evidence Act.

In the case of Kalyan Singh vs. Smt. Chhoti and others reported in AIR 1990 SC 396 the Apex Court has held that ordinary copy of the sale deed

cannot be considered as secondary evidence. Para-25 of the said judgment is reproduced below:

25. The High Court said, and in our opinion very rightly that Ex.3 could not be regarded as secondary evidence. Section 63 of the Evidence Act

mentions five kinds of secondary evidence. Clauses (1),(2) and (3) refer to copies of documents, clause (4) refers to counter parts of documents and

clause (5) refers to oral accounts of the contents of documents. Correctness of certified copies referred to in clause (1) is presumed under Section 79,

but that of other copies must be proved by proper evidence. A certified copy of a registered sale deed may be produced as secondary evidence in the

absence of the original. But in the present case Ex.3 is not a certified copy. It is just an ordinary copy. There is also no evidence regarding contents of

the original sale deed. Ex.3 cannot, therefore, be considered as secondary evidence. The appellate Court has a right and duty to exclude such

evidence.

In the case of Smt.J.Yashoda v. Smt.K.Shobha Rani reported in AIR 2007 SC 1721 the Apex Court has held in para-7,8 & 9 as under:

7. Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through

failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents.

8. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first,

when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the Section declares that secondary evidence ""means

and includes"" and then follow the five kinds of secondary evidence.

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 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 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.

In the case of Ratanlal vs. Kishanlal reported in 2012 (III) MPJR 24 this Court has held as under:

12. According to me the photocopy is neither a primary nor secondary evidence and in this regard decision of this Court Ramesh Verma and others

etc. v. Smt.Lajesh Saxena and others etc. AIR 1998 M.P 46 may be seen. Apart from this even if it is stretched to the extent to bring the photocopy

of will Ex.P/1 within the sphere of secondary evidence, the plaintiff was required to satisfy the ingredients to Section 65 of the Evidence Act which

speaks about the secondary evidence. The plaintiff was further required to examine the person who took out the photocopy of the original. This is very

much essential because it is a matter of common knowledge that by putting another writing written on a separate paper if that paper is kept upon the

original document and photocopy is taken out, the said photo copy cannot be said to be a true photocopy of the original document.

The photocopy is neither a primary evidence nor secondary because the party is required to prove when and where the photocopy was taken and it is

the same and exact copy of the original, therefore, in view of the above law trial Court has not committed any error while rejecting the application

under section 65 of the Indian Evidence Act.

In the present case in absence of such pleadings, the Trial Court has rightly dismissed the application filed under Section 65 of the Evidence Act, 1961.

Hence, no interference is called for.

Even otherwise, the scope of interference in exercise of jurisdiction under Article 227 of Constitution of India is limited. The Supreme court in the

matter of Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil, reported in (2010) 8 SCC 329 has held that High court in exercise of its

power of superintendence cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or

courts subordinate to it, is a possible view. The High court can exercise this power when there has been a patent perversity in the orders of tribunals

and courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

Petition is accordingly dismissed.