
(1990) 03 PAT CK 0043
In the Patna High Court
Case No : Civil Revision No. 2202 of 1989

Madhusudan Mani Tiwary

APPELLANT

Vs

Ishwar Prasad Jhunjhunwala

RESPONDENT

Date of Decision : 16-03-1990

Acts Referred:

Evidence Act, 1872 — Section 65, 66, 74

Citation : (1991) 39 BLJR 1086

Hon'ble Judges : Binod Kumar Roy, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Binod Kumar Roy, J.—This civil revision application has been placed before me for its disposal at its admission stage itself after issuing notice to the sole opposite party by an order dated 19-12-1989. Accordingly the parties have addressed me for its final disposal.

2. The tenant, for whose eviction the suit in question was filed by the opposite party, is the petitioner. By the impugned order passed in his appeal, filed against a decree of eviction, his prayer to take a document in secondary evidence has been rejected. The suit was for eviction as well as arrears of rent in which the main defence of the petitioner was as is evident from the revision petition, the since October, 1983 he had already vacated the premises.

3. It appears that during the trial of the suit the petitioner produced photostat copy of a document said to be complaint dated 18-9-1983 written by the plaintiff-opposite party to the Bank where the petitioner was working. The said document was sought to be proved by the petitioner through D.W. 10, Malik Mani Tiwary. It further appears that the said document was produced by the petitioner only for purposes of marking the same as an exhibit for identification and, in fact, it was marked "X" for identification.

4. It was in the appeal, the petitioner came up with a petition (a copy of which is

Annexure-I to this civil revision application) to mark the said document as an exhibit as secondary evidence stating therein that the petitioner had made a request to the trial Court to mark the photostat copy of the said document as an exhibit but it was not done so--Nothing was explained about its relevancy on the issues involved in the suit/appeal.

5. Mr. Sri Prakash Srivastava, learned Counsel appearing for the petitioner, submits that the court of appeal below has passed the impugned order by committing jurisdictional errors.

6. Mr. Mazumdar, learned Counsel appearing for the opposite party, on the other hand, referring to the counter-affidavit to the revision petition, submits that the reasons assigned in the impugned order are all valid and are not vitiated on account of any error of law or fact much less any jurisdictional error. He further points out that in the appeal arguments were already made and it was posted for judgment when the petition (Annexure-1) was filed.

7. Section 65 of the Indian Evidence Act runs as follows:

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, 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 moveable;

(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 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) (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.

8. Order XLI, Rule 27 of the CPC runs as follows:

Rule 27. Production of additional evidence in Appellate Court.--(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if--

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could, not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced or witness to be examined;

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the court shall record the reason for its admission.

9. Learned Counsel appearing for the petitioner is not in a position to show me as to by which order his prayer was rejected by the trial court. There is no reference of any particular order of the trial court either in the revision petition or even in the impugned order except surmise of the appellate court that there is such an order. Perusal of Annexure-2 to this civil revision application, which is a copy of the rejoinder filed on behalf of the opposite party in the court of appeal shows that it has been stated therein to the effect that the petitioner herein took no step to get it exhibited before the trial court and had allowed the suit to proceed and to be decided and even during argument in the appeal also he never made any prayer for taking any further evidence. It is thus also clear that earlier no attempt was made to get the said document taken into evidence as secondary evidence by the petitioner. It appears from the impugned order that the learned Additional District Judge after taking into consideration all facts and circumstances has been pleased to reject the prayer of the petitioner.

10. The revision petition is absolutely silent about the contents of the alleged

complaint dated 18-9-1983 At the request of Mr. Srivastava and in order to satisfy my conscience, I looked into another photo copy of the said complaint. Mr. Shrivastava could not satisfy me as to how this document shall have any fruitful or substantial effect on the fate of the appeal.

11. As observed by the Supreme Court in Shivajirao Nilangekar Patil Vs. Dr Mahesh Madhav Gosavi and Others, , the additional evidence in question should be relevant for determination of the issues involved in the appeal. Thus the appellate Court had not misconceived the provisions of Order XLI, Rule 27 of the Code of Civil Procedure.

12. There is yet another difficulty in the case of the petitioner. The document in question could not have been taken in evidence, as from the certified copy of deposition of D. W. 10, shown to me, it is clear that D.W. 10 never stated in his evidence that its photostat was taken in his presence or by him and that it was true copy of the original or who was possessing its original which are must, as is evident from the language of Section 65 of the Evidence Act.

13. In this regard the decision of the Supreme Court in Ashok Dulichand Vs. Madahavlal Dube and Another, , is also relevant wherein it was held as follows:

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.

14. For the reasons aforementioned I am of the view that this revision petition lacks substance.

15. This petition is, accordingly, dismissed, but in the peculiar facts and circumstances, there shall be no order as to cost.