

(1999) 03 RAJ CK 0053

In the Rajasthan High Court

Case No : Civil Revision Petition No. 1046 of 1996

Maharaj Kumar Chand

APPELLANT

Vs

Jodhpur Film Vitrak Sahakari Samiti Ltd.

RESPONDENT

Date of Decision : 15-03-1999

Acts Referred:

Evidence Act, 1872 — Section 65

Citation : (1999) 3 CivCC 497 : (1999) 3 WLC 66 : (1999) 1 WLN 466

Hon'ble Judges : V.S. Kokje, J

Bench : Single Bench

Final Decision : Allowed

Judgement

V.S. Kokje, J.—This revision petition is directed against rejection of an application filed by the revision petitioner-defendant for taking photo-copies of a document which is said to have been lost from the custody of the defendant-revision-petitioner. The defendant in his defence submitted photo copies of an agreement and receipt dated 20.1.1986 in the Court. At the time of evidence the defendant moved an application for permission to lead secondary evidence in support of these documents as according to him the originals were lost while in his custody and he is not able to trace them. The plaintiff objected by contending that the documents did not bear signatures of any one and therefore cannot be treated to be a secondary evidence of any other document. It has also been contended that the receipt dated 20.1.1986 Was not executed by the plaintiff. It was further contended that while being examined under Order 10 of the CPC the defendant had admitted that he did not know Uttam Chand and did not have any transaction with him and now he wants to put in secondary evidence about some agreement between him and Uttam Chand. The Trial Court observed that defendant Maharaj Kumar Chand in his statement under Order 10 CPC had clearly admitted that he had not entered into any agreement with Jodhpur Film Distributors and the plaintiff had not taken any money. The Court also observed that the copy of the agreement which is sought to be put in secondary evidence

does not bear the signature of the parties and it was not clearly established that the original documents were lost and are not being traceable. The trial court therefore rejected the prayer.

2. It is being contended by the learned Counsel for the revision petitioner before me that loss of document can be proved by the statement of the defendant alone because he was in custody of the documents. When he has stated on affidavit that he had lost the documents, there could be no other evidence to contradict him and therefore, the question was of the credibility of his statement. If the trial court was not satisfied by statement on oath in an affidavit it could have permitted cross-examination on the affidavit of the defendant, but could not have rejected the averments in the affidavit outright. It was also contended that when photo-copies of the documents were already on record and there is no material on record to show that the defendant was playing a deliberate mischief, the secondary evidence should have been allowed to be led. The learned Counsel for the non-petitioner in reply submitted that if the statements of the parties are taken on their face value, no application u/s 65 of the Evidence Act for permission to lead secondary evidence on the ground of loss of documents could be rejected and the parties would be at the mercy of the other side and will have to contend with secondary evidence of nonexisting documents.

3. I have carefully considered the question involved in this case. The difficulty of a person who has genuinely lost a document is understandable. When he states on oath that the originals in his custody have been lost, in most of the cases he may not have any other evidence to prove the loss except his own knowledge, corroboration being almost impossible in such cases. Even if it is possible to give some evidence of the existence of the document and of the fact that document was in the custody of a party, hardly any evidence except, the evidence of the party himself may be available of the loss of the document. In any case a party cannot be shut out from contending that he was in the custody of the originals at a particular time and subsequently lost them. This he is expected to do by an affidavit only because there is no other practical method, by which it can be inquired into as to whether conditions for allowing secondary evidence...or not. If oral evidence is taken on the question of the custody and the loss of the documents or on the general question as to whether prerequisites of Section 65 of the Evidence Act have been fulfilled or not, it would result in a trial within trial. Section 65 of the Evidence Act does not envisage an application for permission of the Court to lead secondary evidence. It provides that the secondary evidence may be given on the existence, conditions or contents of the documents. It cannot therefore, be said that a person who desires to lead secondary evidence has to apply to the court for permission to do so and that permission is to be granted after deciding by taking evidence as to the existence of the circumstances in which a party may lead secondary evidence. It appears in the scheme of things that a party may offer secondary evidence to be given of the existence, condition or contents of a document by filing an affidavit stating the grounds on which he seeks exemption from production of primary evidence and

wants to lead secondary evidence. The question as to whether a party has made out a case for leading secondary evidence or not should normally be decided on the basis of affidavits filed by the parties.

4. In the present case when the defendant had filed certain photocopies stating them to be the photocopies of the originals in his possession and subsequently stated that the originals have been lost, the secondary evidence may be allowed to be led because there cannot be any counter affidavit as to what happened to the documents in the custody of the defendant. The trial court therefore, clearly erred in shutting out the defendant on the ground that he had not made out a case for leading secondary evidence and his prayer did not appear to be bonafide. Actually the trial court has rejected the prayer on the ground of lack of bonafides and the prayer having been made as an after thought, deliberately making the application belatedly. Such an inference is not sustainable from the record.

5. The revision petition is therefore, allowed. The impugned order is set aside and the application of the revision petitioner for permission to lead secondary evidence is allowed.

6. Before parting with this case it is necessary to emphasis that the issue of right to lead secondary evidence should not be confused with proving the documents itself. Even when the secondary evidence is permitted to be led, it is open to the other side to cross-examine the person tendering secondary evidence. Thus it is always permissible for the opposite party to show that the circumstances in which secondary evidence can be led u/s 65 of the Evidence Act do not exist, that the document of which secondary evidence was sought to be given never existed or was never in the custody of the party putting it in evidence or that it was not lost or destroyed. After receiving secondary evidence also the court may come to the conclusion that the document of which secondary evidence was given was not proved, the photocopies which are being pressed into service as substitute for the original documents cannot therefore, be proof of the existence of the original as well as the proof of their loss or the proof of the photocopies being the photocopies of the originals. It is up to the court to evaluate and (assess evidence on record and to come to a conclusion whether the document is proved or not proved.