
(2011) 04 P&H CK 0033

In the Punjab And Haryana At Chandigarh

Case No : Civil Revision No. 6058 of 2010 (O and M)

M/s. Racco Enterprises, Ludhiana

APPELLANT

Vs

Vivek Kapila and Others

RESPONDENT

Date of Decision : 28-04-2011

Acts Referred:

Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 63, 65, 66, 74

Citation : (2011) 4 CivCC 503 : (2012) 4 RCR(Civil) 229

Hon'ble Judges : Ram Chand Gupta, J

Bench : Single Bench

Advocate : Sunil Chadha, for the Appellant; S.S. Slar, Advocate, Mr. R.S. Bains, Advocate for the Respondent No. 3 to 5, for the Respondent

Final Decision : Dismissed

Judgement

Ram Chand Gupta, J.—The present revision petition has been filed under Article 227 of the Constitution of India for setting aside the impugned order dated 10.05.2010, Annexure P3, passed by learned Additional Civil Judge, Senior Division, Malerkotla, vide which application, dated 24.05.2007, Annexure P1, filed by respondent No. 1-plaintiff, seeking permission to lead secondary evidence regarding agreement to sell dated 14.09.2004 and receipt dated 07.11.2004 was allowed and respondent No. 1 has been permitted to lead secondary evidence qua the said two documents. I have heard learned counsel for the parties and have gone through the whole record carefully including the impugned order passed by learned trial Court.

2. Facts relevant for the decision of present revision petition are that admittedly an agreement to sell dated 14.09.2004 was executed by present petitioner-defendant in favour of respondent No. 1-plaintiff vide which petitioner agreed to sell the land in dispute to respondent No. 1-plaintiff on total consideration of Rs. 40,55,000/-. Rs. 5 lacs were received as earnest money on 14.09.2004 and another sum of Rs. 5 lacs were received by petitioner as earnest money on

07.11.2004. Petitioner on the request of respondent No. 1-plaintiff executed sale deed No. 1864 dated 30.12.2004 regarding one half of the property in dispute in favour of his father on receipt of Rs. 10,20,000/-. However, so far as the remaining half of the total property is concerned, sale deed was not executed as per the agreement. Hence, plea has been taken by respondent No. 1-plaintiff that though he was always ready and willing to perform Ms part of the contract, however, petitioner-defendant No. 1 failed to perform his part of the contract and hence, this suit.

3. Petitioner-defendant No. 1 took the plea that agreement to sell dated 14.09.2004 was mutually cancelled, after registration of the sale deed of half share of the property in favour of father of respondent No. 1-plaintiff.

4. In the present suit itself, it was pleaded by respondent No. 1-plaintiff that original agreement and the receipt have been lost by him on 09.01.2005 alongwith some other documents, which was in his hand bag and regarding the same he also lodged a Rapat No. 8 dated 11.01.2005 in Police Station Dehlon and that the suit was filed by him on the basis of photostat copy of the said agreement to sell, duly attested by Notary. He filed the present application for permission to lead secondary evidence of the original agreement and the receipt in the form of their photostat copies, duly attested by Notary Public, on the plea that the original documents are not in his possession, as the same have been lost. The application was allowed by learned trial Court by observing as under:

8. The Indian Evidence Act permits the leading of secondary evidence under the circumstances enumerated u/s 65. Under Clause (i) of Section 65 of Indian Evidence Act, secondary evidence relating to a document may be given:

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, produced in reasonable time.

9. The applicant/plaintiff alleged that the original agreement to sell dated 14.09.2005 and Receipt dated 07.11.2004 have been lost The applicant has also pleaded this fact specifically in his plaint. The Xerox of the Rapat No. 8 dated 11.01.2005 lodged at Police Station, Dehlon coupled with an affidavit dated 11.01.2005, agreement to sell dated 14.09.2004 and Xerox copies of affidavits dated 13.01.2005 and 17.01.2005 already placed on file by the applicant/plaintiff.

10. To prove a document by way of primary or secondary evidence is a rule of evidence. Whether party seeking leave of the Court to lead secondary evidence ultimately succeeds in proving the document or not is a question of fact and depends upon evidence. To grant leave to lead secondary evidence does not mean the document is admitted in evidence not it is a finding of the existence of any of the conditions indicated in Section 65 of the Indian Evidence Act. Failure or success to prove the existence of the document and its loss cannot be predetermined, that too, without providing opportunity. Proving the agreement to sell dated 14.09.2004 and receipt dated 07.11.2004 to my mind is essential for

reaching at just decision of the case.

11. Resultantly, application under reference is allowed. Applicant/defendants are permitted to lead secondary evidence qua the agreement to sell dated 14.09.2004 and receipt dated 07.11.2004 subject to all just exceptions and proof of existence and loss of the documents.

5. It has been vehemently contended by learned counsel for the petitioner that the original agreement was cancelled as per endorsement on the back of the agreement, after execution of the sale-deed of the half of the property in favour of father of respondent No. 1-plaintiff, as per his request and, hence, the original has been intentionally withheld by respondent No. 1-plaintiff and now he wants to lead secondary evidence in the form of photocopy of the agreement by withholding the same and, hence, it is contended that photostat copy cannot be permitted to be adduced in evidence as secondary evidence as photostat copy of a document is neither primary nor a secondary evidence. On this point, he has also placed reliance upon a number of judgments rendered in *Mangat Ram Vs. Prabhu Dayal and Others*, *Darshan Kaur Vs. The Amritsar Primary Co-operative Agricultural Development Bank Limited* and *Another*, *K. Ashraff Vs. S. Gangaraman*, *Rajasthan Golden Transport Company Vs. LRs. of Amritlal*, and *Smt. J. Yashoda Vs. Smt. K. Shobha Rani*,

6. On the other hand, it has been contended by learned counsel for respondent No. 1-plaintiff that execution of agreement to sell between the parties is not disputed by petitioner and that rather the sale deed pursuant to that agreement regarding one half share of the property was also executed in favour of father of respondent No. 1-plaintiff. It is further contended that however, later on petitioner-defendant No. 1 failed to perform his part of the contract regarding execution of the sale deed of the remaining half. It is further contended that though the documents, i.e., the original documents were in his possession and, however, he has taken specific plea that the same were lost and he also lodged *Rapat* No. 8 dated 11.01.2005 with the concerned police station regarding the same. Hence, it is contended that respondent-plaintiff has been able to *prima facie* show that original documents, which were of his possession have since been lost and hence, it is contended that he is having right to adduce secondary evidence as he is in possession of the photostat copies of the said documents, which were duly compared with the original and attested by Notary public. He has also placed reliance upon *Mukhtiar Singh Vs. Bant Singh* and *Another*,

7. It is pertinent to reproduce Sections 63 and 65 of the Indian Evidence Act, 1872, (for short "the Act"), which read as under:

Section 63. Secondary Evidence.-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 insure 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.

Section 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 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 consists 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, 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. A plain reading of the aforementioned provisions show that under Sub-clause (c) of Section 65 of the Act, a party is entitled to give secondary evidence of existence, condition or contents of a document when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for

any reason not arising from his own default or neglect, produce it in reasonable time.

9. In the present case, prima facie, respondent No. 1-plaintiff has been able to show that original documents have been lost. He has also lodged a rapat with the concerned police station regarding loss of the said documents. The existence of the original documents are not disputed. Hence, when prima facie, existence of the original documents is not disputed and when its lost by respondent No. 1-plaintiff has also been proved, respondent No. 1-plaintiff is having right to lead secondary evidence to prove the contents of the said documents.

10. Further as per Section 63 of the Act, copy made from the original and compared with the original is one of the form of secondary evidence.

11. In this case respondent No. 1-plaintiff intends to prove the agreement in dispute by producing and proving photocopy of the same, duly compared and attested by Notary public. Hence, it cannot be said that the same cannot be taken into evidence as the secondary evidence.

12. Hence, the aforementioned authorities on which reliance has been placed on behalf of the counsel for the petitioner are not applicable to the facts of present case. Each case has to be decided on the basis of its own peculiar facts.

13. In the present case, as already discussed above, the existence of agreement in dispute is not disputed. Prima facie, it has been shown by respondent No. 1-plaintiff that the same has been lost. He has placed on record photostat copy of the same, duly authenticated by the Notary Public, on the basis of which present suit has been filed.

14. Hence, in view of the aforementioned facts, it cannot be said that any illegality or material irregularity has been committed by learned trial Court in passing the impugned order or that grave injustice or gross failure of justice has occasioned thereby, warranting interference by this Court.

15. Moreover, law has been well settled by Hon''ble Apex Court in Surya Dev Rai Vs. Ram Chander Rai and Others, that mere error of fact or law cannot be corrected in the exercise of supervisory jurisdiction by this Court. This Court can interfere only when the error is manifest and apparent on the face of proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law and a grave injustice or gross failure of justice has occasioned thereby. There is no merit in the present revision petition. The same is hereby dismissed.