

(2000) 01 MP CK 0002
In the Madhya Pradesh High Court
Case No : Civil Revision No. 2254 of 1999

Ram Singh Sahu

APPELLANT

Vs

Ram Dayal Gangaram Maheshwari and Others

RESPONDENT

Date of Decision : 06-01-2000

Acts Referred:

Evidence Act, 1872 — Section 63, 65, 66, 74

Citation : (2000) 3 MPLJ 142

Hon'ble Judges : Ramesh Surajmal Garg, J

Bench : Single Bench

Advocate : Vijay Shukla, for the Appellant; Sanjay Agarwal and Mr. Hemant Namdeo, for the Respondent

Final Decision : Dismissed

Judgement

R.S. Garg, J.—The applicant/plaintiff being aggrieved by the Order dated 7.9.1999, passed in Civil Suit No. 140-A/1997 by the learned IInd Civil Judge, Class-11, Bilaspur, rejecting the plaintiffs application seeking permission to lead secondary evidence, has filed this revision petition.

2. The brief facts are that the applicant/plaintiff filed a suit before the Trial Court seeking declaration and injunction that the plaintiff in fact is the real allottee and the rights of defendant No. 1 in relation to the allotment have come to an end, and a mandatory injunction be issued against the respondent No.4 to complete the proceedings and not to dispossess the present plaintiff from the suit premises. The plaintiffs case was that house in dispute was allotted in favour of non-applicant No. 1 but as he was in jail, the applicant paid a sum of Rs.20,000/- to his wife that is non-applicant No.2. After the non-applicant No. 1 was released, he executed a receipt present applicant. The plaint further says that non-applicants Nos. 1 and 2 had been assuring the plaintiff that needful would be done in his favour, but the plaintiff received a notice out of the blue that he was a tenant and was required to vacate the premises. Apprehending a foul play, he filed a suit, for the said reliefs. The defendants inter alia contended that the

defendant No. 1 did not execute any receipt nor did he take back the receipt from the plaintiff. They denied plaintiff's material allegations as contained in paragraphs 2 and 3 of the plaint that the defendant No. 1 had taken the receipt from the plaintiff for doing the needful in favour of the applicant.

3. The plaintiff during the course of the trial made an application u/s 65 of the Indian Evidence Act submitting to the Court that the original of the receipt was in possession of defendant Nos. 1 and 2, and as he was possessed of a photocopy of the original which was supplied to him by the defendant No. 1 he be permitted to lead secondary evidence, prove the execution and contents of the document. Said application was opposed by the defendants. The learned Trial Court after hearing the parties rejected the said application. Being aggrieved by the said order, the applicant/plaintiff has filed this revision petition.

4. Submission of learned Counsel for the applicant is that the Court below did not apply its mind to the facts of the case and the order passed by the Court below shows absolute non-application of mind. According to him when the original of the document is in possession of the contesting defendants, permission to lead a secondary evidence ought to have been given in his favour.

5. Shri Agarwal and Shri Namdeo, learned Counsel for the contesting respondents, controverting the submissions made by the applicant, submit that Section 65 of Indian Evidence Act cannot be read in isolation, but is required to be read in juxta position with Section 66. According to them unless a notice to produce the document is given to the defendants, the plaintiff would not be entitled to obtain permission from the Court. They submit that the Court below was justified in rejecting the application.

6. For proper appreciation of the controversy, it would be necessary to see Sections 63, 65 and 66 of Indian Evidence Act. The said sections read as under-

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.

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 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 original consist of numerous accounts or other documents which cannot conveniently be examined in the 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.

66. Rules as to notice to produce:- Secondary evidence of the contents of the documents referred to in Section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, (or to his attorney or pleader) such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:-

(1) when the document to be proved is itself a notice.

(2) when from the nature of the case, the adverse party must know that he will be required to produce it;

(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force.

(4) when the adverse party or his agent has the original in Court;

(5) when the adverse party or his agent has admitted the loss of the document;

(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

7. Secondary evidence, according to Section 63, would mean and includes copies made from the original by mechanical process which in themselves insure the accuracy of the copy, and copies compared with such copies. There could be no dispute that a photograph of the original or a photocopy, commonly known as xerox copy of the original, would come within the purview of secondary evidence, but such secondary evidence cannot be produced in, evidence unless the permission is sought from the Court. Section 65 clause (a) is relevant for the purposes of the present revision petition. According to clause (a), secondary evidence may be given of the existence condition or contents of a document in a case 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. Undisputedly Section 65 clause (a) would cover a situation like this because the plaintiff is seeking to - use a document against the interest of the defendants Nos. 1 and 2. According to plaintiff the document was executed signed by the defendant No. 1 and after some time the defendant No. 1 had taken back the original from the possession of the plaintiff. Obviously the plaintiff can apply to the Court seeking permission to lead secondary evidence to prove the existence, condition or contents of the document which according to him is in possession and/or power of the person (defendants) against whom the said document is sought to be proved.

8. At this stage, it would be necessary to refer to the argument of Shri V.K. Shukla, as according to him, the order passed by the Court below suffers with non-application of mind. The grievance of the learned Counsel for the applicant is that present is not a case of loss of the original and as the Court has observed that the plaintiff has not pleaded the loss of the original, he would not be entitled to the permission to lead secondary evidence. In the opinion of this Court, if the order passed by the Court below is read in its true perspective, it would show that the Court was alive to the legal provisions as contained in Section 65 clause (a) and clause (c). Clause (c) says that permission to lead secondary evidence can be given when the original has been destroyed or lost. The learned Court below was simply referring to a situation and was not referring to the merits of the matter. The Court below was simply observing that the plaintiff has not come with the case relating to loss of the original, therefore, he would not be entitled to permission unless a notice to produce document has been given to the defendant No. 1 and/or No.2. Section 66 clearly provides that secondary evidence of the contents of the documents referred to in Section 65 clause (a) shall not be given unless the party proposing to give such secondary evidence

has previously given to the party in whose possession or power the document is, such notice to produce it as is prescribed by law. Section 66 further says that if no notice is prescribed by law, then such notice should be given to the other side as the Court considers reasonable. True it is that Section 66 is governed by the proviso, the proviso says that a notice shall not be required in particular circumstances. Clause (3) of Section-66 says that it would not be necessary to issue a notice for production of the document when it appears or is proved that the adverse party has obtained possession of the original by fraud or force.

9. Clause (3) of Section 66 clearly provides that either it may appear to the Court or is proved before the Court that the adverse party has obtained possession of the original either by fraud or by force. The word "appears" would certainly be governed by the law of pleadings. If from the pleadings of the parties, it appears to the Court that the document was obtained by the adverse party by fraud or force, the Court may grant such permission without service of a notice to the other side. Learned Counsel for the applicant has strongly relied upon paragraphs 2 and 3 of the plaint to contend that from these pleadings it would clearly appear that defendant No. 1 and/or 2 had played fraud with the plaintiff and obtained the possession of the receipt. After going through the contents of paragraphs 2 and 3 of the plaint, I am unable to hold that there is even a whisper about the fraud or force. Paras 2 and 3 simply say that the receipt was initially given to the plaintiff, thereafter the defendant took back the receipt; supplied a photo copy of the same to the plaintiff and later on informed him that the proceedings in the office of the defendant No.4 were going on. I am unable to understand how one can read a plea of force or fraud in paras 2 and 3 of the plaint.

10. Clause (3) of Section 66, as observed above, provides that it may be proved to the satisfaction of the Court that the adverse party had obtained possession of the original by fraud or force. Undisputedly the plaintiff did not lead any evidence to prove to the satisfaction of the Court that the adverse party had obtained possession of the original by fraud or force. Probably this also could not be done by him in absence of the material pleadings in the plaint. If pre-conditions for application of the proviso are not available, the plaintiff cannot be exempted from giving a notice to the defendant to produce the document.

11. Order XI, Rule 15, CPC clearly provides about the notice which is prescribed under the law and is required to be served upon the other side for production of the document. Section 66, as already observed, clearly states that secondary evidence of the contents of the documents referred to in Section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has already given to the party in whose possession or power the document is or to his attorney or pleader such notice to produce the document as is prescribed by the law.

12. Section 65 provides that under what circumstances the secondary evidence may be given in relation to the documents to prove the existence, condition or

contents of the document, but Section 66 is in fact a proviso to Section 65 clause (a). Unless the conditions specified in Section 65 are satisfied or the exemption is granted to the party seeking to lead secondary evidence under the proviso of Section 66, permission to lead secondary evidence under clause (a) of Section 65 of Indian Evidence Act cannot be given.

13. The learned Trial Court, while on one side, was appreciating the legal position about the loss of the original and on the other side as comparing clause (a) of Section 65 with clause (c) of Section 65. The Court below was certainly justified in rejecting the prayer at this stage as notice under Order XI, Rule 15, CPC as prescribed by law was not given by the present plaintiff to the other side or his attorney or his pleader for production of the document.

14. I find no reason to interfere. The petition is dismissed.