

(2019) 07 CAL CK 0010

In the Calcutta High Court

Case No : Civil Order/Misc.Cas (CO) No. 2933 Of 2018

Santandal Beliatore Branch & Anr

APPELLANT

Vs

Phani Bhusan Nag & Ors

RESPONDENT

Date of Decision : 02-07-2019

Acts Referred:

Evidence Act, 1872 — Section 65, 65(a), 66
Constitution Of India, 1950 — Article 227

Citation : (2019) 07 CAL CK 0010

Hon'ble Judges : Subhasis Dasgupta, J

Bench : Single Bench

Advocate : Sounak Bhattacharya, Soumik Ganguli

Final Decision : Disposed Off

Judgement

Subhasis Dasgupta, J

The impugned order dated 19.5.2018 passed by Learned Civil Judge (Junior Division), Additional Court at Bankura in Title Suit No.2 of 2011

accepting photocopy of an agreement as secondary evidence is the subject of challenge in this revisional application.

Mr. Sounak Bhattacharya, learned advocate for the petitioners disputing with the legality of the order submitted that the learned court below illegally

exercised his authority while accepting photocopy of an agreement as secondary evidence without non production of the original being first accounted

for by the defendants/opposite parties in such a manner as to bring it within one or the other of the cases provided for in Section 65 of the Evidence

Act.

Learned advocate for the petitioners further submitted that in the absence of any foundational evidence being adduced by the defendant/opposite

parties in authentication of the secondary evidence, the photocopy of the agreement ought not to have been accepted by the learned court below, as secondary evidence merely on account of early initiative being taken by the defendant by issuing summons to examine Gram Panchayat and on his denial to respond the summons.

Learned advocate, Mr. Soumik Ganguli, for the opposite party nos.1 to 6 controverting the submissions raised by the petitioners candidly submitted that when opposite parties/defendant issued summons several times for the evidence of Panchayat Pradhan, and when such initiative having ultimately turned to be an inabortive exercise, the learned court below rightly accepted the photocopy of the agreement as a secondary evidence upon duly considering the initiatives already put forth by the defendants for evidence of the proposed witness together with production of proposed document. It was, thus, submitted by the learned advocate for the opposite parties that in the absence of any apparent error or illegality committed by the learned court below, while accepting the photocopy of the agreement as secondary evidence, there left no scope for the impugned order to be interfered with upon exercise of authority available under Article 227 of the Constitution of India. Before addressing the issue, required to be addressed by this Court, some salient facts need mentioning here for effectively addressing the issue under reference.

Admittedly, petitioners/plaintiffs filed the instant suit with a prayer for declaration of their tenancy right and with a further prayer declaring the plaintiffs had been illegally ousted from the suit property on 2.6.1997 by the landlord. Reference was there in the plaint that there was a meeting held before the Panchayat, when a settlement was reached admitting delivery of possession of the tenanted premises within a certain time, but the same could not be matured for want of a resolution necessary therefor at the end of plaintiffs. A document, accordingly, was prepared bearing signature of the parties to this case, witnesses present over there including the signature of the Panchayat Pradhan. In the instant case, admittedly in order to secure presence of Panchayat Pradhan, summons were issued more than once, and entire exercise was ultimately turned to be futile one. It was at this juncture, when the summons could not be responded to because of the denial of summons, defendants/opposite parties filed a petition praying for

accepting the photocopy of the agreement, as secondary evidence and the learned court below by the impugned order allowed the same subject to furnishing an affidavit by the defendants stating the initiative that had already been taken to produce the original document, but same could not be produced.

The opposite parties/defendants sought to rely upon an agreement allegedly executed between the parties in presence of the Panchayat Pradhan

bearing signature of the parties, witnesses present and the Panchayat Pradhan as well. The document being relied upon by the opposite parties

admittedly, could not be produced in original before the learned court below. It is not the case of the defendants/opposite parties that they sought to

adduce secondary evidence, like the photocopy of the agreement, for the original (primary evidence) being lost or damaged.

It would be useful to refer the provisions of the Section 65(a) of the Evidence Act in order to understand the applicability of such provision over the

factual matrix of this case. The provision of Section 65(a) of the Evidence Act may be mentioned as hereunder:-

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)â?|â?|â?|

(c)â?|â?|â?|

(d)â?|â?|â?|

(e),â?|â?|â?|

(f)â?|â?|â?|..

(g)â?|â?|â?|â??

Section 65 permits secondary evidence to be given of the existence, conditions or contents of document under the circumstances mentioned. The

conditions laid down in the said section have to be necessarily fulfilled before the

secondary evidence can be admitted.

Learned advocate for the petitioners referring decision reported in (2013) 2 SCC 114 delivered in the case of U. Sree vs. U. Srinivas submitted that

the denial of the summons for the summons being issued on several times would not be decisive one and secondary evidence of the contents of

document could not be admitted without non production of the original being first accounted for in such a manner as to bring it within one or the other

of the cases provided for in the section. Thus, according to learned advocate for the petitioners denial of summons including the previous exercise

already undertaken for production of the document as well as for giving evidence by proposed witness, would not matter much. The photocopy of the

agreement, in the absence of any foundational evidence being laid by the defendants in authentication of the secondary evidence, there could not be

any acceptance of any photocopy, as secondary evidence.

In the case of U. Sree (supra) the Apex Court addressed one pertinent issue whether denial of summons to adduce evidence by a person in

possession of a document would automatically be regarded as a proper foundation to lead secondary evidence.

While addressing the issue the Apex Court in the case of U. Sree (Supra) considered the decision delivered in the case of A. Shok Dulichand v.

Madahavilal Dube reported in (1975) 2 SCC 664, the decision, delivered in the case of J. Yashoda v. K. Shobha Rani reported in (2007) 5 SCC 730,

the decision delivered in the case of M. Chandra v. M. Thangamuthu reported in (2010) 9 SCC 712 and decision delivered in the case of H. Siddiqui v.

A. Ramalingam reported in (2011) 4 SCC 240 and disposed of the issue deciding the ratio that in the absence of foundational evidence being laid in

authentication of secondary evidence, denial of summons by a person in possession of a document could not be regarded as a proper foundation for

leading secondary evidence. In the case at hand, the original agreement, the photocopy of which was produced, went unproduced before calling for

the assistance of Section 65 of the Evidence Act.

There left nothing mentioned in the impugned order that the non production of the original agreement was accounted for by the defendants/opposite

parties in such a manner as to bring it within one or the other of the cases provided for in the section. In the instant case, the evidence of

D.W.1/defendant was concluded on 19th August, 2016. The impugned order accepting photocopy of the agreement as secondary evidence was

passed on 19th May, 2018 i.e, about three years after the conclusion of evidence of D.W.1/defendant. In the impugned order, there is nothing

conspicuous that defendants/opposite parties before resorting to Section 65 of the Act duly explained as to what are the circumstances under which

the photostat copy was prepared and who was in possession of the original document at the time when the photocopy was prepared. The possession

of the original agreement, said to have been executed in presence of the Panchayat Pradhan, thus remained undisclosed.

In the honest effort put forward by the learned advocate for the petitioners attempt was further taken to take shelter of a decision reported in (2010) 3

WBLR (Cal) 527 delivered by coordinate Bench of this Court in the case of Ratan Das v. Goutam Das, wherein the requirement of adducing

foundational evidence in authentication of the secondary evidence was felt necessary, to be adduced by defendant, while resorting to applicability of

secondary evidence with the aid of Section 65 of the Evidence Act.

The decision as referred by the petitioners delivered in the case of U. Sree (Supra) will definitely hold the field in the given circumstances of the case

so as to out weigh the stand, taken by the opposite parties. The findings thus reached by the learned court below while accepting the photocopy of the

agreement as secondary evidence being contrary to the provisions of the law would not be acceptable. It was the obligation on the part of the learned

court below to decide the question of admissibility of a document in a secondary evidence before accepting the photocopy of the evidence as

secondary evidence.

Nuances and subtleties of provisions of Section 65 of the Evidence Act, could not be taken care of by the learned court below before accepting the

photocopy of agreement, as secondary evidence. Thus denial of summons by the persons in possession of document, if any, would not be regarded as

proper foundation to lead secondary evidence, without fulfilment of conditions, details of which are discussed hereinabove.

Upon consideration of the rival submissions of the parties, the Court is of the view that the learned court below committed a gross illegality by

accepting the photocopy of the agreement as secondary evidence without

fulfillment of the conditions necessary in terms of the provisions as incorporated in Section 65 of the Evidence Act. The impugned order dated 19.5.2018 passed by the learned Civil Judge (Junior Division), Additional Court, Bankura in Title Suit No.2 of 2011, accepting the photocopy of the agreement as secondary evidence is set aside.

The revisional application succeeds and accordingly stands disposed of.

Petitioners are directed to make communication of this order the learned court below.

Urgent certified photostat copy of this judgement, if applied for, be given to the parties as expeditiously as possible on compliance of all necessary formalities.