Jagmail Singh vs Karamjit Singh on 13 May, 2020

Equivalent citations: AIR 2020 SUPREME COURT 2319, AIRONLINE 2020 SC 529

Author: Krishna Murari

Bench: Krishna Murari, Navin Sinha

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1889 OF 2020
(ARISING OUT OF SPECIAL LEAVE PETITION (C) NO. 17437 O

JAGMAIL SINGH & ANR. ….. A

VERSUS

KARAMJIT SINGH & ORS. ….. RE

JUDGMENT

KRISHNA MURARI, J.

This appeal is directed against the judgment dated 09.01.2017 passed by the High Court of Punjab and Haryana at Chandigarh in Civil Revision No. 7271 of 2015 whereby the High Court confirmed the order passed by the Civil Judge (Junior Division) Moga in application filed under Section 65 and 66 of the Indian Evidence Act by the appellants herein seeking permission to prove the copy of the Will dated 24.01.1989 executed by one Babu Singh in their favour by way of secondary evidence, as the original Will which was handed over to the village patwari for mutation could not be retrieved. The High Court while dismissing the application observed that as the pre-requisite condition of existence of Will is not proved, the Will cannot be permitted to be approved by allowing the secondary evidence.

2. Briefly stated the facts of the case are that the appellants preferred a suit for declaration to the effect that they are owners to the extent of ½ share each of the land owned by Babu Singh son of Phuman Singh, situated in village Kokri Kalan, Tehsil & District Moga and Mutation No. 9971 dated

28.02.1991 and Mutation No. 9359 dated 25.02.1991 sanctioned by the Assistant Collector Second Grade, Moga in favour of Baldev Singh (predecessors-in-interest of respondent nos.1 and 2) and Shamsher Singh (respondent No.3) are illegal, null and void, as the said two mutations have been sanctioned on the basis of a forged Will dated 20.03.1988. A further prayer for consequential relief of permanent injunction to restrain the respondents from alienating, transferring or mortgaging the suit property was also sought for.

3. During pendency of the aforesaid suit, an application under Section 65/66 of the Evidence Act was moved by the appellants seeking permission to prove copy of Will dated 24.01.1989 by way of secondary evidence. The said application was allowed by the Trial Court vide order dated 04.07.2014.

4. Feeling aggrieved by the said order, respondents preferred Civil Revision No.4645 of 2014 which was allowed by the High Court by observing as under:-

> "Once the appellants have alleged that the original Will is in possession of the revenue official, they should have served a notice upon him under Section 66 of the Act for its production and in case, it is alleged that the said Will has been lost, then the application could have been filed for leading secondary evidence but in the absence of the compliance of the aforesaid procedure, the application per se filed under Section 65 of the Act is not maintainable. In view of the aforesaid apparent error on the part of the Court below, the present revision petition is hereby allowed and the impugned order is set aside. However, the respondents are still at liberty to move an application under Section 66 of the Act to the revenue official to whom the alleged Will was given for the purpose of sanctioning of mutation and in case of denial on his part that the Will has been lost, they can maintain the application for secondary evidence".

5. Subsequent thereto, appellants preferred another application under Section 65/66 of the Act, before the Trial Court for issuance of notice under Section 66 of the Act to the revenue officials for production of original Will dated 24.01.1989. The application was made on the ground that the said original Will was handed over by the appellants to revenue officials for sanctioning the mutation in their favour. Both the revenue officials were issued notice for production of the original Will dated 24.01.1989 but they failed to produce the said Will. It was only thereafter, application was dismissed vide order dated 30.09.2015.

6. Aggrieved by the above order, the appellants approached the High Court by way of a Revision Petition under Article 227 of the Constitution of India.

7. Learned counsel for the appellants contended that the impugned order is not sustainable in the eyes of law as it suffers from patent errors of law and is against the letter & spirit of Sections 65 & 66 of the Evidence Act. It is further pointed out that Section 65(a) of the Act allows the production of secondary evidence when the original is shown and appears to be in possession or power of one against whom the document is sought to be proved, or 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. In such contingency, party concerned is entitled to prove the same by way of secondary evidence. It is submitted that the appellants had already served notice under Section 66 of the Evidence Act to the revenue officials through the Court but the Will which was sought to be produced by way of secondary evidence, was not produced by either of the revenue officials.

8. Learned counsel for the appellants further contended that existence of the original Will can only be proved during the course of arguments and it is not the requirement of law that it should be proved at the first instance and only thereafter secondary evidence can be allowed.

9. The High Court vide impugned order dated 09.01.2017 observed that - "As per facts & circumstances of the instant case, original Will dated 24.01.1989 was given to the revenue official(s) for incorporating and sanctioning of mutation on the basis thereof, but to the utter surprise, though, both the revenue officials, namely, Pyare Lal and Rakesh Kumar, Patwaries, were served under Section 66 of the Act to produce original Will dated 24.01.1989 but they failed to produce it. Moreover, they had nowhere stated about the existence of the original Will. So, the pre-requisite condition i.e. existence of the Will, remained un-established on record. Thus, while observing that the learned Trial Court had declined the permission to prove Will dated 24.01.1989 by way of secondary evidence, the order dated 30.09.2015 suffers from no infirmity or illegality, rather the same is absolutely in accordance with the evidence available on file as well as settled proposition of law." The High Court did not find any merit in the Revision Petition and dismissed the same while upholding the decision of the lower Court on the ground that the pre-requisite condition for admission of secondary evidence, i.e. existence of Will remained unestablished.

10. For proper appraisal of the matter in controversy, it would be appropriate to reproduce Sections 65 and 66 of the Act which read as under :-

> " 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.

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."

11. A perusal of Section 65 makes it clear that secondary evidence may be given with regard to existence, condition or the contents of a document when the original is

shown or appears to be in possession or power against whom the document is sought to be produced, 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 notice mentioned in Section 66 such person does not produce it. It is a settled position of law that for secondary evidence to be admitted foundational evidence has to be given being the reasons as to why the original Evidence has not been furnished.

12. The issue arising out of somewhat similar facts and circumstances has been considered by this Court in Ashok Dulichand Vs. Madahavlal Dube and Anr.1, and it was held as under :-

"According to Clause (a) of Section 65 of Indian Evidence Act, Secondary evidence may be given of the existence, condition or contents of a document 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 or of any person out of reach of, or not subject to, the process of the Court of any person legally bound to produce it, and when, after the notice mentioned in Section 66 such person does not produce it. Clauses (b) to (g) of Section 65 specify some other contingencies wherein secondary evidence relating to a document may be given."

13. In the matter of Rakesh Mohindra vs. Anita Beri and Ors. 2 this Court has observed as under:-

"15. The preconditions for leading secondary evidence are that such original documents could not be produced by the party relying upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original documents is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot accepted." [1976] 1 SCR 246 (2016) 16 SCC 483

14. It is trite that under the Evidence Act, 1872 facts have to be established by primary evidence and secondary evidence is only an exception to the rule for which foundational facts have to be established to account for the existence of the primary evidence. In the case of H. Siddiqui (dead) by LRs Vs. A. Ramalingam3, this Court reiterated that where original documents are not produced without a plausible reason and factual foundation for laying secondary evidence not established it is not permissible for the court to allow a party to adduce secondary evidence.

15. In the case at hand, it is imperative to appreciate the evidence of the witnesses as it is only after scrutinizing the same opinion can be found as to the existence, loss or destruction of the original Will. While both the revenue officials failed to produces the original Will, upon perusal of the cross-examination it is clear that neither of the

officials has unequivocally denied the existence of the Will. PW- 3 Rakesh Kumar stated during his cross-examination that there was another patwari in that area and he was unaware if such Will was presented before the other patwari. He went on to state that this matter was 25 years old and he was no longer posted in that area and, therefore, could not trace the Will. Moreover, PW- 4 went on to admit that, "there was registered Will which was entered. There was a Katchi (unregistered) Will of Babu Singh was handed over to Rakesh Kumar [2011 (4) SCC 240] Patwari for entering the mutation...". Furthermore, the prima facie evidence of existence of the Will is established from the examination of PW-1, Darshan Singh, who is the scribe of the Will in question and deposed as under :-

"I have seen the Will dated 24.01.1989 which bears my signature as scribe and as well as witness."

16. In view of the aforesaid factual situation prevailing in the case at hand, it is clear that the factual foundation to establish the right to give secondary evidence was laid down by the appellants and thus the High Court ought to have given them an opportunity to lead secondary evidence. The High Court committed grave error of law without properly evaluating the evidence and holding that the pre-requisite condition i.e., existence of Will remained unestablished on record and thereby denied an opportunity to the appellants to produce secondary evidence.

17. Needless to observe that merely the admission in evidence and making exhibit of a document does not prove it automatically unless the same has been proved in accordance with the law.

18. In view of the aforesaid legal and factual position, we are of the considered opinion that the impugned judgment of the High Court suffers from material irregularity and patent errors of law and not liable to be sustained and is thus, hereby set aside. The appeal accordingly stands allowed.

19. The appellants would be entitled to lead secondary evidence in respect of the Will in question. It is, however, clarified that such admission of secondary evidence automatically does not attest to its authenticity, truthfulness or genuineness which will have to be established during the course of trial in accordance with law.

20. In the facts and circumstances, we do not make any order as to costs.

.....J. (NAVIN SINHA) .....J. (KRISHNA MURARI) NEW DELHI;

MAY 13, 2020