



*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

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C.R.P. 589/1998

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Date of Decision: 6th March, 2009

SURINDER KAUR

Through:

..... Petitioner
Ms. Nandni Sahni,
Advocate.

versus

SARDAR MANGAL SINGH & ORS

Through:

..... Respondents
Mr. N.S. Negi,
Advocate.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No. |
| 2. To be referred to the Reporter or not? | Yes. |
| 3. Whether the judgment should be reported in the Digest? | Yes. |

J U D G M E N T

MANMOHAN, J: (Oral)

1. Present revision petition has been filed for setting aside orders dated 15th December 1997 and 5th May, 1998, whereby petitioner's application to lead secondary evidence under Section 65 of Indian Evidence Act, 1872 (hereinafter referred to as 'IE Act') was dismissed and petitioner was directed to file original documents.

2. Ms. Nandini Sahni, learned counsel for petitioner contended that Agreement to Sell, Receipts and other documents dated 6th August, 1980 executed by respondent No. 1 in favour of some third party do not mention a word about



the Will dated 25th October, 1972 alleged to have been executed by Late Smt. Gurdai Kaur in favour of respondent No. 1. Learned counsel further contended that the said Will has been propounded by respondents only to usurp and grab petitioner's share to the extent of 110 square yards in suit property bearing No. C-53, Hari Nagar, New Delhi.

3. She further contended that alleged Will is surrounded by suspicious circumstances and it was never produced for a long number of years before any court or public authority.

4. Ms. Sahni stated that respondent No. 3 in his cross-examination had stated that an area of 110 square yards of land was sold by Mr. Mangal Singh, respondent No. 1 herein to Mr. S.S. Sabharwal. Subsequently, petitioner on meeting Mr. Sabharwal had come to know that respondent No. 1 had sold the plot to Mr. Narinder Singh Malhotra, who in turn had sold the plot to many persons. She further stated that property has since changed many hands and person holding original documents cannot be pin-pointed. Ms. Sahni stated that however, petitioner was given by Mr. Narinder Singh Malhotra photostat of Agreement to Sell, Receipts, Will and Power of Attorney's dated 6th August, 1980, on the basis of which he purchased 110 square yards of land from respondent No 1.

5. Ms. Sahni, submitted that since aforesaid original documents could not be produced in a reasonable time and the person holding the original documents cannot be pin-pointed,



original documents should be treated as either destroyed or lost and petitioner should be allowed to lead secondary evidence by virtue of Section 65 IE Act.

6. Ms. Sahni, also submitted that respondents in their reply to petitioner's application under Order XIII Rule 2 of Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') had admitted the existence and authenticity of alleged Agreement to Sell, Receipts, Power of Attorney's and Will dated 6th August, 1980. The alleged admission, as contained in respondents' reply is reproduced hereinbelow:-

"7.It is further stated that neither the alleged documents are related to the suit property nor are subject matter of scrutiny in the present suit. Said documents were within the knowledge of the plaintiff and has not been challenged till date. Alleged documents, in any case has attained their finality by afflux of time and the plaintiff cannot, at all, rely upon the alleged documents for any purpose whatsoever. It is stated that the witness of defendant is neither obliged to verify the documents of the property which has nothing to do with the present suit nor the alleged documents have been challenged by the plaintiff till date.

(emphasis supplied)"

7. In this context, Ms. Sahni relied upon the following judgments:-

(A) ***Nawab Singh v. Inderjeet Kaur*** reported in **1999 (4) SCC 413**, wherein Hon'ble Supreme Court was pleased to allow an opportunity to produce documents by leading secondary evidence on the ground that case was covered under Clause (a) of Section 65 of IE Act.



(B) ***Arulmigu Dhandauthapanj Swamy v. Sthanika Miras and another***, reported in ***AIR 2007 (NOC) 816 (MAD.)***, wherein Madras High Court was pleased to allow zerox copy of certified copy of an order as permissible documents under Section 65 (a) of the Act.

(C) ***DDA v. Ramesh Chander Jain*** reported in ***2003 RLR 87***, wherein this Court was pleased to hold that if original was not produced then photo copy was admissible.

(D) In ***Laxmi Chand Textile v. UOI & Ors.*** reported in ***2007 (6) Scale 117*** wherein Hon'ble Supreme Court was pleased to hold that if photocopies of documents are not disputed, then in that case there is no difficulty in taking photocopies as admitted documents.

(E) ***Smt. Sobha Rani and others v. Ravi Kumar and others***, reported in ***AIR 1999 Punjab & Haryana 21***, wherein Punjab and Haryana High Court was pleased to hold that if existence of documents is proved from facts mentioned in plaint and reply of defendants then secondary evidence is permissible.

8. Mr. N.S. Negi, learned counsel for respondents raised three preliminary objections. Firstly, he submitted that civil revision petition was not maintainable as trial court had not decided the case but only disposed of an interim application. Secondly, he submitted that revision petition challenging orders



dated 15th December, 1997 and 5th May, 1998 was barred by limitation and thirdly, he submitted that two orders cannot be challenged in one revision petition.

9. He further submitted that petitioner was guilty of filing contradictory affidavits on oath. He pointed out that on 25th May, 1997, petitioner had filed an application under Order XIII Rule 2 CPC for placing originals of the aforesaid documents on record. Though the said application was allowed on 8th October, 1997 but petitioner instead of filing original documents, filed an application under Order XI Rule 14 CPC seeking a direction to defendants to file the aforesaid documents. But when defendants denied being in possession of the said documents, petitioner thereafter filed an application under Section 65 IE Act on the ground that the said documents had been lost or cannot be traced.

10. He submitted that photocopies of documents placed on record by petitioner were neither certified nor authenticated. He stated that original documents must be with present owner of the property which is adjoining petitioner's property and as such original documents cannot be said to have been lost. He further contended that though present case was pending for the last seventeen years, petitioner had not taken any step to summon their next door neighbour, who must be in possession of the said original documents.



11. Lastly, Mr. Negi, submitted that secondary evidence cannot be allowed to be led in rebuttal and that too after eight years of the suit having been filed. He further pointed out that in the reply filed by respondent to the petitioner's application under Section 65 of the I.E. Act it had been specifically averred as under :-

"It is submitted that the sale has been admitted not the alleged photostat copy which are forged at the face of it. It is denied that the contents of alleged documents have been admitted by the defendant. No application U/o. 11 Rule 14 has been served or supplied to the defendant and the factum of said application is also denied. It is submitted that the defendants are not in possession of any alleged carbon copy and whatever documents were in power and possession of the defendants. The same are already on record."

(emphasis supplied)

12. I may mention that trial court has rejected two applications filed by petitioner by way of a detailed order dated 15th December, 1997. The relevant portion of the impugned order is reproduced hereinbelow:-

"5. Although in the application, Ld. Counsel for plaintiff has mentioned that for all practical purposes originals of aforesaid documents shall be taken to have been destroyed or lost, provisions of Section 65 of Evidence Act do not permit to draw a presumption of destruction or loss. More so, it is not the case of plaintiff that any of the aforesaid document has been destroyed or lost. In this respect even there is nothing on the file to show loss or destruction of any of the original documents. It is well settled that where explanation for non-production of document is that it has been lost, before tendering evidence loss of document has to be proved. Thus, plaintiff cannot be allowed to lead secondary evidence



on the ground of loss or destruction of original documents.

6. Ld. Counsel for plaintiff has simply argued that since property has changed several hands, original documents cannot be traced or produced in a reasonable time and as such on this sole ground plaintiff be permitted to prove the aforesaid documents by secondary evidence.

In this respect, it is pertinent to mention here that out of entire property of 220 sq. yards, plaintiff is stated to be in possession of 110 sq. yards. The aforesaid documents pertain to other 110 sq. yards of property which Shri Mangal Singh (since deceased) brother-in-law of plaintiff sold to Shri Narinder Singh Malhotra on 6.8.1980, on the basis of a Will in his favour alleged to have been executed by his mother Smt. Gurdai Kaur. This other half i.e. 110 sq. yards of property sold to Shri Narinder Singh Malhotra is not the disputed property. When the plaintiff submits that Shri Narinder Singh Malhotra has further sold the property and property has changed several hands, first this fact had to be proved. No material has been placed on record to show as to how many times the property has been sold and as to who purchased it from Shri Narinder Singh Malhotra and further who purchased the same from the vendee. In absence of any such material on record I do not find any merit in the contention that it has not been possible for the plaintiff to know the particulars of the ultimate vendee of the property or that original documents executed by Shri Mangal Singh cannot be traced out within reasonable time. The property measuring 110 Sq. yards is adjoining the property in possession of plaintiff. It cannot be said that she is not aware of particulars of or availability of her neighbourer. Case is pending since 1989. Aforesaid documents are of 6.8.1980. In the meanwhile, plaintiff had sufficient and reasonable time to know about the original documents and the subsequent vendees of the adjoining property. After summoning Shri Narinder Singh Malhotra, the original Vendee, and Shri Gian Singh Sabharwal, the witness and having come to know that original documents are not with the former, plaintiff



has not taken any step to gather information about subsequent vendee(s) and about existence/non-existence of original documents.

For the foregoing discussion, I do not find any merit in the contention raised by Ld. Counsel for plaintiff. Consequently, second application, under Section 65 of Indian Evidence Act is also dismissed."

13. As far as three preliminary objections raised by respondents are concerned, I am of the view that though civil revision may not be maintainable but a petition under Article 227 of Constitution of India would certainly be available. It is settled law that nomenclature under which a petition is filed is irrelevant. Consequently, I treat petitioner's Civil Revision Petition as being a Civil Miscellaneous (Main) filed under Article 227 of Constitution of India.

14. Since I have already treated present petition as a Civil Miscellaneous (Main), issue of limitation is irrelevant. Undoubtedly, by way of a single petition, a petitioner can challenge only one impugned order but in the present case the two orders dated 15th December, 1997 and 5th May, 1998 are inextricably inter linked and consequently, I am of the view that ends of justice would be met if petitioner's present petition is entertained, subject to the condition that petitioner deposits another set of court fees for challenging second impugned order. Let the same be done within a period of six weeks from today.

15. Consequently, all the three preliminary objections raised



by respondents stand negated.

16. Before I may proceed with merits of the controversy, I may refer to Sections 65 and 66 of IE Act which are reproduced hereinbelow:-

“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 consist 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 documents 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, or not subject to, the process of the Court.

(emphasis supplied)”

17. On a reading of aforesaid Sections, I am of the view that application for secondary evidence on the ground of sub-section (c) of Section 65 IE Act should be allowed only when a court is absolutely sure that original documents have been destroyed or lost. In my view, if courts were to adopt a liberal approach in allowing secondary evidence to be led on the ground that original document has been lost or destroyed, then it would have very serious adverse consequences for a person who may be in rightful possession of original of such a document because as and when he were to subsequently produce such an original document, the court may refuse to take cognizance of the same on the ground that some other court had prior in time given a finding that the said document had been lost or destroyed.

18. Keeping the above approach in mind, I am of the view that trial court has given cogent and reasonable reason for not treating original of documents referred to by petitioner as destroyed or lost. Moreover, I am of the view that in the present case, it cannot be said that originals of the aforesaid documents are out of reach or not subject to process of the court. In fact, in the present case, petitioner has not taken any step to either summon or issue a notice to present occupier of



the neighbouring 110 square yards to find out as to whether they are still in possession of originals of the aforesaid documents. Consequently, in my opinion, sub-section (a) and sub-section (c) of Section 65 IE Act are not fulfilled in the present instance.

19. However, in my opinion, in view of the reply filed by respondents to petitioner's application under Order XIII Rule 2 CPC, existence and contents of aforesaid documents stand admitted in writing by respondents themselves and consequently, sub-section (b) of Section 65 IE Act is attracted to facts of the present case and written admission of respondents is admissible. As far as Mr. Negi's reference to his reply affidavit to Section 65 application is concerned, in my opinion, it has to be read harmoniously and in conjunction with the reply filed by respondent to petitioner's application under Order XIII Rule 2 CPC, which I have already referred in extenso hereinabove.

20. In fact, on harmonious reading of replies to Order XIII Rule 2 and Section 65 of IE Act applications, I am of the view that respondents have admitted that whatever documents were within the knowledge, power and possession of petitioner/plaintiff have not been challenged and that the same are already on record. In fact, the respondents' consistent stand has been that said documents are irrelevant to present case as they have attained finality by efflux of time. Consequently sub-section(b) of Section 65 of IE Act is clearly



attracted to the present proceedings.

21. Consequently, impugned orders dated 15th December, 1997 and 5th May, 1998 are set aside and petitioner's application under Section 65 of IE Act stands allowed.

22. In view of aforesaid, parties are directed to appear on 23rd March, 2009 before the District & Sessions Judge-I, Tis Hazari Courts, Delhi who shall assign the case to concerned Civil Judge in accordance with the roaster.

March 6th, 2009
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MANMOHAN, J