AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 22-02-2024

Passed on 01- 05-2024

WP227 No. 751 of 2019

Vishnu Pratap Singh S/o Late Prasanath Singh Aged About 51 Years R/o Seepat Road Ashok Nagar, Chantidih, Bilaspur Tahsil And District Bilaspur Chhattisgarh, District : Bilaspur, Chhattisgarh

---- Petitioner

Versus

1. Mukteshwar Rai S/o Sankatha Rai Aged About 62 Years R/o Jorapara, Sarkanda, Bilaspur Tahsil And District Bilaspur Chhattisgarh, District : Bilaspur, Chhattisgarh
2. Narad Singh S/o Late Parasnath Singh Aged About 45 Years R/o Seepat Road Ashok Nagar, Chantidih, Bilaspur Tahsil And District Bilaspur Chhattisgarh, District : Bilaspur, Chhattisgarh
3. State of Chhattisgarh through The Collector, Bilaspur District Bilaspur Chhattisgarh, District : Bilaspur, Chhattisgarh

---- Respondents

For petitioners : Mr. Ratnesh Kumar Agrawal with Mr. Akhtar Hussain, Advocates.

For respondent No.1 : Mr. Abhijeet Mishra, Advocate.

Hon'ble Shri Justice Narendra Kumar Vyas

CAV ORDER

1. The petitioner/plaintiff has filed the present writ petition under Article 227 of the Constitution of India assailing the order dated 9-9-2019 (Annexure P/1) passed in Civil Suit No 91-A/2016 by the 4th Additional District Judge, Bilaspur, District Bilaspur by which the application under Section 65 of the Indian Evidence Act, 1872 (for short, “the Act, 1872”) filed by the

petitioner/plaintiff to examine the photo copy of the agreement dated 17-5-1991 as secondary evidence has been rejected.

2. The brief facts as reflected from the record are that the petitioner/plaintiff had filed a civil suit for declaration, title and grant of permanent injunction relating to the property situated at village Bodri, Patwari Halka No.1, Tahsil Belha, District Bilaspur bearing Khasra No. 279 and 280 and Khasra No 15 total area 4.26 acres of land. It has been contended that the plaintiff along with defendants No.1 and 2 had agreed to purchase the land bearing Khasra No. 279/3 and 280/3 area 3.81 acres situated at village Bodri, Patwari Halka No.1, Tahsil Belha, District Bilaspur, but the defendant No.1 was not having sufficient money to meet the expenses of registry, therefore, the defendant No.1 has shown his unwillingness to purchase the property before the plaintiff. It has also been contended the defendant No. 1 has assured the plaintiff that within 4 – 6 months whenever consideration of the property and expenses towards registration is available with him, the plaintiff will execute the sale deed of the land bearing Khasra No. 279/3 and 280/3 admeasuring 3.81 Acres registration in the name of defendant No.1 by paying himself. It has also been contended that though the sale deed was executed in favour of defendant No.1, still the possession of the property bearing Khasra No 279/3 and 280/3 area 3.81 acres are with the plaintiff and defendant No.2 and they are doing the agricultural work. Though lot of time has passed after registration, still the defendant No.1 is not ready to pay the money. As such,

defendant No.1 has no right over the suit property as entire property was invested by the plaintiff and defendant No.2 who are in possession of the suit property.

3. It has also been contended that the defendant No. 1 has no objection if the name of defendant No.2 is also recorded in the revenue records, therefore, defendant No.1 voluntarily executed the agreement in favour of defendant No.2 and it has been signed by the defendant No.1 in presence of the witnesses. This agreement was executed on 17-5-1991. On the basis of said agreement the names of the plaintiff and defendant No.2 were recorded in the revenue record. Thereafter, with mutual consent of the plaintiff and defendant No.2 the property was partitioned and out of total 3.81 acres, land bearing Khasra No. 2.77 acres was given to the plaintiff and defendant No.2 was given 1.04 acres and since then they are in possession of the suit property. Thereafter, defendant No. 1 out of greed has challenged the said mutation order by filing an appeal before the Sub Divisional Officer, Belha which was allowed on 28-9-2015 and mutation proceeding entry No 96 dated 30-6-1991 has been cancelled, against which the plaintiff had preferred an appeal. Before the Commissioner, Bilaspur which is pending. Thus, on the above factual matrix, he has prayed for declaration, title and grant of permanent injunction with regard to suit property.

4. The defendant No.1 has filed his written statement denying the allegations made by the plaintiff/petitioner. During pendency of the case, plaintiff had moved an application under Section 65 of the Act, 1872 mainly contending that the agreement dated 17-

5-1991 was kept with the defendant No.1 and photostat copy was given to the plaintiff which has been received after thorough search, as such he would submit that photostat copy of the agreement may be allowed as secondary evidence and documents may be exhibited.

5. The defendant No.1 has submitted reply to the said application mainly contending that the petitioner has not fulfilled the requirement of Section 65(3) of the Evidence Act, 1872 as the plaintiff has not filed an affidavit in support of his contention. He has also not submitted when the documents have been traced out and from where he has received the documents, therefore, requirement of Section 66 of the Act, 1872 is also not fulfilled, as such he has prayed for rejection of the application. It has also been contended that the document is unregistered document which is not acceptable in the evidence and would pray for rejection of the application.

6. Learned trial court vide order dated 9-9-2019 has rejected the application by recording its finding that the essential condition for leading secondary evidence has not been fulfilled by the plaintiff and accordingly it has rejected the application. This order is being assailed by the petitioner by filing of this writ petition.

7. Learned counsel for the petitioner would submit that the impugned order dated 9-9-2019 (Annexure P/1) is illegal and would submit that the trial court while passing the order failed to examine that the original copy of the agreement dated 17-5-1991 is in existence and it was filed before the Revenue Officer,

Belha and during the course of mutation original copy of the agreement was given to respondent No.1 and photo copy of the agreement was given by the respondent No.1 to the petitioner. He would further submit that provisions of Section 65 of the Act, 1872 can be exhausted as it fulfills the requisite condition as per Clause (a)(b) of Section 65 of the Act, 1872 and would pray for quashing of the impugned order. To substantiate his arguments, he has relied upon the judgment of Hon'ble Supreme Court in case of **J. Yashoda vs. K. Shobha Rani, reported in (2007) 5 SCC 730.**

8. On the other hand, learned counsel for respondent No.1 would submit that the petitioner has not laid any foundation for examination of the secondary evidence as required under Sections 65 & 66 of the Act, 1872. He would further submit that photostat copy cannot be accepted as secondary evidence, thus he would pray for dismissal of the writ petition. To substantiate his arguments, he has referred to the judgment of this court in WP227 No. 334 of 2021 decided on 8-8-2022.

9. I have head learned counsel for the parties and perused the record.

10. From the above stated discussion, the point emerged for determination is whether the learned court below was justified in dismissing the application under Section 65 of the Act, 1872 filed by the plaintiff.

11. To appreciate the point raised in this writ petition, it is expedient for this court to extract the provisions of Sections 63, 65 and 66 of the Indian Evidence Ac, 1872 which 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. Illustrations (a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original. (b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original. (c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original. (d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

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; 34 (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 1 [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 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.
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> 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, 1 [or to his attorney or 1. Ins. by Act 18 of 1872, s. 6. 36 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”

12. To examine the validity of the impugned order this court has to examine whether the photostat copy can be termed as secondary evidence and whether the petitioner has laid the condition required to examine the secondary evidence in the

present facts and circumstances of the case. Secondary evidence has been defined in Section 63 of the Act, 1872.

13. From bare perusal of Section 63 of the Act, 1872 it is quite vivid that the copies made from the original by mechanical process which in themselves insure the accuracy of the copy and copies compared with such copies, copies made from or compared with the original will be treated as secondary evidence. Though photostat copy is being obtained by the mechanical process, but it does not insure the accuracy of the copy as there can be manipulation in the photo copies. Even otherwise the photostat copy of the document cannot be admitted in evidence unless the genuineness of the same was not admitted by other side. The issue regarding admission of photocopy of a document has come up for consideration before the Hon'ble Supreme Court in case of **United India Assurance Company Limited vs. Anbari and others, reported in (2000) 10 SCC 523** wherein Hon'ble Supreme Court has held in para 3 as under.

> "3. Lenard counsel for the appellant submitted that the point regarding validity of the driver's licence was raised by the appellant before the Motor Accidents Claims Tribunal and the Tribunal in accepting the photo copy of a document purporting to be the driver's licence and recording a finding that the driver had a valid licence, has committed a grave error of law. He also submitted that the High Court has not dealt with the said contentions of the appellant and without giving any reason has dismissed the appeal. The Tribunal and also the High Court have failed to appreciate that production of a photo copy was not sufficient to prove that the driver had a valid licence when the fact was challenged by the appellant and genuineness of the photo copy was not admitted by it".

14. The record of the case would show that the defendant No.1 has objected towards existence and execution of the original document, as such it is incumbent upon the plaintiff to lead the foundation for examining the secondary evidence. Even the petitioner/plaintiff has not given any notice under Section 66 of the Act, 1872 to Rules as to notice to produce the documents unless the notice is given by the plaintiff. From bare perusal of Section 66 of the Act, 1872 it is quite vivid that secondary evidence of the contents of the documents preferred in Clause (a) of Section 65 of the Act, 1872 shall not be given unless parties supposing to give such evidence as previously given party in whose possession the document is available, such notice should be produced in accordance with law. This was also required to be followed by the plaintiff which he has not done.

15. Learned counsel for the petitioner/plaintiff would submit that as per law laid down by the Hon'ble Supreme Court in case of **J. Yashoda (supra)**, photostat copy can be treated as secondary evidence, but the facts of that case are distinguishable from the facts of present case as in case of **J. Yashoda** respondent No.1 was examined as witness and was directed to produce the original manuscript of which the photocopy was filed before the Court. The respondent of that case has also made a prayer before the court that in case the appellant denies that the said manuscript has been written by him, photocopy made by him be examined by the hand writing expert and also file the affidavit. Hon'ble the Supreme Court considering the fact that the

respondent has laid down foundation for exhibiting the photo copy as secondary evidence has dismissed the appeal whereas in the present case the petitioner has not laid any foundation for examining the secondary evidence. In the present case also the plaintiff/petitioner has pleaded that the original document was with the defendant No.1 but he has never moved any application as provided under Section 66 of the Act, 1872 to give notice to produce document to defendant No. 1 and no affidavit in support of contents has been filed. Thus, the requisite foundation to lead secondary evidence has not been brought on record. Hon'ble the Supreme Court in case of **H. Siddiqui (dead) By Legal Representatives vs. A. Ramalingam, reported in (2011) 4 SCC 240,** has considered the Sections 61 to 65 of the Act, 1872 and held in para 11 and 12 which read as under.

> “11. In view of the pleadings, as the respondent has specifically denied the execution of a power of attorney in favour of R. Viswanathan, defendant No.2 in the suit (not impleaded herein), the main issue could be as to whether the power of attorney had been executed by the respondent in favour of R. Viswanathan enabling him to alienate the suit property and even if there was such power of attorney whether the same had been proved in accordance with law.
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> “12. The Provisions of Section 65 of the Act 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a

document is inadmissible, until the non production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide: The Roman Catholilc Mission & Anr. v. The State of Madras & Anr., AIR 1966 SC 1457; State of Rajasthan & Ors. v. Khemraj & Ors., AIR 2000 SC 1759; Life Insurance Corporation of India & Anr. v. Ram Pal Singh Bisen, (2010) 4 SCC 491; and M. Chandra v. M. Thangamuthu & Anr., (2010) 9 SCC 712)"

16. Thereafter, again the Hon'ble Supreme Court in case of R**ajesh Mohindra vs. Anita Beri and others, reported in (2016) 16 SCC 483** has held in para 20 and 21 as under.

"20. It is well settled that if a party wishes to lead secondary evidence, the Court is obliged to examine the probative value of the document produced in the Court or their contents and decide the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. It is equally well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law.

23. In the case of M. Chandra vs. M. Thangamuthu, (2010) 9 SCC 712, this Court considered the requirement of Section 65 of the Evidence Act and held as under:-

"47. We do not agree with the reasoning of the High Court. It is true that a party who

> wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party."

17. Hon'ble the Supreme Court in case of **Jagmail Singha and another vs Karamit Singh and others, reported in (2020) 5 SCC 178** has held in para 11 and 13 as under.

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

18. From the above stated factual and legal position, it is quite vivid that the petitioner has not laid foundation for examining the secondary evidence, as such the learned trial court has not committed any illegality in rejecting the application filed by the petitioner/plaintiff under Section 65 of the Act, 1872. Considering all the facts and material on record, I do not find any good ground to interfere in the impugned order.

19. Accordingly, the writ petition being devoid of merit is liable to be and is hereby dismissed.

20. Interim order passed by this Court on 14.10.2019 is vacated.

Sd/-

(Narendra Kumar Vyas)
Judge

Raju