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Court : Madhya Pradesh

Decided On : Apr-01-2002

Reported in : 2002(3)MPHT432; 2002(3)MPLJ371

Judge : Dipak Misra, J.

Acts : [Evidence Act, 1872](#) - Sections 63 and 65

Appeal No. : Civil Revision No. 1444/99

Appellant : Sunil Kumar and anr.

Respondent : Smt. Anguri Choudhari and anr.

Advocate for Def. : R.K. Verma, Adv.

Advocate for Pet/Ap. : Ravish Agrawal, Sr. Adv. and ;Pranay Verma, Adv.

Disposition : Civil revision allowed

Judgement :

ORDER

Dipak Misra, J.

1. Invoking the revisional jurisdiction of this Court under Section 115 of the. Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') the applicants have called in question the sustainability of the order dated 17-3-99 passed by the

learned First Additional District Judge, Shahdol in Civil Suit No. 2-A/93.

2. The non-applicant No. 1 as plaintiff initiated a civil action for partition and separate possession of the suit house situate over Khasra No. 1207, Burhar, Tahsil Sohagpur, District Shahdol. The case of the plaintiff in the Court below was that by Hukumnama date 26-8-41 the then Pawaidar, Shri Lal Shiv Pratap Singh, granted the aforesaid Khasra No. 1207 to Kishore Chand who later on built shops and residential accommodation. After the expiry of said Kishorchand on 1-7-72 his widow Kasturibai, the defendant No. 1, and daughter, Anguribai, the plaintiff, inherited the said land with superstructure standing on it under the provisions of Hindu Succession Act, 1956. It was pleaded that the defendants, namely, Sunil Kumar and Sanjay Kumar, the sons of Virendra had no right, title or interest over the suit property. In Paragraph 4 of the plaint it was set forth that by Hukumnama dated 26-8-41 the disputed land was bounded on the East by road leading to Railway. In Paragraph 12 the plaintiff stated that it relied upon the documents filed the list. It is put forth in the revision petition that the plaint was further conspicuously silent as to actual physical possession of the original Hukumnama. The plaintiff omitted to state in whose possession the original document was. The document enclosed was neither the original nor the photocopy nor the true copy of the original.

3. The applicants who were the defendants in the Court below denied the claim and specifically pleaded that no Hukumnama was ever executed on 26-8-41 or on any other date to convey the piece of land situate on Khasra No. 1207 which finds mention in Paragraph 4 of the plaint. In the written statement it was categorically asseverated that Thakur Lal Shiv Pratap Singh did not have the power to dispose of the land and the same was disputed. The execution of Hukumnama by said Thakur Lal Shiv Pratap Singh was controverted. It was put forth that Pawaidars after certain point of time were authorised to grant 'pattas' of land which were not already allotted to some other persons. The case of the defendants was that the land bearing Khasra No. 1207 of Burhar town was already held by Gannulal as 'Pattedar' thereof and, therefore, the Pawaidar had no power to grant 'pattas' thereof or 'Hukumnama' for the said piece of land as the land in question was not available for allotment. It was put forth that the alleged 'Hukumnama' purporting to

transfer a piece of land of high valuation could not confer any title on Late Kishorchand and through him to the plaintiff, as said Kishorchand had never acquired any right, title or interest on the disputed land. It was put forth that at the time of death of Kishorchand the land already vested with the father of the defendants and there was nothing to devolve on the daughter of Late Shri Kishorchand. It was further stated that the land has been mutated and diverted in the favour of Shri Virendra Kumar in the years 1958 and 1967, respectively. It was also the case of the defendant that Gannulal demised the said land by registered sale-deed dated 10-12-36 in favour of Shri Veerchand who owned and possessed the land after sale.

4. During the progress of the suit an application was filed under Order VII Rule 14 of the Code of Civil Procedure dated 31-8-94 by the defendant Nos. 2 and 3 for production of alleged 'Hukumnama' in original. The plaintiffs reply to the said application was that she had filed her certified copy along with the certified copy of application dated 6-10-75 by Virendra Kumar, the father of the defendant Nos. 2 and 3 before the Administrator, Notified Area Committee, Burhar and, therefore, original is not with the plaintiff and, that the question of production would arise at the time of evidence. On 22-9-95 the defendants stated that even the certified copy of Hukumnama has not been filed by the plaintiff and, therefore, she should be directed to file an application seeking production of Hukumnama in original. While the plaintiffs reply to this interlocutory application was awaited the defendant Nos. 2 and 3 filed an application under Order XXXIX Rule 4 of the Code praying for vacation of the order of temporary injunction as the original Hukumnama had not been produced. The plaintiff in her reply to this application submitted that the original Hukumnama was in the custody of defendant Nos. 2 and 3 but they were not deliberately producing the same. As the matter proceeded the plaintiff made a statement on 18-11-96 that the list of documents on which reliance was placed included photocopy of Hukumnama dated 26-8-41 and she did not have the original or the certified copy of the same. Thereafter, the plaintiff filed an application under Order XI Rule 4 read with Section 151 of the Code for issuance of direction to the defendant Nos. 2 and 3 to produce the copy of Hukumnama alleging that it is in possession of the defendants.

5. The defendants contested the application by filing the reply denying the existence of alleged Hukumnama in their possession.
6. The learned Trial Judge on 3-11-98 directed the defendants to produce the original or photocopy or true copy of the documents mentioned in the application or file an affidavit in relation to possession or knowledge of documents aforesaid. Accordingly, the defendants filed their affidavit denying the existence and/or possession of original or copies of Hukumnama dated 26-8-41. When the matter stood thus, on 19-2-99 an application under Sections 63 and 65 of the [Evidence Act, 1872](#) was filed seeking permission to lead secondary evidence of documents, namely, objection dated 6-10-75 filed by Virendra Kumar before the Administrator, Burhar and Hukumnama dated 26-8-41. The said application was resisted by the defendants who denied the existence of so called Hukumnama as well as objection filed by Late Shri Virendra Kumar.
7. Upon hearing the learned Counsel for the parties the learned Trial Judge allowed the application seeking permission to lead secondary evidence in partial manner as far as it relates to Hukumnama dated 26-8-41. The prayer for leading secondary evidence in relation to first document was negated.
8. It is urged in the petition that the learned Trial Judge taking note of the fact that the defendants had disputed the existence of the documents and that there is reference to the said document in application dated 6-10-41 and that it was necessary for just adjudication of the case allowed the application and permitted to adduce secondary evidence.
9. During the pendency of the civil revision an application for taking documents on record was filed by the non-applicant No. 1 forming the subject-matter of I.A. No. 4647/2000. In the said application statement of Late Shri Virendra Kumar recorded in case instituted by his step brother in C.S. No. 1-A/82 has been brought on record alongwith other documents to highlight that there is reference to execution of the Hukumnama in question.
10. I have heard Mr. Ravish Agrawal, learned Senior Counsel alongwith Mr. Pranay Verma for the applicants and Mr. R.K. Verma, learned Counsel for non-

applicant No. 1.

11. Assailing the impugned order it is urged by Mr. Agrawal that the alleged Hukumnama which has been filed is neither a certified copy nor true copy of the original and it relates to different Khasra No. and, therefore, the order passed by the learned Trial Judge is sensitively susceptible. It is his further submission that the plaintiff has taken different and conflicting stands as to the existence or possession of Hukumnama at various points of time and hence, the plea putforth by the plaintiff should have been negatived. It is also submitted by him that the conditions precedent for grant of permission for adducing secondary evidence as enjoined under Sections 63 and 65 of the Evidence Act are not satisfied and, therefore, the order is vulnerable in law.

12. Resisting the aforesaid submissions of Mr. Ravish Agrawal, learned Senior Counsel for the petitioners, Mr. R.K. Verma, learned Counsel for the non-applicant No. 1 has contended that the plaintiff has not taken any inconsistent stand but had always taken a consistent stand that her right is embedded by virtue of Hukumnama dated 26-8-41 and she has categorically asseverated that the original is not with her but with the defendants who are deliberately not producing the same. It is also urged by him that the defendants have taken different pleas in the written statement sometimes establishment of title by way of Will and sometimes by way of prescription, but there has been no specific denial of the execution of said Hukumnama. The learned Counsel has putforth that in document dated 6-10-75 Late Shri Virendra Kumar admitted the fact with regard to execution of Hukumnama dated 26-8-41 in favour of Late Shri Kishorchand and, therefore, the permission for adducing secondary evidence by the learned Trial Judge cannot be faulted. Mr. Verma has further canvassed that the evidenciary value of the document and its effect and impact cannot be gone into while dealing with the application for adducing secondary evidence though much stress has been given on the same by the defendants.

13. To appreciate the rival submissions raised at the Bar I have carefully perused the impugned order. On a scrutiny of the same it is perceivable that the learned Trial Judge has given immense emphasis on the document dated 26-8-41 by

holding that the same is necessary for adjudication of the dispute in question and there is some reference to the said document in the application dated 6-10-75. In this context I may profitably refer to Sections 63 and 65 of the Evidence Act. They read as under:--

'63. 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 ensure 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. 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 move able;

(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 document is admissible. In case (b), the written admission is admissible.

In case (e) or (t), 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.'

14. On a perusal of the pleadings it is quite clear that the plaintiff had taken inconsistent and contradictory stands and the defendants have categorically denied to be in possession of the original document. The learned Trial Judge has not recorded a finding that the documents are in possession of the defendants and they have deliberately not produced the same. There is also no finding that the said document is within the domain and power of the defendants. It is also not the case that the defendants being in custody of the documents had refused to produce the same. In view of this the first exception enumerated under Section 65 of the Act is not attracted. It is also noteworthy to mention here that the plaintiff had filed an application under Order VII Rule 14 of the Code indicating that the plaintiff had filed the certified copy of the application dated 6-10-75 wherein Late Shri Virendra Kumar, the father of defendant Nos. 2 and 3 admitted about the Hukumnama in question and, therefore, original is not with the plaintiff. The said application was opposed by the defendants by filing an objection that Hukumnama which was filed by the plaintiff was neither a certified copy or a true copy of the original. The question that arises for consideration is whether in absence of certified copy or true copy of the document the permission to adduce secondary evidence is tenable.

15. Mr. R.K. Verma, learned Counsel for non-applicant No. 1, submitted that when there is reference to the document the same should be permitted to be brought on record as secondary evidence. He has referred to the decision rendered in the case of Nawab Singh v. Inderjit Kaur, AIR 1999 SC 1668. On a perusal of the aforesaid decision it is apparent that the Apex Court has held that the secondary evidence is permissible to be adduced if other party fails to produce the document in question. The said decision is not of much assistance to the non-applicant No. 1 inasmuch as in the present case a finding has not been recorded that the defendant Nos. 2 and 3 though are in possession of the documents have not deliberately produced the same. Nothing has been brought on record to suggest such a finding.

16. The next aspect which requires to be delineated is whether the document which has been brought on record can be regarded as a document covered under Section 63 of the Act. I have already referred to Section 63 of the Act to show what secondary evidence means and includes. I have also reproduced the illustrations. The document which has been brought on record is neither a photocopy nor the true copy of the original and, there is no material on record to show that the document has been described as to be true copy and, therefore, does not come under the concept of secondary evidence as defined under Section 63 of the Act. In this context, I may profitably refer to the decision rendered in the case of Land Acquisition Officer v. N. Venkata Rao, AIR 1991 AP 31 wherein their Lordships expressed the view as under:--

'30. Summarising the position, we hold firstly that if 'secondary evidence' is allowed to be marked for one party without objection at the trial, no objection can be permitted to be raised by the opposite party at any later stage in the same Court or in appeal that conditions for adducing secondary evidence have not been made out initially. Secondly, we hold that though ordinarily copies of copies are not to be treated as 'secondary evidence' unless such copies are again compared with the original, the said principle does not apply to certified copies granted by the Sub-Registrar under the Registration Act. These certified copies are, under law, to be treated as secondary evidence and once they have acquired such a status, the marking of such documents at the trial without objection results in such documents and their contents being evidence in the case. No objection can be raised in the same suit or proceeding or in appeal later by the opposite party that before marking the certified copies, the necessary conditions for adducing secondary evidence have not initially been established. We hold accordingly on point No. 2.'

17. In this regard Mr. Agrawal, learned Senior Counsel, has pressed into service a decision rendered in the case of Badrunnisa Begum v. Mohamooda Begum, AIR 2001 AP 394, wherein a Division Bench after referring to the illustrations made in Section 65 held as under :--

'As is seen above, this illustration merely says that 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 does not produce it. So, in order to get the benefit under Section 65(a) three things have to be shown; (1) that the document is, or appears to be, in the possession or power of the person against whom the document is sought to be proved; (2) it is in possession of any person out of reach, or not subject to the process of the Court, or of any person legally bound to produce it; and (3) that even after a notice under Section 66 the person who has its custody does not produce it. Section 66 lays down the mode of getting the document before the Court, Under this section the person who wants the document has to give a notice to the person in whose custody the document is, and if no such notice is prescribed under law then a notice which the Court may consider reasonable. Therefore, Section 63 of the Evidence Act lays down what can be termed as secondary evidence and Section 65 lays down in which situations secondary evidence can be led. Section 65(a) does not in any way make a copy of a copy admissible in evidence as it is barred under Section 63.'

After so holding the Bench proceeded to hold that copy of copy of the document which is not compared with the original document is not admissible in evidence and in that context adducing of secondary evidence is not permissible.

18. In this context I may profitably refer to the decision rendered in the case of United India Assurance Co. Ltd. v. Anbari and Ors., (2000) 10 SCC 523, wherein the Apex Court while dealing with the photocopy of the licence of a driver expressed the view as under :--

'3. Learned 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 photocopy 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 photocopy was not sufficient to prove that the

driver had a valid licence when that fact was challenged by the appellant and genuineness of the photocopy was not admitted by it.'

19. It is not disputed that neither the certified copy nor a true copy indicating an endorsement that it was compared with the original has been brought on record. Thus, in my considered view, the document does not meet the requirement of Section 63 of the Act.

20. At this juncture I may dilate on another facet of argument which was canvassed by Mr. R.K. Verma, learned Counsel that he has filed certain documents indicating that Late Shri Virendra Kumar had admitted about the execution of this document in some other proceeding. Be that as it may, the evidenciary value of that cannot be gone into in this civil revision. What will be the impact of such a deposition that has to be tested during trial. As far as present revision is concerned it is confined to allowing of the application of the plaintiff granting her permission to adduce secondary evidence to prove the document dated 26-8-41. In view of discussion above, I am of the considered opinion, grant of leave of Court to adduce secondary evidence in respect of such a document is absolutely pregnable and does not deserve the stamp of approval of this Court,

21. Consequently, the civil revision is allowed and the impugned order is set aside without any order as to costs.