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Laiqan Begam Vs. Abdul Hamid

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Court : Delhi

Decided On : Jul-12-1979

Reported in : 1979RLR545

Judge : S.S. Chadha, J.

Acts : Evidence Act, 1872 - Sections 65

Appeal No. : Civil Revision Appeal Nos. 90 and 240 of 1978

Appellant : Laiqan Begam

Respondent : Abdul Hamid

Advocate for Pet/Ap. : D.S. Marwah and; Mohd. Mian, Advs

Judgement :

S.S. Chadha,J.

(1) This revision petition under Section 115 of the Code of Civil Procedure has arisen out of the order dated 18th January, 1978 passed by Mrs. Aruna Suresh, Sub-Judge 1st Class Delhi declining an application of the petitioners under Section 65 of the Indian Evidence Act, 1872 for permission to lead secondary evidence.

(2) The petitioners herein and respondents 2 to 6 herein filed a suit against Shri Abdul Wahid, respondent No.1 herein for the recovery of possession of plot of land

on the ground that they are the owner's/landlords of the property. The petitioners herein claimed as the heirs of Haji Mohd. Ahmed and respondents 2 to 6 claimed to be the heirs of Mohd. Isaq. It was alleged that the property in dispute was purchased in the name of Haji Mohd. Ahmed and Mohd. Isaq on 8th November, 1943. During the pendency of the suit, a question arose about the ownership of the property in dispute though the contention of respondents 2 to 6 was that the issue of ownership was not required as the plaintiffs being landlords could file the suit for possession for the vacant land. However, the petitioners herein moved an application under Section 65 of the Indian Evidence Act, 1872 for leave to lead secondary evidence of the sale-deed of the property in dispute which was registered on 8th November, 1943 in favor of Haji Mohd. Ahmed and Mohd. Isaq. The trial Court by its order dated 21st May, 1977 dismissed the application on the ground that there is no specific contention of the plaintiffs that the original sale-deed had been lost and the same is not traceable.

(3) The petitioners herein then moved a separate application on 3rd October, 1977 under Section 65 read with Section 90 of the Indian Evidence Act, 1872. The application was accompanied by an affidavit dated 3rd October, 1977 by Shri Mohd. Usman, son of Shri Haji Mohd. Ahmed, one of the plaintiffs. It is deposed ;-

'THATthe sale-deed of the property in dispute was registered on 8-11-1943 in favor of Mohd. Ahmad and Mohd. Isaq son of Mohd. Hussain. The said document is 30 years old. The original document/sale-deed has been lost being an old document was placed some where and is not traceable inspire of the best efforts made by the plaintiffs. The said sale deed was in the possession of Mohd. Isaq and it is not traceable and its lost. Document was in possession of Mohd. Isaq, during his life time, who had two wives at the time of his death. and one of his wife died in 1973. And after enquiries having been made from both the widows of the said Mohd. Isaq, the original sale deed was not treaceable, and it appears that it had been lost by the widows of the said deceased'.

(4) The trial Court by the impugned order dated 18th January, 1978 dismissed the application of the petitioners herein on two grounds, namely, that the earlier application of the petitioners was dismissed by the Court and secondly that the

allegations of the plaintiffs about the loss of the document are vague and may be the said sale-deed is traceable if proper search is made.

(5) It is the case of the petitioners that the sale-deed of the property in dispute was registered on 8th November, 1943 in favor of Mohd. Ahmad and Mohd. Isaq, son of Mohd. Hussain. An averment has been made that the original document was in possession of Mohd. Isaq during his life time who had two wives at the time of his death and one of his wives died in 1973. The affidavit goes on to say that after enquiry having been made from both the widows of Mohd. Isaq, the original sale-deed was not traceable and it appears that it had been lost by the widows of the said deceased. A search for the document was made from the person in whose custody the original sale-deed could be expected after the death of Mohd. Isaq. Section 65(e) of the Indian Evidence Act, 1872, provides that secondary evidence may be given of the existence, condition, or contents of a document when the original has been destroyed or lost. An affidavit has been filed solemnly affirming that the original sale-deed has been lost by the widows of the deceased. The contesting respondent could have been given opportunity to cross-examine the deponent and elicit any further information if it was so required. In N. Ibtisham Ali v Jamna Prashad, A.I.R. 1922 P.C. 56, it was held that the evidence of a witness who deposes to the loss of a deed which should be in his custody, is sufficient to allow secondary evidence. Mst Noorjahan Begum, widow of Mohd. Isaq is respondent No. 4 before me. Her counsel has stated at the Bar that the original sale-deed is not traceable with Mst. Noorjahan Begum. Counsel for respondents 4 to 6 has no objection to the grant of the relief claimed in the revision petition. The learned Subordinate judge has acted against the material on record contained in the affidavit dated 3rd October, 1977 while observing that the petitioners herein do not know as to who is in actual possession of the original sale deed alleged to have been executed in favor of Mohd. Ahmed and Mohd. Isaq. If the sale-deed is not traceable inspire of best efforts made by the petitioners, then the petitioners cannot reasonably know as to who is in actual possession. Either the sale-deed is not traceable or is lost and in both eventualities. Section 65 of of the said Act enables the inception of the secondary evidence. The impugned order suffers from the clear irregularity and illegality in exercise of the jurisdiction by the trial Court resulting into manifest injustice to the petitioners.

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