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RAKESH MOHINDRA

v.

ANITA BERI AND OTHERS

(Civil Appeal No. 13361 of 2015)

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NOVEMBER 06, 2015

[M. Y. EQBAL AND C. NAGAPPAN, JJ.]

C *Evidence Act, 1872 – ss. 63, 65 – Leading of secondary evidence – Admissibility of documents – On facts, order passed by the trial court allowing appellant to lead secondary evidence of the contents of the documents – Said order set aside by High Court – Sustainability of – Held: Not sustainable – All efforts were taken for purpose of leading*
D *secondary evidence – Trial court noticed that the photocopy of the document came from the custody of DEO and the witness, who brought the record, was examined as witness – There was compliance of the provisions of s. 65 – Merely because the signatures in some of the documents were not*
E *legible and visible that cannot be a ground to reject the secondary evidence – Thus, the order passed by the High Court set aside.*

Allowing the appeal, the Court

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HELD: 1.1 The pre-conditions for leading secondary evidence are that such original documents could not be produced by the party relied 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,

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secondary evidence in respect of that document cannot A
accepted. 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. Mere admission of secondary B
evidence, does not amount to its proof. The genuineness,
correctness and existence of the document shall have
to be established during the trial and the trial court shall
record the reasons before relying on those secondary
evidences. [Paras 17, 22, 26] [1167-C-E; 1170-D; 1171-G] C

1.2 All efforts have been taken for the purpose of
leading secondary evidence. The trial court noticed that
the photocopy of the document came from the custody
of DEO Ambala and the witness, who brought the record, D
was examined as witness. In that view of the matter, there
is compliance of the provisions of Section 65 of the
Evidence Act. Merely because the signatures in some of
the documents were not legible and visible that cannot
be a ground to reject the secondary evidence. The trial E
court correctly appreciated the efforts taken by the
appellant for the purpose of leading secondary evidence.
The impugned order passed by the High Court cannot
be sustained in law and is set aside. [Paras 24, 25] [1171-
C-F] F

J. Yashoda vs. Smt. K. Shobha Rani AIR 2007
SC 1721 : 2007 (5) SCR 367; *H. Siddiqui (dead)*
by LRs. v. A. Ramalingam AIR 2011 SC 1492 :
2011 (5) SCR 587; *Rai Baijnath (Dead) by*
Kedarnath Goenka v. Maharaja Sir pavaneshwar
Prasad Singh AIR 1922 Privy Council 54;
M. Chandra v. M. Thangamuthu (2010) 9 SCC
712 : 2010 (11) SCR 38 – referred to.

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Case Law Reference

[2007] 5 SCR 367 referred to Para 19

[2011] 5 SCR 587 referred to Para 19

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AIR 1922 Privy Council referred to Para 21

[2010] 11 SCR 38 referred to Para 23

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 13361 of 2015.

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From the Judgment and Order dated 02.09.2014 of the High Court of Himachal Pradesh at Shimla in CMPMO No. 165 of 2014.

K. V. Vishwanathan, Sr. Adv., Ms. Radhika Gautam, (For E. C. Agrawala), Advs., for the Appellant.

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Vipin Gogia, Ms. Jaspreet Gogia, Rakesh Gupta, Advs., for the Respondent.

The Judgment of the Court was delivered by

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M. Y. EQBAL, J. 1. Leave granted.

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2. This appeal by special leave is directed against order dated 2.9.2014 passed by learned Single Judge of the High Court of Himachal Pradesh who set aside the order rendered by the trial court permitting the defendant-appellant to lead secondary evidence in the Civil Suit filed by respondent no. 1.

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3. The short question that arises for consideration by this Court is as to whether the High Court is justified in reversing the order passed by the Trial Court allowing the defendant-appellant to lead secondary evidence of the contents of the documents.

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4. The facts of the case lie in a narrow compass.

5. The respondents-plaintiffs have filed a suit under Sections 34 and 38 of the Specific Relief Act, 1963 for

declaration that the appellant-defendant has no right, title or interest over the suit property in any manner and plaintiffs are in possession of the same. Consequently, defendant be restrained from causing any type of loss, injury and doing any such act which may in any manner, cause prejudice to the user, possession and title of the plaintiff qua the suit property.

6. The subject matter of the suit is part of the land defined as Survey No. 41, Kasauli Cantt. Tehsil Kasauli and structures/buildings more specifically known as "Dharma Prakash, Homestead". One late Sh. Duni Chand Advocate was owner in possession of land comprised in Survey No. 41, measuring 2.31 acres described as "Kildare Estate" Homestead Dharma Prakash. Late Sh. Duni Chand, during his life time executed a gift deed with regard to the property owned by him which was registered as deed No. 2 with Sub Registrar, Kasauli. He gifted his properties to his son Justice late Sh. Tek Chand. Justice late Sh. Tek Chand became owner-in-possession of the suit property. Justice late Sh. Tek Chand expired on 16.6.1996 leaving behind two daughters Smt. Anila Sood and Smt. Anita Beri and one son Sh. Vikram Dhanda. Justice late Sh. Tek Chand during his life time executed a legal and valid 'will' in favour of plaintiff No. 2, Smt. Anita Beri, which was duly registered with Sub Registrar Chandigarh, as deed No. 410 dated 19.6.1984. The mother of defendant was step sister of Justice late Sh. Tek Chand. He was using portion of house known as 'Homestead' with the permission of plaintiff No. 2, namely, Smt. Anita Beri. She came to know that defendant was misusing the license and raised some illegal construction in the shape of platform, so as to use the same for the purpose of car parking.

7. According to the plaintiff, defendant has no right, title or interest over the suit property and as such could not change the nature of the same. A legal notice was issued on 5.11.2006.

- A Reply was sent by the defendant to the same. The defendant has also started causing obstruction to the path which leads from circular road to 'Homestead cottage' and 'Homestead building'. Plaintiff No. 2 has requested the defendant not to lock the gate. However, the lock on the gate has been put to
- B cause temporary obstruction, hindrance and prejudice to the user of the suit property by plaintiff No. 2.

8. On the other hand, the defendant-appellant's case is that they have inherited the property from Smt. Vijaya Kumari who became the owner of the suit property on the basis of the gift deed dated 19.03.1965. Appellant's further case is that Justice Tek Chand had issued a letter of disclaimer dated 24.08.1982. According to the appellant, the said letter of disclaimer was handed over by Justice Tek Chand to his sister

C Smt. Vijaya Kumari who in turn handed over to the appellant. On the basis of letter of disclaimer, the appellant vide letter dated 21.07.2001 requested the authority, namely, Defence Estate Officer (DEO), Ambala Cantt for effecting mutation of the property in his name.

E 9. On these backgrounds, the defendant filed an application in the Trial Court under Section 65 of the Evidence Act seeking permission to prove the letter of disclaimer executed by Justice Tek Chand by way of secondary evidence.

F For that purpose, the defendant summoned the record of GLR from the office of DEO, Ambala who is said to be the custodian of the record. According to the appellant, at the time of sanction of mutation with respect to the suit property, the appellant had filed the original affidavits of the co-sharers along with the letter

G of disclaimer executed by Justice Tek Chand with one Photostat set lying in the office of DEO, Ambala.

10. For the purpose of deciding the application under Section 65. of the Evidence Act, the appellant examined the

H concerned official to produce the record available in the said

office. On the basis of the evidence given by the witness, who produced the record and the evidence of defendant, the Trial Court allowed the application and admitted the letter of disclaimer to be used as secondary evidence.

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11. As averred in the application, the defendant has summoned the record of General Land Register from the Office of D.E.O. Ambala, who is the custodian of the record. It is defendant's case that at the time of sanction of the mutation with regard to the suit property he had filed the original affidavits of the co-sharers including affidavits and original letter of disclaimer of late Justice Sh. Tek Chand with one Photostat set of the same in the office of D.E.O. Ambala. On the basis of the original letter of disclaimer and affidavits, mutation of the suit property was sanctioned in favour of the deponent. The concerned official produced the original record in the Court on 4.7.2013 except the letter of disclaimer executed by late Justice Sh. Tek Chand on 24.8.1982, in favour of Sh. Harish Chandra Dhandra and Smt. Vijaya Kumari, the mother of the applicant. The original disclaimer letter is supposed to be in the said office but the concerned official made statement on oath in the Court that the original is not in their office and their office has Photostat copy of the original, and therefore, he produced the Photostat copy of the letter. According to the defendant, despite his efforts, the original of DW-2/B was not traceable and has been misplaced/lost from the Office of D.E.O. Ambala. In reply to the application, it was denied that the letter of disclaimer ever existed or Photostat of the same was ever made. It has been pleaded that late Justice Sh. Tek Chand never executed disclaimer letter and the Photostat copy was a forged one.

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12. Allowing the application of the defendant and granting leave of the court to lead secondary evidence qua document Ext.DW-2/B, trial court observed that:

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A “The photocopy Ext.DW-2/B has come from the custody
of DEO Ambala and the applicant has been able to
comply with the provision of Section 65 of the Indian
Evidence Act as it has come in evidence that the original
document i.e. letter of disclaimer Ext.DW-2/B was
B handed over by the applicant to DEO Ambala. In view
of the aforesaid this court is satisfied that the original
document stands misplaced and the applicant is allowed
to lead secondary evidence with respect to the
document Ext.DW-2/B as envisaged under Section
C 65(c) of the Indian Evidence Act and both these issues
are decided in favour of the applicants and against the
respondents.”

D 13. Learned Single Judge of the High Court in the civil
revision preferred by the plaintiff-respondent no.1 set aside
the aforesaid order of the trial court.

14. Hence, this appeal by special leave by the
defendant.

E 15. As a general rule, documents are proved by leading
primary evidence. Section 64 of the Evidence Act provides
that documents must be proved by the primary evidence except
in cases mention in Section 65 of the Evidence Act. In the
F absence of primary evidence, documents can be proved by
secondary evidence as contemplated under Section 63 of the
Act which reads as under: -

“Secondary evidence means and includes—

G 1. certified copies given under the provisions hereinafter
contained;

H 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 ; A

4. counterparts of documents as against the parties who did not execute them;

5. oral accounts of the contents of a documents given by some person who has himself seen it. B

Illustration:

(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. C

(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. D

(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. E

(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." F

3. Section 65 of the Act deals with the circumstances under which secondary evidence relating to documents may be given to prove the existence, condition or contents of the documents. For better appreciation Section 65 of the Act is quoted herein below:- G

"65. Cases in which secondary evidence relating to documents may be given:

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- A 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—
- B 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
- C 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;
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- (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;
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- (d) when the original is of such a nature as not to be easily movable;
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- (e) when the original is 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 ⁴⁰[India] to be given in evidence ;
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- (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.
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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, admissible. A

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.” B

17. The pre-conditions for leading secondary evidence are that such original documents could not be produced by the party relied 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. C
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18. The High Court in the impugned order noted the following: -

“9. There is no averment about Ext. DW-2/B in the Written Statement. The Written Statement was filed on 19.2.2007. DW- 2/B infact is only a photocopy. The plaintiffs are claiming the property on the basis of a registered will deed executed in her favour in the year 1984. It was necessary for the defendant to prove that in what manner the document dated 24.8.1982 was executed. The defendant while appearing as AW-1 has admitted in his cross-examination that except in his affidavit Ext. AW-1/A, he has not mentioned in any document that the letter of disclaimer was executed by F
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A Justice late Sh. Tek Chand in his presence. The
statement of DW-2 does not prove that Ext. DW-2/A,
ever existed. DW-2 Sh. Gurcharan Singh, has
B categorically admitted in his cross-examination that he
has not brought the original of Ext. DW- 2/B. He has
also admitted that on Ext. DW-2/B, the signatures of
P.C. Danda were not legible. Volunteered that, those
C were not visible. The learned trial Court has completely
misread the oral as well as the documentary evidence,
while allowing the application under Section 65 of the
Indian Evidence Act, 1872, more particularly, the
statements of DW-2 Gurcharan Singh and DW-3
D Deepak Narang. The applicant has miserably failed to
comply with the provisions of Section 65 of the Indian
Evidence Act, 1872. The learned trial Court has erred
by coming to the conclusion that the applicant has taken
sufficient steps to produce document Ext. DW-2/B.”

19. The High Court, following the ratio decided by this
Court in the case of **J. Yashoda vs. Smt. K. Shobha Rani**,
E AIR 2007 SC 1721 and **H. Siddiqui (dead) by Irs. vs. A.**
Ramalingam, AIR 2011 SC 1492, came to the conclusion that
the defendant failed to prove the existence and execution of
the original documents and also failed to prove that he has
ever handed over the original of the disclaimer letter dated
F 20. 8.1982 to the authorities. Hence, the High Court is of the
view that no case is made out for adducing the secondary
evidence.

20. The witness DW-2, who is working as UDC in the
G office of DEO, Ambala produced the original GLR register.
He has produced four sheets of paper including a photo copy
of letter of disclaimer. He has stated that the original documents
remained in the custody of DEO. In cross-examination, his
deposition is reproduced hereinbelow:-
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"xxxxxxx by Sh. M.S. Chandel, Advocate for the plaintiff A
No.2.

I have not brought the complete file along with the record.
I have only brought those documents which were
summoned after taking up the documents from the file. B
As on today, as per the GLR, Ex.DW-2/A, the name of
Rakesh Mohindra is not there. His name was deleted
vide order dated 29.8.2011. I have not brought the
original of Ex.DW-2/B. It is correct that Ex.DW-2/D does C
not bear the signatures of Sh. P.C. Dhanda.
Volunteered.: These are not legible. Ex.DW- 2/C is
signed but the signatures are not leible. On the said
document the signatures of the attesting officer are not D
legible because the document became wet. I cannot
say whose signatures are there on these documents.
On Ex.DW-2/E the signatures at the place deponent E
also appears to have become illegible because of
water. Ex.DW-2/F also bears the faded signatures and
only Tek Chand is legible on the last page. It is incorrect
to suggest that the last page does not have the F
signatures of the attesting authority. Volunteered: These
are faded, but not legible. The stamp on the last paper
is also not legible. There is no stamp on the first and
second page. In our account, there is no family G
settlement, but only acknowledgement of family
settlement. I do not know how many brothers Rakesh
Mohindra has. It is correct that the original of Ex.DW-2/
H does not bear the signatures of Sh. Abhay Kumar. I
do not know whether Sh. Abhay Kumar Sud and Rakesh
Mohindra are real brothers. The above mentioned G
documents were neither executed nor prepared in my
presence. It is incorrect to suggest that the above
mentioned documents are forged. It is incorrect to
suggest that because of this reason I have not brought
the complete file." H

A 21. In the case of **Rai Baijnath (dead) by Kedarnath Goenka vs. Maharaja Sir pavaneshwar Prasad Singh**, AIR 1922 Privy Council page 54, a similar question came for consideration as to the admissibility of secondary evidence in case of loss of primary evidence. Lord Phillimore in the
B judgment observed: -

 “ It is, no doubt, not very likely that such a deed would be lost, but in ordinary cases, if the witness in whose custody the deed should be, deposed to its loss, unless
C there is some motive suggested for his being untruthful, his evidence would be accepted as sufficient to let in secondary evidence of the deed.”

 22. It is well settled that if a party wishes to lead secondary evidence, the Court is obliged to examine the probative value
D 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
E 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.

F 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
G 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
H 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.”

24. After considering the entire facts of the case and the evidence adduced by the appellant for the purpose of admission of the secondary evidence, we are of the view that all efforts have been taken for the purpose of leading secondary evidence. The trial court has noticed that the photocopy of the Exhibit DW-2/B came from the custody of DEO Ambala and the witness, who brought the record, has been examined as witness. In that view of the matter, there is compliance of the provisions of Section 65 of the Evidence Act. Merely because the signatures in some of the documents were not legible and visible that cannot be a ground to reject the secondary evidence. In our view, the trial court correctly appreciated the efforts taken by the appellant for the purpose of leading secondary evidence.

25. For the reasons aforesaid, the impugned order passed by the High Court cannot be sustained in law. The appeal is accordingly allowed and the order passed by the High Court is set aside.

26. However, we make it clear that mere admission of secondary evidence, does not amount to its proof. The genuineness, correctness and existence of the document shall have to be established during the trial and the trial court shall record the reasons before relying on those secondary evidences.