Indore, dated : 20.03.2020

Shri Jitendra Verma, learned counsel for the petitioners/defendants No.1 to 3.

Shri Sanjay Sharma, learned counsel for the respondents/plaintiffs.

With consent of learned counsel for the parties, heard finally.

O R D E R

The petitioners/defendants No.1 to 3 have filed the present petition being aggrieved by order dated 28.2.2020 whereby the application filed u/s. 63 and 65 of the Indian Evidence Act by the respondents/plaintiffs has been allowed.

2. Respondents/plaintiffs have filed the suit for declaration, permanent injunction and cancellation of 'Hiba' in respect of land bearing Survey Nos. 56+64/2, 57, 58/2 and 60/1 of Village Sutarkhedi, Tehsil Mhow, District Indore (hereinafter referred to as “the suit property”). The suit property was initially owned by Ismail and the plaintiffs are claiming their right and title over the suit property by virtue of succession. The suit property has been mutated in the name of defendants by virtue of oral 'Hibanama', which gave the cause of action to the plaintiffs for filing the suit challenging the 'Hibanama'.

3. The plaintiffs filed the suit on 15.2.2018. After receipt of the summons, the defendants appeared and filed the written statement on 11.7.2018. Thereafter, the trial Court framed the issues on 18.7.2018. The plaintiffs have concluded

their evidence and at present, evidence of defendants are going on. Along with the written statement, the defendants have filed the original affidavit of Ismail executed in respect of 'Hibanama' and also filed photocopy of another affidavit of Ismail bearing Notary No.133/2007 dated 19.6.2007. The original affidavit was marked as Ex. D/6 and at the time of marking the photocopy of the affidavit in evidence at the instance of plaintiffs, the defendants came up with the plea that by mistake, the said affidavit has been filed and the same is not related with the subject matter of the suit, hence same be ignored. The plaintiffs, after getting the photocopy of the affidavit of Ismail along with the written statement by defendants, immediately filed the application under Order 7 Rule 12 of C.P.C. seeking production of the original of the said affidavit by the defendants. The defendants filed an affidavit on 26.2.2020 that the original document is not in their possession. Thereafter, the plaintiffs filed another application u/s. 63 & 65 of the Indian Evidence Act seeking permission to prove the affidavit of Ismail as secondary evidence which was opposed by the defendants on the ground that the property mentioned in the said affidavit are different and not related to the suit property. Learned trial Court vide order dated 28.2.2020 has allowed the application by placing the reliance over the judgment of apex Court in the case of **J. Yashoda V/s. K. Shobharani : (2007) 5 SCC 730**, hence the present petition before this Court.

4. Shri Jitendra Verma, learned counsel appearing for the petitioners/defendants, submits that the learned trial Court has failed to examine the provisions of Section 63 of the Indian Evidence Act. The photocopy of the document is neither primary nor secondary evidence. U/s. 63 of the Indian Evidence Act, before seeking permission to tender the document as secondary evidence, the parties must satisfy the conditions mentioned sub-sections (1) to (5) of Section 63. In the entire application, pleadings in regard to the preparation of second copy from the original by mechanical process and this is the accurate copy and compared with the original are missing, therefore, in absence of such pleading, the trial Court has wrongly allowed the application. In support of his contention, he has placed reliance over the judgment of this Court in the case of **Rashid Khan V/s. State of M.P. : 2011 (3) MPLJ 575**; **Sangita Malviya V/s. Santosh Malviya : 2017 (3) MPLJ 108**; and judgment of apex Court in the case of **Benga Behera V/s. Braja Kishore Nanda : (2007) 9 SCC 728**.

5. On the other hand, Shri Sanjay Sharma, learned counsel appearing for respondents/plaintiffs, submits that before allowing the application, learned trial Court has obtained the affidavit from the defendants that they are not in possession of original copy of the affidavit of Ismail. The photocopy of the affidavit of Ismail was filed by the defendants along with the written statement and when they have failed to produce the original of the same, the trial Court has not committed any error

while allowing the application filed u/s. 63 & 65 of the Indian Evidence Act and the interference by this Court under Article 227 of the Constitution of India is not permissible.

6. In this case, the plaintiffs filed an application u/s. 63 & 65 of Indian Evidence seeking permission to tender photocopy of the affidavit of Ismail as secondary evidence. The photocopy of the said affidavit was filed by the defendants along with written statement. The plaintiffs after receipt of copy of the same immediately filed an application seeking production of original copy of the document from the defendants. The defendants have denied possession of the original document. The plaintiffs filed another application u/s. 63 & 65 of the Indian Evidence Act seeking permission to prove the document as a secondary evidence. Learned trial Court has allowed the application because the original of the document has not been produced by the petitioners. The affidavit of Ismail came from the defendants' side, therefore, it was for them to explain as to from where the photocopy of the same came in their possession. The defendants are opposing the application only on the ground that the said affidavit is in respect of property other than the suit property. This issue can be decided on the basis of evidence as to whether the affidavit is relevant or not. At this stage, the trial Court has only granted permission to tender the photocopy of the affidavit as secondary evidence which was filed by the defendants themselves. Therefore, in the opinion of this Court, the learned trial Court has not committed any error while allowing the

application especially when before allowing the application, defendants filed the affidavit that the original affidavit is not in their possession and photocopy of the document was filed by themselves.

7. The Apex Court in the case of **Narbada Devi Gupta v/s Birendra Kumar Jaiswal : (2003) 8 SCC 745** has held that mere production and marking of a document as exhibit by the Court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence. In the case of **Life Insurance Corporation of India v/s Ram Pal Singh Bisen : (2010) 4 SCC 491**, the Apex Court has again held that mere making of exhibit on a document does not dispense with its proof, which is required to be done in accordance with law. The aforesaid view further been followed by the Apex Court in the case of **Rakesh Mohindra v/s Anita Beri : (2016) 16 SCC 483**. The Apex Court in this case has further held 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. The party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. Para 22, 23, 24, 24 and 26 of the judgment are reproduced below :-

> "22. 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* v/s *M. Thangamuthu* (2010) 9 SCC 712, this Court considered the requirement **o**f 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."

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."

8. In view of the foregoing discussion, I do not find any ground to interfere with the impugned order. Accordingly, the petition fails and is hereby dismissed.

(VIVEK RUSIA)
JUDGE

Alok/-

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