

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

**BEFORE
HON'BLE SHRI JUSTICE SUBODH ABHYANKAR**

ON THE 6th OF SEPTEMBER, 2023

MISC. PETITION No. 1971 of 2022

BETWEEN:-

**NARENDRA KUMAR S/O DEEPCHAND
KUMRAWAT, AGED ABOUT 45 YEARS,
OCCUPATION: PAN KI GUMTI R/O 27
ARYA SAMAJ MARG (MADHYA
PRADESH)**

.....PETITIONER

(BY SHRI ABHILASH VYAS - ADVOCATE FOR THE PETITIONER)

AND

- 1. DEEPCHAND S/O TUKARAM, AGED
ABOUT 75 YEARS, OCCUPATION:
BUSINESS R/O 27 BRAHMIN GALI
ARYA SAMAJ MARG (MADHYA
PRADESH)**
- 2. DHARMENDRA S/O DEEPCHAND
KUMRAWAT, AGED ABOUT 34
YEARS, OCCUPATION: VYAPAR
KUMRAWAT PAN BHANDAR
VIHAR LODGE DUKAN NO. 17
DEWAS GATE THANE KE SAMNE
UJJAIN (MADHYA PRADESH)**
- 3. MAMTA S/O DEEPCHAND JI
KUMRAWAT, AGED ABOUT 47
YEARS, OCCUPATION: MAJDURI
27, ARYA SAMAJ MARG UJJAIN
(MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI AJAY JAIN GIRIYA - ADVOCATE FOR RESPONDENT NO.2)

This petition coming on for order this day, the court passed the following:

ORDER

This petition has been filed under Article 227 of the Constitution of India by the petitioner/plaintiff against the order dated 12.04.2022, passed in Case No. 51-A/2020 by the Fifth Civil Judge, Senior Division, District Ujjain, whereby the application filed by the respondents/defendants under Section 65 of the Evidence Act, 1872 (hereinafter referred to as '*the Evidence Act*') has been allowed (Annexure-P-1).

2. Brief facts of the case are that the petitioner has filed a suit for declaration, injunction, and partition against the respondents/defendants. According to the plaint, the disputed property belonged to one Sumitrabai, who happens to be the mother of the plaintiff, wife of defendant No.1, and mother of defendants No. 2 and 3. Plaintiff's contention is that the property is purchased by Sumitrabai from her joint family's income. The suit is at the stage of recording evidence, and defendants' evidence is being recorded. In contrast to the plaintiff's case, in their written statement, the defendants' contention is that late Sumitrabai left behind a Will dated 25.08.2012, on the basis of which they are claiming their rights. Thus, to bring the original Will on which the reliance has been placed by the defendants, an application under Order 11 Rule 14 of C.PC was filed by the plaintiff, seeking a direction to the defendants to produce the original Will dated 25.08.2012. The aforesaid application was allowed by the trial court vide order dated 17.08.2015, and the defendants were directed to produce the original Will. However, on 08.10.2015, an affidavit was filed by the defendants, stating that the aforesaid Will is lost somewhere, and

they have also made a complaint at the Police station, Dewas, a copy of which was also filed along with the affidavit.

3. During the course of hearing of this affidavit, counsel for the defendants also submitted before the trial Court that since the photo copy of the Will is already on record, the same may be considered as secondary evidence of the original Will, and the Court, vide its order dated 08.10.2015 has also accepted the aforesaid submission to accept the aforesaid Will as secondary evidence.

4. Subsequently, the plaintiff filed an application under Section 151 of the CPC on 03.11.2015, for recall of the aforesaid order dated 08.10.2015, on the ground that defendants have not even filed a formal application for treating the aforesaid Will as secondary evidence, which according to the plaintiff was a forged document, thus, it was prayed that the order dated 08.10.2015 be recalled,. The aforesaid application was decided by the learned Judge of the trial Court vide order dated 11.04.2016, holding that the Will can be used as a secondary evidence by the plaintiff, but it cannot be used as a secondary evidence by the defendants in the light of Section 65(a) of the Evidence Act, and the application was rejected. However, on an application filed on behalf of the defendants under Section 65 of the Evidence Act, stating that since the original Will has already been lost, and the defendants have also lodged a complaint in the concerned Police station, they may be allowed to produce the photocopy of the aforesaid Will in secondary evidence under Section 65 (c) of the Evidence Act. The aforesaid application was opposed by the plaintiff contending that the photocopy of the Will cannot be accepted as a secondary evidence, but rejecting such contention, the learned judge of the trial court has allowed the application filed by the defendants by the impugned order dated 12.04.2022. Being aggrieved of the same, this petition has been filed by the petitioner/plaintiff.

5. Counsel for the petitioner has submitted that the impugned order is liable to be set aside as the learned Judge of the trial Court has erred in holding that the photo copy of the Will can be produced as secondary evidence merely on the ground that the defendant has complied with the provision of Section 65 (c) of the Evidence Act as they have stated that the original Will has been lost, and complaint regarding which is also filed with the concerned Police station. It is further submitted that the Court has also erred in holding that whether the Will is forged or not, can only be decided after the evidence in this regard is led by the parties. Counsel has submitted that prior to allowing the application u/s.65, the Court ought to have seen if the provisions of Section 63 of the Evidence Act are also complied with, which provide that photo state document should be compared with the original, and that they are procured through mechanical process from the original document. In support of the aforesaid submissions counsel for the petitioner has relied upon the judgment delivered by this Court in the case of **Sangita Malviya Vs. Santosh Malviya** reported in **2017(3) MPLJ 108**. Relevant paragraph No.10 is reproduced as under:-

“10. Learned Civil Judge has come to the conclusion that photocopy is neither a primary evidence nor secondary because the party is required to prove when and where the photocopy was taken and it is the same and exact copy of the original, therefore, in view of the above law trial Court has not committed any error while rejecting the application under Section 65 of the Evidence Act.”

6. Learned counsel for the petitioner has further relied upon the judgment passed by this Court in the case of **Gwalior Development Authority Vs. Dushyant Sharma and others** reported in **2013 (3) MPLJ 172**.

7. Prayer is vehemently opposed by the learned counsel for the respondents/defendants and it is submitted that no case for interference is made out as learned trial Court has rightly held that the document (duplicate) can be taken on record and the veracity of the same can be decided only after the evidence in this regard is led by the parties. Counsel has also submitted that the defendants have discharged their primary duty of complying with the provisions of Section 65 of the Evidence Act, and when the Court has already directed that the aforesaid document can be considered as secondary evidence by the plaintiff, then there was no reason to deny the same treatment to the defendants. Counsel for the respondent has relied upon the judgment delivered by the Supreme Court in the matter of **Rakesh Mohindra Vs. Anita Beri and others** reported as **(2016) 16 SCC 483**, wherein it is stated that genuineness, correctness, and existence of document shall have to be established during trial and, therefore, it is submitted that the petition is liable to be dismissed.

8. Heard, counsel for the parties and perused the record. So far as the admissibility of a photocopy as a secondary evidence is concerned, reference may be had to the decision rendered by the co-ordinate bench of this court in the case of **Dushyant Sharma (supra)**, the Relevant paragraphs 6, 7, 15 and 16 read as under :-

(6) Before dealing with the rival contentions of the parties, it is apt to quote the relevant provisions of the Indian Evidence Act, 1872.

Section 63(2) reads as under:

“63. Secondary evidence.— Secondary evidence means and includes—

(1) xxx xxx xxx

(2) Copies made from the original by mechanical process which in themselves insure the accuracy of the copy, and copies compared with such copies.”

Section 63(a) and (b) (Illustrations) reads as under:

(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”

Section 65(c) reads as under:

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) | XXX | XXX | XXX |
| (b) | XXX | XXX | XXX |

(7) The arguments of learned counsel for the parties are based on these provisions. Section 63(2) aforesaid makes it obligatory that the copies which are made from the original by mechanical process are required to be compared with such copies. Thus, there is no manner of doubt that two conditions are required to be fulfilled for applying Section 63(2) viz, (i) the copies are made from the original by mechanical process (ii) copies are compared with original copies.

Section 63(Illustration)(a) has no application, in my opinion, in the present matter because the said illustration deals with photographs. Illustration (b) talks about comparing a letter with the original. Thus, a conjoint reading of Section 63(2) with Section 63(Illustration)(c) makes it clear that aforesaid two conditions are necessary to bring a document within the ambit of “secondary evidence”.

Section 65(c) is an enabling provision where the original document is lost or destroyed and it is shown that the said event of loss or destroy of the document is not arising out of any default or neglect of the party concerned, the document can be taken as secondary evidence.

(15) On the basis of aforesaid analysis, in my opinion, the court below has not committed any error of law in rejecting the application of the petitioner. The necessary ingredients for treating the documents in question as secondary evidence were not available and application preferred under Section 65 of Evidence Act does not contain necessary averments and declaration on the strength of which the documents could have been treated as secondary evidence.

(16) The last submission of Shri Raghvendra Dixit, learned counsel for the petitioner is based on the definition of “proved” is of no help to him at this stage. The question of treating a document or giving a finding about “proved” would arise provided the documents in question are taken into the evidence. At this stage, this argument is premature.

(Emphasis supplied)

9. On perusal of the aforesaid decision clearly reveals that when it comes to copying the original documents, the copies must be made by original from mechanical process, and copies are compared with original

and cases in which secondary evidence relating to documents must be given which also reveals that original has been destroyed or lost or cannot be produced in the reasonable time. Thus, before a document can be produced in the Court, first of all it is required to be shown that the copies are made from mechanical process, and also that they are compared with the original. Thus, this requirement is *sine qua non* for a document to be produced in secondary evidence, and merely pleading that the original document is lost would not suffice.

10. So far as the decision rendered by the Hon'ble apex Court in the case of **Rakesh Mohindra (supra) is concerned, on which** the respondent has relied upon, in that case the petitioner was able to comply with the provisions of Section 65, i.e., the original documents stands misplaced, and in the photo copy of the document was also produced from the custody of D.E.O., Ambala, and the apex Court has held that it is the compliance of Section 65 of the Evidence Act, whereas in the present case the photo copy of the will has been produced from the possession of the defendant itself who is a private person. Thus, this decision is of no avail to the defendants.

11. In the present case, admittedly, the document (Will), has been lost, however, the defendants have not satisfied the condition as enumerated under Section 63 of the Act as aforesaid. In such circumstances, this Court does not find any force as advanced by the learned counsel for the respondent.. Otherwise, every such document which is in the form of a photocopy, shall be produced on record in the name of secondary evidence, and the parties would be required to lead evidence in this regard, and such document can only to be discarded after the evidence is led by the parities in trial that the conditions enumerated under Section 63 are not fulfilled, which, in the considered opinion of this court is not the object of s.63 of the Evidence Act..

12. In such circumstances, by no stretch of imagination, the photo copy of the Will cannot be allowed to be admitted, and the impugned order being contrary to law, is liable to be and is hereby set aside. Learned Judge is requested to proceed with the trial, in accordance with law, without taking the Will on record.

No order as to costs.

(SUBODH ABHYANKAR)
JUDGE

rashmi