IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
HON'BLE SHRI JUSTICE SANJAY DWIVEDI
ON THE 2nd OF NOVEMBER, 2022
Misc. Petition No.1352 of 2020

BETWEEN:-

1. TULSIRAM S/O MADARI LODHI, AGED ABOUT 52 YEARS, OCCUPATION: FARMER VILL. BANDHI, TEH. TENDUKHEDA, DISTRICT NARSINGHPUR (MADHYA PRADESH)

2. MULLA (WRONGLY MENTIONED AS MUNNA) S/O MADARI LODHI, AGED ABOUT 48 YEARS, OCCUPATION: FARMER VILLAGE BANDHI TEHSIL TENDUKHEDA DISTT.NARSINGHPUR (MADHYA PRADESH)

3. DHARAMDAS S/O MADARI LODHI, AGED ABOUT 40 YEARS, OCCUPATION: FARMER VILLAGE BANDHI TEHSIL TENDUKHEDA DISTT. NARSINGHPUR (MADHYA PRADESH)

4. TARABAI D/O MADARI LODHI W/O BHOGARAM LODHI, AGED ABOUT 45 YEARS, OCCUPATION: HOUSEWIFE R/O KHADAUN TEHSIL UDAYPURA DISTT.RAISEN (MADHYA PRADESH)

5. RAMDAS S/O DHARAMDAS LODHI, AGED ABOUT 25 YEARS, VILLAGE BANDHI TEHSIL TENDUKHEDA DISTT.NARSINGHPUR (MADHYA PRADESH)

6. PRAMOD S/O TULSIRAM LODHI, AGED ABOUT 28 YEARS, OCCUPATION: FARMER VILLAGE BANDHI TEHSIL TENDUKHEDA DISTT.NARSINGHPUR (MADHYA PRADESH)

7. KAUSHAL S/O TULSIRAM LODHI, AGED ABOUT 30 YEARS, OCCUPATION: FARMER VILLAGE BANDHI TEHSIL TENDUKHEDA DISTT.NARSINGHPUR (MADHYA PRADESH)

.....PETITIONERS

(BY SHRI NITIN KUMAR AGRAWAL, ADVOCATE)

AND

1. RAJARAM S/O MANGAL, AGED ABOUT 40 YEARS, VILL. BANDHI, TEH. TENDUKHEDA, DISTRICT NARSINGHPUR (MADHYA PRADESH)

2. KARELAL S/O MANGAL, AGED ABOUT 38 YEARS, VILLAGE BANDHI TEHSIL TENDUKHEDA DISTT. NARSINGHPUR (MADHYA PRADESH)

3. MEHERWAN S/O MANGAL, AGED ABOUT 36 YEARS, VILLAGE BANDHI TEHSIL TENDUKHEDA DISTT. NARSINGHPUR (MADHYA PRADESH)

4. LAKHAN S/O MANGAL, AGED ABOUT 34 YEARS, VILLAGE BANDHI TEHSIL TENDUKHEDA DISTT. NARSINGHPUR (MADHYA PRADESH)

5. MUKHIYA W/O LATE MANGAL, AGED ABOUT 68 YEARS, VILLAGE BANDHI TEHSIL TENDUKHEDA DISTT. NARSINGHPUR (MADHYA PRADESH)

6. SUSHILA D/O MANGAL, AGED ABOUT 32 YEARS, VILLAGE BANDHI TEHSIL TENDUKHEDA DISTT. NARSINGHPUR (MADHYA PRADESH)

7. ANNIBAI W/O MANGAL SINGH D/O MADARI LODHI, AGED ABOUT 55 YEARS, R/O MOTHEGAON TEHSIL UDAYPURA DISTRICT RAISEN (MADHYA PRADESH)

8. SADDIBAI W/O RAMLAL D/O MADARI,

AGED ABOUT 50 YEARS, R/O RICHAWAR TEHSIL GADARWARA, DISTRICT NARSINGHPUR (MADHYA PRADESH)

9. BRIJLAL S/O MANGAL, AGED ABOUT 45 YEARS, R/O VILLAGE BANDHI TEHSIL TENDUKHEDA DISTT. NARSINGHPUR (MADHYA PRADESH)

10. STATE OF MADHYA PRADESH THROUGH COLLECTOR DISTT. NARSINGHPUR (MADHYA PRADESH)

.....RESPONDENTS

(NONE – THOUGH SERVED)

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RESERVED ON : 15.09.2022.

DELIVERED ON : 02.11.2022.

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

(O R D E R)

The instant petition was listed under caption 'Held up Matters' as by way of interim order passed by this Court on 03.03.2020, the proceedings of Civil Suit giving rise to the instant petition were stayed.

2. The petitioners have filed this petition under Article 227 of the Constitution of India questioning the validity of order dated 14.02.2020 (Annexure P/1) whereby the trial Court in a pending civil suit had rejected the application filed under Section 65 of the Evidence Act, 1872.

3. As per the facts of the case, the plaintiffs (respondents herein) filed a suit for partition against the

defendants (petitioners herein). The plaintiffs and defendants are the members of same family whose original ancestor was Madari Lodhi and after his death, the ancestral property sought to be partitioned by filing a suit wherein it was claimed that the property also included the property which was purchased from the income of the joint family.

4. As per the plaintiffs, the property should be partitioned and every plaintiff is entitled to get 1/7th share of property of late Madari Lodhi who left behind four sons and three daughters. A copy of the plaint is available on record as Annexure P/4 containing the family tree of late Madari Lodhi.

5. The defendants no.1 to 4 and 6 to 8 filed their written-statement, opposing the stand taken by the plaintiffs and stated that the property had already been partitioned and a memorandum in this regard had also been prepared before the Panchas (पंच) on 22.07.1993 which was signed by the parties especially the father of plaintiffs no.1 to 5 and out of 38 acres, 10 acres of land was given to late Mangal (father of plaintiffs no.1 to 5) and remaining land came in the share of defendants no.1 to 3. The defendants no.4 and 6 to 8 in their written-statement by way of counter claim had claimed that if the suit of the plaintiffs is allowed then plaintiffs and defendants would become entitled to get 1/8th share in the property. The defendants no.4 and 6 to 8 also added some more properties claiming the same to be suit properties.

6. The petitioners/defendants in the pending suit had filed an application under Section 65 of the Evidence Act along with an application under Order 8 Rule 3 of CPC seeking permission to take photocopy of the Memorandum in evidence and also sought permission to lead secondary evidence thereof. It is mentioned that the original Memorandum was handed over by late Madari to Shri M.K. Shrivastava, Advocate engaged for filing the suit, but Shri Shrivastava unfortunately died in the year 1994-95 and late Madari also died on 08.04.1994 and as such, the said document i.e. original Panchnama dated 22.07.1993 was destroyed by the legal heirs of Shri M.K. Shrivastava, Advocate.

7. The plaintiff no.1 who has been later on transposed as defendant no.9 had filed an affidavit under Order 18 Rule 4 CPC admitting that partition between the parties had already been recorded in the form of Panchnama or Memorandum dated 22.07.1993.

8. The Court below vide impugned order dated 14.02.2020 (Annexure P/1) rejected the application holding that the Memorandum is inadmissible in evidence until and unless it is compared with the original document; hence this petition.

9. Learned counsel for the petitioners submits that the Court below did not appreciate the legal position that photocopy of a Panchnama can be used in evidence for

leading the secondary evidence as per requirement of Section 65 of the Evidence Act. He submits that since the original document was lost as destroyed, therefore, it is difficult to compare the photocopy with the original document but without considering the admission made by PW-1 (Brijlal) in his affidavit filed under Order 18 Rule 4 of CPC, rejection of the application is not proper. He further submits that Section 65 (c) of the Evidence Act clearly provides that secondary evidence of the contents of the documents are admissible 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. He submits that while rejecting the application, the Court below did not appreciate the legal impact of Clause (c) of Section 65 of the Evidence Act and as such, the impugned order deserves to be set aside.

10. Considering the submissions made by learned counsel for the petitioners and on perusal of record, this Court is of the opinion that as per the settled legal position, photocopy of a document is inadmissible in evidence. For the purpose of convenience and taking note of the submission made by learned counsel for the petitioners, Section 65 of the Evidence Act is required to be seen:-

> **"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) 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 movable;

(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 consists 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 (f), 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."

11. It is the consistent view of the Supreme Court and also of the High Court that as per Section 65 of the Evidence Act, photocopy is inadmissible in evidence. The High Court in case of **Haji Mohd. Islam and another Vs. Asgar Ali and another** reported in **AIR 2007 MP 157,**

relying upon various Supreme Court decisions, has considered the impact of Section 65 of the Evidence Act and held that photocopy without any revelation of sources is not permissible to be tendered as secondary evidence. Further, in the aforesaid case, this Court has relied upon a judgment of Division Bench in the case of **Badrunnisa Begum v. Mohamooda Begum** reported in **AIR 2001 AP 394** wherein the Court has observed as under:-

> "11. In this context I may refer with profit to the decision rendered in the case of Badrunnisa Begum v. Mohamooda Begum, AIR 2001 AP 394 wherein he Division Bench after referring to the illustrations made in section 65 of evidence Act has held as under:
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> > "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."

In the said case, this Court has placed reliance upon a judgment of Supreme Court i.e. **United India Assurance Co. Ltd. V. Anbari and others** reported in **(2000) 10 SCC 523** wherein the Supreme Court has observed 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 the fact was challenged by the appellant and genuineness of the photocopy was not admitted by it."

Ultimately, this Court in the aforesaid case in paragraph-14 has observed as under:-

> "14. If the obtaining factual matrix is tested on the touchstone of the aforesaid principles of law, the document that has been sought to be tendered as secondary evidence is neither a certified copy nor a true copy indicating endorsement. In my considered view the document does not meet with the requirement of section 65 of the Evidence Act. In the absence of any proof and requirement of

law not being satisfied, I am of the considered opinion, the order of the learned trial Judge does not suffer from any infirmity."

12. Further, this Court in a case of **Sunil Kumar Sahu Vs. Smt. Awadhrani** passed in **W.P. No.8224/2010,** relying upon a decision of the Supreme Court in case of **Hariom Agrawal Vs. Prakash Chand Malviya** reported in (**2007) 8 SCC 514** has observed as under:-

"Now the question arises whether the document which was insufficiently stamped, a photo-copy of such document can be admitted as secondary evidence. This question has been considered by Apex Court in Hariom Agrawal (supra) wherein the Apex Court considering the question held that:

> "10. It is clear from the decisions of this Court and a plain reading of Sections 33,35 and 2(14) of the Act that an instrument which is not duly stamped can be impounded and when the required fee and penalty has been paid for such instrument it can be taken in evidence under Section 35 of the Stamp Act. Sections 33 and 35 are not concerned with any copy of the instrument and party can only be allowed to rely on the document which is an instrument within the meaning of Section 2(14). There is no scope for the inclusion of the document for the purposes of the Stamp Act. Law is now no doubt well settled that copy of the instrument cannot be validated by impounding and this cannot be admitted as secondary evidence under the Stamp Act, 1899."

In view of the aforesaid, the Apex Court has settled the law that the copy of the instrument which was on insufficient stamp cannot be admitted as secondary evidence under Section 65 of the Indian Evidence Act. So the photo-copy of

> Annexure P-4 was not admissible in the secondary evidence as its original was not adequately stamped. It is also in dispute that no such original is in existence and Annexure P-4 is fabricated one but this question is not decided in this petition."
> In view of the aforesaid, trial court erred in granting permission to the respondent No.1 to lead secondary evidence of document Annexure P-4 which is unsustainable under the law and is set aside. This petition is allowed. Petitioner is entitled to costs of this petition from the respondents."

13. Likewise, in a case of **Smt. Aneeta Rajpoot Vs. Smt. Saraswati Gupta** (W.P. No. 11990/2012), this Court relying upon a decision of the Supreme Court in the case Anbari **(supra)** has observed as under:-

> "14. The Supreme Court in United India Assurance Co. Lted. V. Anbari and others 2000(10) SCC 523 while dealing with the photocopy of license of a driver expressed the view as under:-
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> > 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 contention 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.

> Thus, the Apex Court has held that photocopy was not sufficient to prove that driver had a valid license. By following the aforesaid decision of Supreme Court, Shri Justice Dipak Mishra, J. (as His Lordhship then was) in Haji Mohd. Islam and another Vs. Asgar Ali and another AIR 2007 MP 157 has held that when a photocopy without any reasonable source has been filed, it is not permissible as secondary evidence. Yet there is another decision of this Court in W.P. No. 8224/2010 (Sunil Kumar Sahu Vs. Smt. Awadharani) decided on 31.08.2010 wherein it has been held that photocopy of a document is not admissible as secondary evidence under Section 65 of the Evidence Act."

14. Moreso, in a case of **Pravin Vs. Ghanshyam and others (M.P. No. 1144/2017)**, this Court relying upon a decision of **Ratanlal Vs. Kishanlal** reported in **2012(3) MPJR 24,** has observed as under:-

> "In the case of Ratanlal vs. Kishanlal reported in 2012 (III) MPJR 24 this Court has held as under:
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> > "12. According to me the photocopy is neither a primary nor secondary evidence and in this regard decision of this Court Ramesh Verma and others etc. vs. Smt. Lajesh Saxena and others etc. AIR 1998 MP 46 may be seen. Apart from this even if it is stretched to the extent to bring the photocopy of will Ex. P/1 within the sphere of secondary evidence, the plaintiff was required to satisfy the ingredients to Section 65 of the Evidence Act which speaks about the secondary evidence. The plaintiff was further required to examine the person who took out the photocopy of the original. This is very much essential because it is a matter of common knowledge that by putting another writing written on a separate paper if that paper is kept upon the original

> document and photocopy is taken out, the said photocopy cannot be said to be a true photocopy of the original document."
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> The 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."

In view of aforesaid enunciation of law and the facts involved in the case, this Court is also of the opinion that the original Memorandum which is sought to be produced in evidence and to lead secondary evidence is rightly denied by the Court below because there was no source of information about possession of the original one in favour of Shri M.K. Shrivastava, the counsel earlier engaged by the party. The photocopy of Panchnama/Memorandum is available on record which is creating right in favour of a particular person by transferring title of the land, however, the same indicates that the it is an un-stamped document and as such, it needs registration and proper stamp duty.

15. Nothing is available on record to indicate that the said Panchnama/Memorandum is a valid document as per the requirement of provisions of Registration Act, 1908 and accordingly, it is inadmissible as per the provisions of the Evidence Act. The trial Court in the impugned order, taking note of the provisions of Section 65 of the Evidence Act rejected the application saying that the document which is

sought to be taken on record for the purpose of leading secondary evidence is inadmissible until and unless it is compared with the original document. The statement and pleading was not available in this regard even before this Court and as such, the photocopy cannot be used in evidence even for leading the secondary evidence. I find that the trial Court has not committed any error in rejecting the application and, therefore, no interference in the impunged order dated 14.02.2020 (Annexure P/1) is warranted.

16. The petition is therefore, without any substance and is accordingly **dismissed**.

(Sanjay Dwivedi)
Judge

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