

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

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 25th OF APRIL, 2024

MISC. PETITION No. 2067 of 2024

BETWEEN:-

1. ARUN KUMAR S/O LATE GULABCHAND BHAMORE, AGED ABOUT 70 YEARS, R/O WARD NO. 12 BADA BAZAR SHAHPUR TAHSIL AND DISTRICT BURHANPUR (MADHYA PRADESH)
2. VIJAY KUMAR S/O LATE GULABCHAND BHAMORE, AGED ABOUT 58 YEARS, R/O WARD NO 12 BADA BAZAR SHAHPUR TEHSIL AND DISTRICT BURHANPUR (MADHYA PRADESH)
3. GOPICHAND S/O LATE GULABCHAND BHAMORE, AGED ABOUT 52 YEARS, R/O WARD NO 12 BADA BAZAR SHAHPUR TEHSIL AND DISTRICT BURHANPUR (MADHYA PRADESH)

.....PETITIONERS

(BY SHRI SHAILENDRA VERMA - ADVOCATE)

AND

DR. MANISH KHADKODKAR S/O DR. VASANRAO KHADODKAR, AGED ABOUT 42 YEARS, R/O CHHOTA BAZAR NEAR RAM MANDIR SHAHPUR TAHSIL AND DISTRICT BURHANPUR (MADHYA PRADESH)

.....RESPONDENTS

(NONE)

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

ORDER

This petition under Article 227 of Constitution of India has been filed against the order dated 02.04.2024 passed by VIth Civil Judge, Class-II (Junior Division) Burhanpur in RCSA No.160/2022 by which the application filed by the petitioner under Section 65 of the Evidence Act seeking permission to lead secondary evidence has been rejected on the ground that the application does not contain the basic averments as required under Section 63 of the Evidence Act as well as in order to prove the signatures, the production of original document is necessary.

2. It is submitted by counsel for petitioners that once the petitioners had specifically proved that the original will has been misplaced and is not traceable, then the petitioners had made sufficient ground to lead secondary evidence and reliance of petitioners on photocopy clearly indicates that the petitioners wanted to claim that it has been prepared by a mechanical process, therefore it is submitted that the trial Court should have allowed the application.

3. Considered the submissions made by counsel for petitioners.

4. This Court has gone through the application filed by the petitioners under Section 65 of Evidence Act, which reads as under:-

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egkn;] oxl 02 dfu"B[kM] ftyk cjgkuij e-ç-*

व्य. वाद. कमांक आर.सी.एस.ए.—160/22

पेशी दिनांक 01/03/2024

01 अरूण कुमार व अन्य —वादीगण

विरुद्ध

01 डॉ. मनीष खडकोदकर —प्रतिवादी

vkonu i = vrxt /kkjk 65 l k}; vf/kfu; e

वादीगण की ओर से निम्नलिखित निवेदन है कि :-

01 यह कि वादीगणों की ओर से अभिलेख पर विवादित संपत्ति के संदर्भ में वसीयतनामे की छायाप्रति अभिलेख पर प्रस्तुत की गयी है।

02 यह कि उक्त वसीयतनामे की असल प्रति रख रखाव में गुम हो गयी है काफी बुढ़ने के प्रयास करने पर भी असल प्रति मिल नहीं रही है, जिसके परिणाम स्वरूप उक्त वसीयतनामे की छायाप्रति को द्वितीय साक्ष्य के रूप में ग्राह्य किये जाने की अनुमति मिलने वास्ते यह आवेदन माननीय न्यायालय के समक्ष निवेशित किया गया है।

03 यह कि वसीयतनामे की मूलप्रति खो गयी है जिसकी भविष्य में मिलने की संभावना भी समाप्त हो चुंकि है इस कारण छायाप्रति को द्वितीय साक्ष्य के रूप में ग्राह्य किया जाना अति आवश्यक है। अन्यथा वादी को अपरिमित हानि होगी जिसकी भरपाई हो पाना संभव नहीं है।

04 यह कि इस आवेदन पत्र के समर्थन में वादी कमांक 1 स्वयं का शपथ पत्र निवेशित करता है।

अतः श्रीमान से प्रार्थना है कि अभिलेख पर प्रस्तुत वसीयतनामे की असल प्रति गुम होने से उसकी छायाप्रति को द्वितीय साक्ष्य में ग्राह्य किये जाने की अनुमति प्रदान करने की कृपा की जावें।

बुरहानपुर

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5. Section 63 of Evidence Act reads as under:-

“63. **Secondary evidence.**- Secondary evidence means and includes:-

(1) certified copies given under the provisions hereinafter contained';

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

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

(5) oral accounts of the contents of a document given by some person who has himself seen it.”

6. Sub-section 2 of 63 requires that the person seeking permission to lead evidence must satisfy that the copy was made from the original by mechanical process which in itself insures the accuracy of the copy and the copy was compared with such original copy.

7. There is no averment in the application that the photocopy on which the petitioners seeking reliance to lead secondary evidence was prepared from the original by mechanical process as well as it was compared with the original copy. Thus, there was an inherent defect in the application.

8. Faced with such a situation, the counsel for petitioners seeks permission of this Court to withdraw this petition with liberty to file a fresh application with all necessary averments as required under Section 63 of Evidence Act.

9. With aforesaid liberty, the petition is **dismissed** as withdrawn.

10. If fresh application is filed, then the trial Court shall decide the application afresh without getting influenced or prejudiced by any of the finding given by this Court.

(G.S. AHLUWALIA)
JUDGE

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