

RAJASTHAN HIGH COURT

Rajesh Kumar Bhati

Vs.

Additional District Judge,

Civil Writ Petition No. 734 of 2008

(Sangeet Lodha, J.)

25.02.2009

ORDER

Sangeet Lodha, J.

1. This writ petition is directed against order dated 14-12-2007 passed by the learned Additional District Judge (F.T.) No. 3, Jodhpur in Civil Suit No. 468/04, whereby an application preferred by the petitioner-defendant under Order 11, Rule 14 of Civil Procedure Code, 1908 read with Section 65 of the Indian Evidence Act, 1872 (in short "the Act" hereinafter), stands rejected.
2. The respondent-plaintiff preferred a suit for possession of the disputed property *inter alia* against the petitioner-defendant on the strength of a Will dated 21-10-1980 executed by Smt. Kisturi Devi in his favor. The petitioner-defendant filed the written statement denying the averments made in the plaint and also filed a counter claim seeking declaration to the effect that the said Will dated 21-10-1980 is concocted, false and null and void. That apart, petitioner-defendant has taken the stand that the plaintiffs father late Sri Ummed Singh had executed his last Will on 25-7-1994, the copy whereof was supplied to him by the plaintiff in the month of November, 97.
3. The petitioner-defendant preferred an application under Order 11, Rule 14, Civil Procedure Code read with Section 65 of the Act with the allegation that original Will dated 25-7-1994 is in possession of the plaintiff but he is not producing the same therefore the petitioner-defendant may be permitted to produce the Photostat copy of the Will as secondary evidence. The respondent-plaintiff filed a reply to the application and submitted that late Sri Ummed Singh had never executed the Will on 25-7-1994 and the photo stat copy of the said Will sought to be produced on record is forged and fabricated. It was stated that neither the Will dated 25-7-2004 is in

possession of the respondent-plaintiff nor photo copy thereof was ever supplied by the plaintiff to the petitioner- defendant.

4. The learned trial Court found that the petitioner-defendant has not been able to establish the existence of the original Will and he has also failed to explain as to from where he has obtained the photostat copy thereof. The learned trial Court opined that unless it is proved that the document sought to be produced is photostat copy of the original Will, the same cannot be taken on record as secondary evidence. Accordingly, the application preferred by the petitioner-defendant has been rejected by the learned trial Court.

5. It is contended by the learned counsel for the petitioner that the learned trial Court has seriously erred in doubting the genuineness of the document even before the same is tendered in evidence. The learned counsel submitted that in the written statement the petitioner-defendant has specifically pleaded with regard to the existence of Will dated 25-7-94 and has categorically stated that the original of the same is in power and possession of the plaintiff, in this view of the matter, the learned trial Court ought to have permitted the plaintiff to produce the photostat copy of the Will as secondary evidence. The learned counsel submitted that the learned trial Court could not have questioned the genuineness of the Will at this stage. It is submitted by the learned counsel that if the order impugned passed by the learned trial Court is allowed to stand then it will result in mis-carriage of justice and will cause irreparable injury to the petitioner-defendant.

6. Per contra, the learned counsel appearing on behalf of the respondent- plaintiff submitted that unless and until the existence of the original document is established and it is *prima facie* proved that the document sought to be produced as secondary evidence is true copy of its original, the same cannot be permitted to be taken on record.

7. I have considered the rival submissions and perused the material on record.

8. As per clause (a) of Section 65 the secondary evidence of the existence condition or contents of the document can be given in the three situations; firstly, when the original is shown or appears to be in possession or power of the person against whom the document is sought to be produced, secondly when it is in possession and power of any person who is out of reach of or not subject to the process of the Court and thirdly, when it is in possession of any person legally bound to produce it but he fails to produce the same even after the service of the notice in terms of Section 66 of the Act.

9. It is to be noticed that in the instant case, the petitioner-defendant has taken the specific stand that the original Will dated 25-7-94 executed by late Shri Ummed Singh is in the possession of the plaintiff but, he is deliberately not producing the same therefore, the petitioner-defendant may be permitted to photostat copy thereof as secondary evidence. As per clause (a) of Section 65, the secondary evidence of the contents of the document may be given when the original is in possession or power of the adversary however, the satisfaction of the Court to that effect is necessary before the party is allowed to adduce secondary evidence. But then, at this stage, the learned trial Court could not have refused the prayer of the petitioner-defendant doubting the genuineness of the document. The opinion formed by the learned trial Court about the veracity of document without affording an opportunity to petitioner-defendant to adduce the evidence does not appear to be justified. The reliance in this regard may be placed on the decision of the Hon'ble Supreme Court in the matter of "*Nawab Singh v. Inderjit Kaur*"¹

10. As noticed above, the petitioner-defendant has taken the specific stand that the original Will is in possession of the plaintiff; therefore, petitioner-defendant's claim to produce the secondary evidence is covered by clause (a) of Section 65 of the Act. In this view of the matter, the document sought to be produced by the defendant as secondary evidence deserves to be taken on record. It will be open for the plaintiff to question the genuineness of the document sought to be produced as secondary evidence at the appropriate stage.

11. For the aforementioned reasons, order impugned passed by the learned trial Court deserves to be set aside.

12. In the result, the writ petition succeeds, it is hereby allowed. Order impugned dated 14-12-07 passed by the learned Additional District Judge (F.T.) No. 3, Jodhpur in Civil Suit No. 468/04 is set aside. The application preferred by the petitioner under Order 11 Rule 14 read with Section 65 of the Act is allowed. No order as to costs.

Petition allowed.

Cases Referred.

1. (1999) 4 SCC 413: (AIR 1999 SC 1668)