(9) In view of the law laid down in various authorities referred to above and taking into consideration the facts and circumstances of the present case, in my opinion, the present objector-petitioners, who are also the judgment debtors in the decree passed in favour of the decree holder-respondent, are liable to be evicted from the property in dispute in executions of the decree passed in favour of the decree holder and the petitioners are not entitled to any protection either under Order 21 Rule 36, CPC or under the provisions of Rent Act. That being the position, in my opinion, the executing Court was perfectly justified in dismissing the objection petitions filed by the petitioners and no fault can be found with the order dated 6th January, 2000 passed by the executing Court in this regard .

(10) So far as the prayer made on behalf of the petitioners for granting them reasonable time to make alternative arrangements for shifting from the property in question is concerned, if any such request is made before the executing Court and an undertaking is filed before that Court, undertaking to vacate the premises in question within a specified period, the learned executing Court shall give reasionable time to the present petitioners to vacate the premises in question and to shift to some other place/places, on such terms as the executing Court may find suitable on the facts and circumstances of the present case.

(11) For the reasons recorded above, there is no merit in all these three revisions, which are hereby dismissed but with no order as to costs.

J.S.T.

Before M.L. Singhal, J

SURJEET KAUR & OTHERS—*Petitioners*

versus

NACHHATTAR SINGH—*Respondent*

C.R. No. 2677 of 2000

8th September, 2000

Code of Civil Procedure, 1908—S. 115—Evidence Act, 1872—S. 65 (c)—Secondary evidence—Term 'lost'—Lost must be absolute—If

a person is not able to produce the original within reasonable time for any reason other than his own fault or neglect should be permitted to lead secondary evidence.

Held that Section 65(c) of the Evidence Act consists of three parts, namely (i) where the original has been destroyed, (ii) where the original is lost and (iii) where the party offering such evidence cannot produce it in a reasonable time for a reason not arising out of his own default or neglect. It is not always a condition percedent to prove that original document had been destroyed. There is no need to go into the scope of the word 'lost' in the sense that the loss must be in absolute terms. The third part of the above provision makes it abundantly clear that if a person is not able to produce the original within a reasonable time for a reason other than the one arising from his own default or neglect, he may be permitted to lead secondary evidence.

(Para 11)

Code of Civil Procedure, 1908—0.41 Rl. 27—Additional evidence—Petitioners not allowed to lead additional evidence to prove will by way of secondary evidence—Should not be penalised in case they were not vigilant in production of evidence—Petitioners claiming succession on the basis of registered will which had been relied upon during mutation proceedings—Shutting out this evidence will tentamount to foreclosing right of petitioners—Petitioners allowed to lead secondary evidence.

Held, that despite having availed as many as 27 adjournments, petitioners did not file application for secondary evidence. Suffice it to say, the petitioners should not have been penalised if they had not been that vigilant in the production of their evidence. Petitioners were claiming succession to the estate of Sadhu Singh, on the basis of registered will which they had relied upon during mutation proceedings and then in the written statement before the trial Court. Shutting out this evidence would tantamount to foreclosing the right of the petitioners to have justice from the Court.

(Para 12)

R.S. Aulakh, *Advocate for the Petitioner.*

M.S. Lubana, *Advocate with*

Paramjit Batta, *Advocate for the Respondent.*

JUDGMENT

M.L. Singhal, J

(1) It was inheritance suit filed by Nachhattar Singh, son of Bakshish Singh, son of Hira Singh against Smt. Surjit Kaur, wife of Lachhman Singh, Lachhman Singh, son of Bakshish Singh, son of Hira Singh, Gurmeet Singh, Bant Singh, Chhinder Singh and Darshan Singh sons of Lachhman Singh on the basis of will, dated 5th June, 1986, executed by his brother Sadhu Singh in his favour, which was decreed by the trial Court. Appeal filed by Smt. Surjit Kaur etc. was dismissed.

(2) According to the case set up by Nachhattar Singh, he, Sadhu Singh and Lachhman Singh are brothers. They have sisters namely Nachhattar Kaur, wife of Surjit Singh and Bachan Kaur, wife of Pritam Singh. Sadhu Singh died bachelor. As per Nachhattar Singh, Sadhu Singh was residing with him and on 5th June, 1986 Sadhu Singh executed will in his favour regarding the suit property. Nachhattar Singh averred that Sadhu Singh died on 27th June, 1986. He had executed that will in his favour because he was serving him and he was pleased with the services being rendered to him. Nachhattar Singh further averred that Smt. Surjit Kaur etc. are claiming that there is will, dated 29th May, 1986, alleged to have been executed by Sadhu Singh in his favour and they have also got sanctioned the mutation of his inheritance in their favour on 24th April, 1987.

(3) Surjit Kaur and others filed written statement and denied any will to have been executed by Sadhu Singh in favour of Nachhattar Singh. Trial Court held that will dated 5th June, 1986, executed in favour of Nachhattar Singh was proved and will, dated 29th May, 1986, in favour of Surjit Kaur etc. was not proved. These findings were upheld by the First Appellate Court.

(4) Before the trial Court, there was an application to lead secondary evidence to prove the will being set up by Surjit Kaur etc. Their contention is that that will was produced during mutation proceedings. Unfortunately, they did not take back the will from the Mutation Officer after mutation had been sanctioned in their favour and when they wanted to take it back, they found that it was missing

from the mutation record. It was a registered will. Trial Court did not allow them permission to prove that will by secondary evidence. During appeal before the First Appellate Court, this point was raised. With regard to this point, First Appellate Court observed as under :—

> "At the very outset, the learned counsel for the appellants has argued that an application for secondary evidence, dated 10th December, 1993, to prove the will set up by the defendants, has not been decided by the Court. However, he admitted that another application for permission to lead secondary evidence regarding will, dated 16th November, 1994, was dismissed on 4th December, 1994 and subsequent application on the same ground met the same fate. Therefore, question as to whether the appellants are to be allowed to lead secondary evidence regarding will set up by them, was finally decided by the trial court. The said order was never appealed against before the Superior Court and has now become final., The suit is pending since 1989. The defendants have set up a registered will. Neither the will was produced alongwith the written statement nor till date a certified copy of the will has been produced on file. Therefore, there is no ground to allow any further opportunity to the defendants to lead secondary evidence and prove the will set up by them. The perusal of the trial court file would show that the defendants were given large number of opportunities to lead evidence spreading over more than two years. Therefore, no furhter opportunity to the defendants/appellants is to be granted in the interest of justice. Hence the oral prayer of the learned counsel for the defendants/appellants to allow the defendants further to prove the will set up by them, is declined."

(5) First Appellate Court dismissed the appeal. Surjit Kaur etc. went in regular second appeal. Hon'ble S.S. Sudhalkar, J, allowed the Regular Second Appeal, set aside the judgment and decree of the First Appellate Court and directed the First Appellate Court to decide the appeal afresh after considering the question of allowing additional evidence and if it allowed, the effect of the additional evidence. In the trial Court, an application under Order 18 Rule 17-A CPC had been moved, which was rejected. In the First Appellate Court, an application under Order 41 Rule 27 CPC was filed which was refused by it saying that after the trial court had rejected the prayer of Surjit Kaur etc. for leading additional evidence, they should have gone in revision against

that order and the First Appellate Court could not consider their prayer for permitting them to lead additional evidence in appeal when their application for leading additional evidence had been declined by the trial court and the order declining that prayer had become final. Application for additional evidence could be moved before the First Appellate Court under Order 41 Rule 27 CPC notwithstandsing that similar prayer made before the trial court had been declined earlier.

(6) In pursuance of the remand of the appeal by Hon'ble S.S. Sudhalkar, J, the application for leading additional evidence moved under Order 41 Rule 27 CPC before the First Appellate Court became revived for decision.

(7) Additional District Judge, Ropar declined the prayer of Surjit Kaur etc., to permit them to lead additional evidence to prove will dated 29th May, 1986 by way of secondary evidence.

(8) Aggrieved from this order, dated 27th May, 2000 passed by Additional Distt. Judge, Ropar, Surjit Kaur etc. have come up in revision to this Court.

(9) It is submitted by the learned counsel for the petitioners Surjit Kaur etc. that Sadhu Singh held land in villages Dumna and Sarhana. During his life time, he had executed registered will, dated 29th May, 1986. They had produced the registered will, dated 29th May, 1986, in mutation proceedings before AC 1st Grade, Ropar. In the mutation proceedings, the attesting witnesses of the will appeared before AC 1st Grade and supported the execution of the will, which was exhibited as Ex. A1. Will set up by Nachhatar Singh was an unregistered will. It was discarded by AC 1st Grade. Will set up by Surjit Kaur etc. weighed with AC 1st Grade. Mutation consequently was sanctioned in their favour on the basis of will, dated 29th May, 1986. Nachhattar Singh filed suit for possession on the basis of will, dated 5th June, 1986, and also challenged the order of AC 1st Grade sanctioning mutation of inheritance in favour of Surjit Kaur etc. It is submitted by the learned counsel for the petitioners that unfortunately, petitioners did not take back the will, dated 29th May, 1986, which they had produced in the mutation proceedings before AC 1st Grade. They summoned the mutation file with a view to proving will, dated 29th May, 1986, before the Court. Daljit Singh, Assistant Office Kanungo, Ropar, appearned as DW3, on 16th November, 1994, and stated on oath that in the mutation file, which he brought to the court, did not contain the original will and the original will was missing. Thereupon, they moved an

application for additional evidence and secondary evidence of will, dated 29th May, 1986, which was decided on 9th December, 1994. Trial Court decided the suit in favour of Nachhattar Singh on the basis of unregistered will, dated 5th June, 1986, ignoring altogether that they had set up registered will, dated 29th May, 1986, in their favour, which they were not being allowed to prove by secondary evidence. They want in appeal against the judgment and decree of the trial court, which was dismissed. In appeal, they also moved application for additional evidence to prove that will by way of secondary evidence. First Appellate Court also dismissed the appeal. In Regular Second Appeal, judgment and decree of the First Appellate Court was set aside and the case was remanded to the First Appellate Court with a view to deciding afresh the appeal after considering the question of allowing additional evidence and if it allowed, the effect of the additional evidence.

(10) It is unfortunate that First Appellate Court declined the prayer of Surjit Kaur etc. for permission to them to lead additional evidence pertaining to registered will, dated 29th May, 1986, and to prove it by way of secondary evidence. It is submitted by the learned counsel for the petitioner that First Appellate Court should have permitted them to lead addtional evidence pertaining to will, dated 29th May, 1986, particularly, when it was a registered will and further to prove it by way of secondary evidence and when they had proved the loss of the original will by examining the office kanungo Daljit Singh. By refusing permision to Surjit Kaur etc. to produce additional evidence pertaining to registered will, dated 29th May, 1986, and to prove it by way of secondary evidence the First Appellate Court set at naught the well known can on of equity, justice and fair play which permeats the judicial functioning of this country and on which the edifice of justice rests. Surjit Kaur etc. had set up this will, dated 29th May, 1986, before the Mutation Officer, which was a registered will. Before the Mutation Officer, they had examined attesting witnesses. Mutation Officer believed this will to be genuine. They had relied upon this will in their written statement in the suit. Not that, the setting up of this will by them was afterthought. It was up to the court whether to believe will, dated 29th May, 1986, or 5th June, 1986 after assessing the pros and cons of both the wills on the anvil of evidence before it concerning each of these wills. First Appellate Court should not have scuttled their request to prove the registered will which had been set up by Surjit Kaur etc. at the outset. It was held in *Ram Singh and others* vs. *Pat Ram and others* (1), "the fact that the document is not

(1) AIR 1933 Lahore 782

found on the record, does not send the plaintiff out of court. Once a document is produced in Court and tendered in evidence and exhibited, the court is responsible for its safe keeping and if the document is lost, the plaintiff must be given another chance of producing a copy or giving secondary evidence of the contents." *In Sinnu* vs. *Smt. Pali* (2), it was held that "where the petitioner had produced the original will before Assistant Collector and there was categorical statement of Office Kanugo affirmed by Tehsildar that original record was not traceable and that being so, the plaintiff was unable to produce original will in a reasonable time. His inability did not arise out of his own default or neglect. Petitioner should have been allowed to produce secondary evidence as he had made out case under section 65 (c) for permission to lead secondary evidence. Court in dismissing application acted with material irregularity in the exercise of its jurisdiction. Section 65 (c) of the Evidence Act reads as follows :—

> "65 (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."

(11) It will be seen that the above provision consists of three parts, namely (i) where the original has been destroyed; (ii) where the original is lost, and (iii) where the party offering such evidence cannot produce it in a reasonable time for a reason not arising out of his own default or neglect. It is not always a condition precedent to prove that original document had been destroyed. There is no need to go into the scope of the word "lost" in the sense that the loss must be in absolute terms. The third part of the above provision makes it abundantly clear that if a person is not able to produce the original within a reasonable time for a reason other than the one arising form his own default or neglect, he may be permitted to lead secondary evidence. In *Bihari Lal* vs. *Ram Piari* (3), it was held that "petitioner-plaintiff should have been allowed to lead secondary evidence of the will when his case was that when he was going in a rickshaw to the District Consumer Forum, the original will got lost from him and he was to produce the original will before the District Consumer Forum that day. He also made complaint to the police. Loss of the will has been amply proved by plaintiff." In *Raj Kumari* vs. *Lal Chand* (4), it was held that "to prove the loss of the document in absolute term is not necessary."

(2) 1992 (1) RCR 428
(3) 1999 (3) RCR (civil) 239.
(4) 1994 (1) RRR 117

(12) Faced with this position, learned counsel for the respondent submitted that petitioner should not have been permitted to produce additional evidence pertaining to will, dated 29th May, 1986, and further to prove it by way of secondary evidence as they had been allowed ample opporunity by the trial court to produce their evidence. So much so, on 26th November, 1993, their counsel had made statement that only defendant would be examined (First Appellate Court observed that despite having availed as many as 27 adjournments, petitioners did not file application for secondary evidence. Suffice it to say, the petitioners should not have been penalised if they had not been that vigilant in the production of their evidence. Petitioners were claiming succession to the estate of Sadhu Singh, on the basis of registered will which they had relied upon during mutation proceedings and then in the written statement before the trial court. Shutting out this evidence would tantamount to foreclosing the right of the petitionerts to have justice from the court. At this stage, only will, dated 29th May, 1986, is sought to be produced by way of secondary evidence and it is after the proof of the will by secondary evidence that the First Appellate Court will decide the merits of the case of each party i.e. whether will, dated 5th June, 1986, set up by Nachhattar Singh is genuine or the will, dated 29th May,1986, setup by Surjit Kaur etc. is genuine.

(13) For the reason given, this revision is allowed and Surjit Kaur etc. are permitted to produce registered will, dated 29th May, 1986, alleged to have been executed by Sadhu Singh in their favour and prove it by secondary evidence.

J.S.T.

Before V.M. Jain, J

SUGAN CHAND,—*Petitioner*

versus

THE STATE OF HARYANA,—*Respondent*

Crl. M No. 14490/M/ 2000

21st December, 2001

Food Adulteration Act, 1954—S.2(1)(a)(f)—Code of Criminal Procedure. 1973—S.482—Criminal Complaint filed after receiving the report of the Public Analyst, which shows presence of weevils & meal worms in the sample—Case at the stage of evidence—Report of the Public Analyst not disclosing that the sample was insect infested or was unfit