

Before S.S. Saron, J.

M/S PARKASH CHAND KAPOOR CHAND,—*Petitioner / Plaintiff*

versus

INDERJIT SINGH & OTHERS,—*Respondents / Defendants*

CIVIL REVISION NO. 858 OF 2005

20th April, 2006

Evidence Act, 1872—S. 65—Suit for specific performance of agreements executed by defendant No. 1 in favour of plaintiff—Defendants 2 & 3 also claiming an agreement of sale in their favour executed by plaintiff—Defendants seeking production of secondary evidence of the said agreement—Trial Court allowing production of the said agreement of sale by way of secondary evidence—Challenge thereto—Defendants failing to show existence of agreement to sell and source how they procured photo-copy of the said agreement in the absence of original—No mention of such agreement in sale deeds executed by defendant No. 1 in favour of defendants—Petition allowed while setting aside the order of trial Court granting permission to lead secondary evidence.

Held, that in terms of the provisions of section 65(c) of the Evidence Act, it is evident that the secondary evidence may be given of the existence, condition or contents of a document in the cases. In terms of clause (c) thereof, it is provided that secondary evidence may be given 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. The principle underlying the provisions of section 65 of the Evidence Act is that the best evidence that is available should be produced. The original document is always the best and primary evidence. Section 65 provides an alternative method of proving the contents of a document which for various reasons cannot be produced. However, it is liable to be shown that the original document of which secondary evidence is sought to be produced was in existence. Besides, secondary evidence is admissible when it is shown that the primary evidence which is the original document was in existence. Therefore, before secondary evidence of a document can be led and proved, the

original document and its loss is liable to be proved. In the case in hand, the existence of the document i.e. the agreement to sell, dated 13th June, 1995 has not been shown to exist or accounted for anywhere and it is only for the first time in the written statement dated 10th August, 2000 that it has been stated by defendants Nos. 2 and 3 that defendant No. 1 had executed an agreement to sell, dated 13th June, 1995. The said agreement is also stated to be with the respective husbands of defendants Nos. 2 & 3 and not with the defendants Nos. 2 & 3 themselves. In fact, the stand taken by defendants Nos. 2 and 3 is that on 13th June, 1995 i.e. the date of entering into the agreement of sale of land measuring 20 Bighas @ Rs. 40,000 per Bigha the earnest money amounting to Rs. 5,49,000 was received by defendant No. 1 and an agreement to this effect was executed in favour of the husbands of the respective defendants Nos. 2 and 3. Therefore, if earnest money amounting to Rs. 5,40,000 had been received on 13th June, 1995 and that also in pursuance of the agreement, a mention of the same i.e. regarding existence of the agreement would have been there in the sale deed that was subsequently executed by defendant No. 1 in favour of defendants No. 2 and 3. Besides there must be some other material to even otherwise show *prima facie* as to how the said amount of Rs. 5,49,000 was raised on or some time before 16th June, 1995 and how it was expended by defendant No. 1. Failure of the defendants Nos. 2 and 3 to show the existence of the agreement, dated 13th June, 1995, the permission granted to lead secondary evidence by the learned trial Court was wholly improper.

(Para 6 & 7)

D. Khanna, Advocate.

None for respondent No. 1

Ramesh Sharma, Advocate for respondents No. 2 to 4

JUDGMENT

S.S. SARON. J.

(1) Learned counsel for the petitioner has produced the dasti notices regarding effecting of service on respondent No. 1. According to the same, respondent No. 1 has been served. However, despite service, no one has put in appearance on his behalf. He is, therefore, proceeded against *ex parte*.

(2) This revision petition has been filed against the order dated 9th December, 2004 passed by the learned Additional Civil Judge (Sr. Divn) Sangrur, whereby defendants—respondents No. 2 to 4 have been granted permission to lead secondary evidence of an agreement to sell dated 13th June, 1995.

(3) The plaintiff-petitioner filed a suit for specific performance of the agreements to sell dated 20th June, 1996, 15th November, 1996 and 31st December, 1996 executed by Inderjit Singh (defendant No. 1) in favour of the plaintiff with regard to land measuring 12 Bighas 13 Biswas, as detailed in the head note of the plaint, after setting aside the sale deeds dated 18th December, 1996 executed by Inderjit Singh (defendant No. 1) in favour of Amarjit Singh (defendant No. 4) and Kulwinder Kaur (defendant No. 2) as also the sale deed dated 20th May, 1997 executed by Inderjit Singh (defendant No. 1) in favour of Kulwinder Kaur and Tejinder Kaur (defendants No. 2 and 3) and in the alternative, suit for recovery of Rs. 3,80,000 on account of refund of earnest money was prayed alongwith interest, etc. In the written statement filed by Kulwinder Kaur and Tejinder Kaur (defendants No. 2 and 3), a stand was taken that there was an agreement of sale dated 13th June, 1995 between them and Inderjit Singh (defendant No. 1) which had been misplaced from their house. The plaintiff-petitioner submitted an application dated 5th September, 2000 for production of the said agreement of sale dated 13th June, 1995. In response to that, the defendants stated that the said agreement of sale had been misplaced and therefore, it could not be produced in the Court. Accordingly, a prayer was made by the defendants for production of secondary evidence of the aforesaid agreement in terms of Section 65 of the Evidence Act, which has been allowed by the learned trial Court. The said order allowing the production of the said agreement of sale by way of secondary evidence is assailed by the plaintiff-petitioner.

(4) Learned counsel for the petitioner contends that the impugned order is absolutely erroneous inasmuch as the agreement dated 13th June, 1995 on which defendants No. 2 and 3 have based their claim, has in all probability been prepared after the case had been filed. In fact, there is no mention of the agreement dated 13th June, 1995 in the sale deeds dated 18th December, 1996 and

20th May, 1997 executed by Inderjit Singh (defendant No. 1) in favour of defendants No. 2 and 4 and defendants No. 2 and 3 respectively. Therefore, it is contended that when the original of the agreement to sell is not shown to exist, the question of its being misplaced or lost does not arise. The defendants-respondents in fact were liable to show as to how they procured the photocopy of the said agreement in the absence of the original being shown to have been lost or misplaced. The defendants-respondents, therefore, it is contended cannot be allowed to lead secondary evidence in respect of an agreement of which there is no original.

(5) In response, learned counsel for the respondents states that the agreement to sell dated 13th June, 1995 had been misplaced by defendants No. 2 and 3 and they have undertaken to produce the same as and when the same is traced out. Besides, it is submitted that the question of admissibility is not to be decided in the application seeking permission to lead secondary evidence. As such, it is open to the plaintiff to argue on the admissibility of the document aforesaid at the appropriate stage, as has been observed by the trial Court in its impugned order dated 9th December, 2004. Therefore, it is contended that the petition merits dismissal.

(6) I have given my thoughtful consideration to the contentions raised by learned counsel for the respective parties. In order to appreciate the same the provisions of Section 65(c) of the Evidence Act which provides for leading of secondary evidence when the original has been destroyed or lost may be noticed. The same 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 to b. | XXXX | XXXX |
| 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. to g. | XXXX | XXXX” |

In terms of the above, it is evident that the secondary evidence may be given of the existence, condition or contents of a document in the cases enumerated above. In terms of clause (c) thereof, it is provided that secondary evidence may be given 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. The principle underlying the provisions of Section 65 of the Evidence Act is that the best evidence that is available should be produced. The original document is always the best and primary evidence. Section 65 provides an alternative method of proving the contents of a document which for various reasons cannot be produced. However, it is liable to be shown that the original document of which secondary evidence is sought to be produced was in existence. Besides, secondary evidence is admissible when it is shown that the primary evidence which is the original document was in existence. Therefore, before secondary evidence of a document can be led and proved, the original document and its loss is liable to be proved. In the case in hand, the existence of the document i.e. the agreement to sell dated 13th June, 1995 has not been shown to exist or accounted for anywhere and it is only for the first time in the written statement dated 10th August, 2000 that it has been stated by defendants No. 2 and 3 that Inderjit Singh (defendant No. 1) had executed an agreement to sell dated 13th June, 1995. The said agreement is also stated to be with the respective husbands of defendants No. 2 and 3 not with the defendants No. 2 and 3 themselves. In fact, the stand taken by defendants No. 2 and 3 is that on 13th June, 1995 i.e. the dated, entering into the agreement of sale of land measuring 20 Bighas @ Rs. 40,000 per Bigha the earnest money amounting to Rs. 5,49,000 was received by Inderjit Singh (defendant No. 1) and an agreement to this effect was executed in favour of the husbands of the respective defendant No. 2 and 3. Therefore, if earnest money amounting to Rs. 5,49,000 has been received on 13th June, 1995 and that also in pursuance of the agreement, a mention of the same i.e. regarding existence of the agreement would have been there in the sale deed that was subsequently executed by Inderjit Singh (defendant No. 1) in favour of Kulwinder Kaur and Tejinder Kaur

(defendants No. 2 and 3). Besides, there must be some other material to even otherwise show *prima facie* as to how the said amount of Rs. 5,49,000 was raised on or some time before 13th June, 1995 and how it was expended by Inderjit Singh (defendant No. 1). This Court in the case of **Mangat Ram versus Prabhu Dayal and ors.(1)** held that when document is lost, the applicant must show how he procured its photocopy which is produced. The said case was not a case where the documents were required to be kept in duplicate and in triplicate and the applicant having failed to prove as to how he arranged photocopy of the original document, the application for seeking permission to lead secondary evidence was dismissed. In **Hari Singh versus Shish Ram and ors (2)**, in a case where the applicant seeking permission to lead secondary evidence had failed to prove the existence of the document, it was held that before a party is permitted to adduce secondary evidence, it is a *sine qua non* for him to show that the document was in existence and despite notice, it has not been produced by the party in whose custody the document was kept.

(7) In view of the aforesaid dictum of this Court and the failure of the defendants No. 2 and 3 to show the existence of the agreement dated 13th June, 1995, the permission granted to lead secondary evidence by the learned trial Court was wholly improper.

(8) In the circumstances, the revision petition is allowed and the impugned order dated 9th December, 2004 passed by the learned trial Court is set aside. It is, however, made clear that any observation made in this order is only for the purpose of the disposal of the present petition and shall not be construed as an expression on the merits of the controversy between the parties and the trial Court shall consider the case of the parties on the basis of the evidence and material as adduced before it.

R.N.R.

(1) 2002 (3) CCC 381 (P&H)

(2) 2003 (1) CCC 554 (P&H)