



**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**

CMPMO No. 321 of 2021

Reserved on: 19.5.2023

Date of decision : 24.5.2023.

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Rakesh Kumar Duggal ...Petitioner.

Versus

Rajeev Kumar Duggal & others ...Respondents

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*Coram:*

***The Hon'ble Mr. Justice Satyen Vaidya, Judge.***

*Whether approved for reporting?*<sup>1</sup> Yes.

For the petitioner : Mr. Karan Singh Kanwar, Advocate.

For the respondents : Mr. Rupinder Singh, Advocate, for respondents No. 1 and 2.

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**Satyen Vaidya, Judge:**

Aggrieved against the order dated 26.8.2021, passed by learned Senior Civil Judge, Sirmour District at Nahan, H.P., in Case No. 21/1 of 2019, petitioner has approached this Court by way of instant petition.

2. Parties hereunder shall be referred by same status, which they hold before learned trial Court. Respondents No. 1 and 2 herein are plaintiffs in Civil Suit No. 21 of 2019 before learned trial Court. Petitioner and proforma-respondents are the defendants. Petitioner herein is defendant No.2.

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<sup>1</sup> ***Whether reporters of Local Papers may be allowed to see the judgment?***

3. Plaintiffs and defendants are real brothers and sisters. Plaintiffs have filed a suit for declaration that they have inherited the share of their mother late Smt. Pushpa Rani in the suit property on the basis of her unregistered Will dated 25.2.2017. Defendants by way of their written statement have specifically denied the execution of Will by Smt. Pushpa Rani in favour of plaintiffs. Smt. Pushpa Rani is stated to have died on 6.4.2017.

4. Plaintiffs have not produced the original Will on record of the suit by alleging that on 13.6.2017, they had visited the Halqua Patwari for mutation of the estate of late Smt. Pushpa Rani and had handed over the original Will to the Patwari. It is alleged by them that the mutation was subsequently attested in favour of all the plaintiffs and defendants in equal shares. Despite their repeated requests, the Patwari had not returned the original Will to the plaintiffs. The plaintiffs have placed on record a photocopy of the alleged Will of Smt. Pushpa Rani.

5. During the trial of the suit, plaintiffs filed an application under Section 65 of the Indian Evidence Act, (for short 'the Act'), seeking leave of the Court to prove the Will of Smt. Pushpa rani by way of secondary evidence. The factum of

original Will having been handed over to Halqua Patwari on 13.6.2017 was reiterated. They further alleged that lastly, the Halqua Patwari had admitted to have misplaced the Will in Patwar office and had promised to return the original to the plaintiffs after tracing the same.

6. Defendants contested the application by specifically denying the execution of Will by late Smt. Pushpa Rani. The version of plaintiffs with respect to the original Will being in possession of Halqua Patwari was contested as being fabricated. As per defendants, they have never been shown the original Will and hence they did not believe the version of the plaintiffs.

7. Learned trial Court allowed the application of the plaintiffs vide impugned order dated 26.8.2021 and granted them permission to prove the Will by leading secondary evidence. Defendant No.1 is before this Court by way of the instant petition against the order allowing the plaintiffs to lead the secondary evidence to prove the alleged Will.

8. I have heard the learned counsel for the parties and have also gone through the record carefully.

9. Sh. Karan Singh Kanwar, learned counsel for defendant No.1 contended that existence and loss of the

original document (alleged Will) was to be proved as a *sine-qua-non* for seeking of permission to lead secondary evidence. According to him, plaintiffs had miserably failed to discharge the burden and thus the impugned order passed by learned trial Court required interference.

10. On the other hand, Sh. Rupinder Singh, learned counsel representing the plaintiffs has defended the impugned order. He submitted that the plaintiffs had complied with the requirement of Section 66 of the Act. Notice was issued to the Patwari on 16.4.2020 through registered post, requiring her to produce and return the original Will dated 25.2.2017. In order to strengthen his argument, learned counsel for the plaintiffs also placed reliance on the contents of copies of Mutation Nos. 407 and 947, according to which, on 13.6.2017, an entry had been made purportedly in the hand of the then Patwari to the effect that the plaintiffs had presented unregistered Will of Smt. Pushpa Rani for attestation of mutation.

11. The impugned order reveals that the learned trial Court had also placed reliance on the contents of copies of mutation Nos. 407 and 947 for believing that the Will was produced before the Patwari. Holding itself to be a Court of

equity, learned trial Court proceeded to allow the prayer of plaintiffs for secondary evidence on such premise only.

12. It was clear stand of plaintiffs that despite of issuance of notice to the Patwari under Section 66 of the Act, the Patwari had failed to produce the document. They relied upon notice dated 16.4.2020 and the postal receipt of same date evidencing dispatch of some registered letter to the Patwari.

13. As per Section 65 of the Act, secondary evidence can be given of the existence, conditions or contents of a document in various situations detailed therein. For the purposes of instant case, situation as enumerated in Section 65 (a) of the Act will be relevant, which provides that the secondary evidence may be given of the existence, conditions or contents of a document, when the original is shown or appears to be in the possession or power of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it. In alternative, the case of the plaintiffs can also be said to be covered under Section 65 (c) of the Act, according to which, the 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.

14. The requirement of law in both the above situations is that the foundational facts have to be established to prove the existence of primary evidence.

15. In the case in hand, the allegation is that the plaintiffs had handed over the original Will to Patwari Halqua. They had not received the original from said official despite efforts and even after service of notice to the Patwari. The plaintiffs had placed on record a copy of notice dated 16.4.2020, purportedly issued to Ms. Renu Gupta, Patwari, Patwar Circle Mian-Mandir, Nahan, District Sirmour, H.P. Noticeably, It is also mentioned in the notice as under:

***“Now Renu Gupta is serving as Kanungo Nahan, District Sirmour, H.P.”***

Perusal of original postal receipt dated 16.4.2020 reflects the name of addressee as Renu Gupta Patwari, Patwar Circle, Nahan. Thus, the plaintiffs had failed to show due compliance to the provisions of Section 66 of the Act. On the face of it, the notice was not sent on the correct address as Ms. Renu Gupta was not posted as Patwari at relevant time and was posted as Kanungo. In such situation, no presumption could have been

raised in respect of the issuance of notice to Ms. Renu Gupta. For non compliance of provisions of Section 66 of the Act only, the prayer as made for secondary evidence could not have been allowed.

16. Further, the recitations in Mutation Nos. 407 and 947 also cannot be said to be sufficient compliance of the requirement of Section 65 of the Act for the reasons, *firstly* that the contents of above noted mutations allegedly scribed by the then Patwari were not *per-se* admissible and could be proved by the said official only and *secondly*, there was no recital in mutation Nos. 407 and 947 to the effect that the Will allegedly produced by plaintiffs, was the original document.

17. In case titled as, **Jagmail Singh vs. Karamjit Singh & others** reported in **2020 (5) SCC 178**, Hon'ble Supreme Court has held as under:-

*“11. A perusal of Section 65 makes it clear that secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power against whom the document is sought to be produced, 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 notice mentioned in Section 66 such person does not produce it. It is a settled position of law that for secondary evidence to be admitted foundational evidence has to be*

*given being the reasons as to why the original Evidence has not been furnished.*

12. *The issue arising out of somewhat similar facts and circumstances has been considered by this Court in Ashok Dulichand Vs. Madahavlal Dube and Anr.1, and it was held as under:-*

*“7. ....According to Clause (a) of Section 65 of Indian Evidence Act, Secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in 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 of any person legally bound to produce it, and when, after the notice mentioned in Section 66 such person does not produce it. Clauses (b) to (g) of Section 65 specify some other contingencies wherein secondary evidence relating to a document may be given.”*

13. *In the matter of Rakesh Mohindra vs. Anita Beri and Ors. this Court has observed as under:-*

*“15. The preconditions for leading secondary evidence are that such original documents could not be produced by the party relying upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original*

*documents is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot accepted.”*

14. *It is trite that under the Evidence Act, 1872 facts have to be established by primary evidence and secondary evidence is only an exception to the rule for which foundational facts have to be established to account for the existence of the primary evidence. In the case of H. Siddiqui (dead) by LRs Vs. A. Ramalingam, this Court reiterated that where original documents are not produced without a plausible reason and factual foundation for laying secondary evidence not established it is not permissible for the court to allow a party to adduce secondary evidence.”*

18. Reverting to the facts of the case, there is no hesitation to hold that the plaintiffs, on one hand, had failed to produce sufficient credible material before learned trial Court to prove the existence of original Will executed by Smt. Pushpa Rani and on the other they had also failed in proving its receipt by Ms. Renu Gupta, Patwari Halqua and her refusal to return the same to the plaintiffs.

19. Learned trial Court has thus erred in allowing the prayer of the plaintiffs for secondary evidence without seeking proof of the factum of existence and loss of the original document in accordance with law. It, however, does not mean

that the further doors will remain closed for the plaintiffs to prove on record the factum of existence and loss of original document in accordance with law.

20. In light of above discussion, petition is allowed. Impugned order dated 26.8.2021, passed by learned Senior Civil Judge, Sirmour District at Nahan, H.P. in Case No. 21/1 of 2019 is set aside with directions to learned trial court to allow the plaintiffs further opportunity to prove the existence and loss of alleged original Will of late Smt. Pushpa Rani, strictly in accordance with law and thereafter to pass orders afresh on the application of plaintiffs seeking leave to prove the Will by way of secondary evidence.

21. The petition stands disposed of. Pending applications, if any, also stand disposed. Record be sent back forthwith.

24<sup>th</sup> May, 2023  
(kck)

**(Satyen Vaidya)**  
**Judge**