2025:HHC:36120

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

CMPMO No. 475 of 2017
Decided on : 30.10.2025

Shri Mansha Ram

...Petitioner

Versus

Shri Amar Nath (since deceased) through Lrs. Sh. Ashok Kumar and others

...Respondents

Coram
Hon'ble Mr. Justice Ajay Mohan Goel, Judge
Whether approved for reporting?[1] Yes

For the petitioner	**:**	**Mr. Bhupender Gupta, Senior Advocate, with Mr. Janesh Gupta, Advocate.**
For the respondents	**:**	**Mr. Ashok Sud, Senior Advocate, with Mr. Rajat, Advocate, for respondents No.1(a) to 1(c).** **Respondents No.3 to 5, 7, 9 & 11 already *exparte.*** **Names of respondents No.2(a), 2(b), 6(a) to 6(c), 8(a) and 8(b) are deleted vide order dated 10.10.2025.**

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, the petitioner has assailed order dated 04.10.2017, passed by learned Civil Judge (Senior

1*Whether reporters of the local papers may be allowed to see the judgment?*

Division), Court No.1, Ghumarwin, District Bilaspur, H.P., in CMA No. 781-6 of 2016, in Civil Suit No. CS 102-1 of 2011, in terms whereof, an application filed by the predecessor respondents No.1(a) to 1(c), namely Amar Nath, under Section 65 of the Indian Evidence Act (hereinafter referred to as 'the Evidence Act') to lead secondary evidence, was allowed.

2. Brief facts necessary for the adjudication of this petition are that deceased-respondent No.1 Amar Nath, who was the plaintiff before the learned Trial Court, filed a suit praying for a decree of declaration to the effect that plaintiff and defendant No.1 are joint owners in possession in equal share over the share of late Smt. Har Dei, as per her last Will executed on 12.12.2009 and revenue entries showing Har Dei as the owner in possession in revenue record are illegal, null and void.

3. In terms of the averments made in the plaint, copy whereof is on record as Annexure P-1, the contention of the plaintiff was that the plaintiff, defendant No.1 and Smt. Har Dei are jointly recorded as owners in possession of the suit land. Smt. Har Dei was being looked after and maintained by the

plaintiff as well as defendant No.1 during her lifetime and as Har Dei was pleased with the services of plaintiff and defendant No.1, she had executed a Will dated 12.12.2009 out of her free will, consent etc. and in terms whereof, the plaintiff and defendant No.1 were to inherit the property in equal share.

4. According to the plaintiff, after the death of their mother, he asked defendant No.1 to get the mutation attested on the basis of Will dated 12.12.2009, but defendant No.1 on flimsy pretexts evaded it. Thereafter, plaintiff filed an application for registration of the aforesaid Will, but in the meantime, defendant No.1 threatened to forcibly dispossess the plaintiff from the suit land and started claiming his sole right over the suit land, hence the suit.

5. In the written statement, the defence taken by defendant No.1 is, *inter alia,* to the effect that Har Dei during her lifetime, had executed a Will dated 12.02.1985 which was duly registered in the Office of Sub-Registrar Ghumarwin, vide No.83, Page No. 4-5, Book No. 3/1991, in terms whereof, the suit land devolved upon defendant No.1. The defendant denied the execution of any Will dated 12-12-2009 by Har Dei in favour

of the plaintiff and pleaded that the plaintiff had managed and manufactured this false Will in connivance with the witnesses.

6. In the backdrop of the said respective stands of the parties, an application under Section 65 of the Evidence Act was filed by the plaintiff-Amar Nath before the learned Trial Court seeking leave to lead additional evidence. Said application is on record as a Annexure P-7. It was mentioned in the application that the plaintiff had filed the suit which was pending adjudication. The basis of the suit was Will dated 12.12.2009, which was the last testament of late Smt. Har Dei. After the death of their mother, the plaintiff submitted said Will for registration under Sections 40 and 41 of the Evidence Act before Sub-Registrar, Ghumarwin, District Bilaspur along-with an application. However, defendant No.1, who is a very influential and clever person, influenced Sub-Registrar Bhrari and got said Will misplaced from the Office of Sub-Registrar Bhrari, in connivance with the official in the said office and in this regard, a report was lodged by the applicant in Police Station Bhrari. In this backdrop, a notice as is required under Section 65 of the Evidence Act was served upon defendant

No.1, calling upon him to produce the original Will, but as he failed to do so, therefore, the plaintiff had no option but to file the application with the prayer that the plaintiff be allowed to prove the said Will by leading secondary evidence.

7. The application was resisted by defendant No. 1 in terms of reply Annexure P-8 in which, *inter alia,* it was reiterated that no Will dated 12.12.2009, as was being alleged by the plaintiff, was ever executed by Har Dei.

8. In terms of the impugned order, Annexure P-9 dated 04.10.2017, learned Trial Court has allowed the application and feeling aggrieved, defendant No.1 has filed the present proceedings.

9. Learned Senior Counsel appearing for the petitioner argued that the impugned order is per se perverse. He took the Court through the order in issue and submitted that learned Trial Court has erred in not appreciating that as the application did not meet the ingredients of Section 65 of the Evidence Act, there was no occasion for the learned Trial Court to have allowed the application. He submitted that a grave irregularity stood committed by the learned Trial Court, by allowing the

application and by giving an opportunity to the respondent herein to prove a forged document. Accordingly, he submitted that the present petition be allowed and the impugned order be set aside.

10. On the other hand, learned Senior Counsel appearing for respondent No.1 submitted that there was no perversity in the order under challenge for the reason that in the backdrop of the averments made in the application, there was no other way vide which, the Will in issue could have been proved by the plaintiff, except by way of leading secondary evidence. He submitted that in fact as existence of the Will in question was admitted by defendant No.1, therefore, learned Trial Court rightly allowed the application granting permission to the plaintiff to lead secondary evidence. He also submitted that besides defendant No.1, all other defendants had admitted the existence of the said document. He further submitted that in light of the fact that as it stood proved on record that the original Will indeed was misplaced by the Office of the Revenue Officer concerned, the order passed by the learned Trial Court suffers from no infirmity and accordingly, he prayed that as

there is no merit in the petition, the same be dismissed.

11. I have heard learned Senior Counsel for the parties and have also carefully gone through the impugned order as well as other documents on record.

12. The contents of the plaint and the written statement as well as the application filed under Section 65 of the Evidence Act, which are relevant for the purpose of the adjudication of this petition, have already been mentioned by me hereinabove. Before proceeding further, it is relevant at this stage to refer to the provisions of Section 65 of the Evidence Act. Section 65 of the Evidence Act provides that secondary evidence may be given of the existence condition or contents of documents in the matters which stand mentioned there. For ready reference, this Section is quoted hereinbelow:-

> *"**65. Cases in which secondary evidence relating to document may be given.-** Secondary evidence may be given of the existence, condition or contents of a document in the following cases:-*
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> *(a) When the original is shown or appears to be in the possession or power-*
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> *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, or

of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

(b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(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) When the original is of such a nature as not to be easily movable;(e)When the original is a public document within the meaning of section 74;

(f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] [[[Cf. the Bankers' Books Evidence Act, 1891 (18 of 1891), Section 4.]], to be given in evidence;

(g) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection."

13. In terms of Sub-Section (a) of Section 65 of the

Evidence Act, secondary evidence may be given of existence, condition or contents of a document when the original is shown or appears to be in the 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 Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produces it. In terms of Sub-Section (b) of Section 65 of the Evidence Act, secondary evidence can be allowed when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest. Sub-Section (c) thereof provides that secondary evidence can be allowed to be lea when the original has been destroyed or lost and when the party offering evidence of its contents cannot for any other reason not arising out of its own default or neglect, produce it in reasonable time. As the said Sub-sections are relevant for the purpose of the decision of this case, I will not be referring to the remaining Sub-sections of Section 65 of the Evidence Act, which though stands quoted hereinabove.

14. In terms of the impugned order, learned Trial Court allowed the application permitting the plaintiff to lead secondary evidence by *inter alia* holding that the plaintiff alleges that the Will in original was misplaced by defendant No.1 in connivance with the Sub-Registrar. It held that having served the notice as stipulated under Indian Evidence Act for adducing secondary evidence and having moved the application, certainly the veracity and truthfulness of the same can only be tested on the basis of evidence as may be proved in that regard. Learned Trial Court thereafter observed that it was for the plaintiff to prove the alleged document by way of adducing secondary evidence in accordance with law and the same can also be determined only after an opportunity is given for the same. It further observed that merely giving an opportunity for the same would not dispense with the requirement of law in regard to adducing of secondary evidence. On these basis, learned Trial Court gave an opportunity to the plaintiff to lead secondary evidence.

15. While returning these findings, learned Trial Court erred in not appreciating that the opportunity given to a party to

lead secondary evidence is not a matter of discretion vested upon the Court, but such an opportunity can only be granted if the parameters, as have been laid down in Section 65 of the Evidence Act, are met in terms of the application which is filed by the applicant before the Court.

16. In the present case, the allegation of the plaintiff is not that the original Will is in possession or power of the defendant, because the case as has been put forth by the original plaintiff, is that he himself submitted the alleged Will for the purpose of registration in the Office of the Sub-Registrar and from there purportedly and allegedly, the Will was got misplaced by defendant No.1. This Court is of the considered view that these allegations made in the plaint, which have been controverted in the written statement, by no stretch of imagination, can be deemed to be a presumption of the fact that the Will was in possession of the defendant No.1. This extremely important aspect of the matter was overlooked by the learned Trial Court while allowing the application.

17. Not only this, in terms of Sub-Section (b) of Section 65 of the Evidence Act, secondary evidence can be permitted

when the existence or condition of contents of the Will have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest. In the present case, the existence of the Will has not at all been admitted by the defendant No.1 and in fact said defendant has denied its existence in the written statement. The contention of learned Senior Counsel for the plaintiff that the existence of the document stands admitted by defendant No.1 is worth rejection for the reason that there is not even a murmur in the entire written statement from which it can be inferred that the existence of the Will dated 12.12.2009 executed by Har Dei was admitted by defendant No.1.

18. As far as the contention of the learned Senior Counsel for the respondent/plaintiff that besides the present petitioner, all other defendants had admitted the existence of the will is concerned, a perusal of the memo of party demonstrates that as it was only the present petitioner, who was made the contesting defendant. In these circumstances, admission of the existence of the Will by other defendants has got no relevance as far as the adjudication of this application is

concerned because herein, the contents of the application have to be taken into consideration vis-à-vis the response as was filed thereto by the contesting defendant i.e. the present petitioner.

19. Now, as far as the ingredients of Sub-Section (c) of Section 65 of the Evidence Act are concerned, in terms thereof, secondary evidence can be allowed to be led 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 its own default or neglect, can produce it in reasonable time. Though in the present case, it is the allegation of the plaintiff that he submitted the original Will for the purpose of registration before Sub-Registrar and from there the Will got misplaced by defendant No.1, however, the same cannot be construed to be a fact from which it can be inferred that the original Will has been destroyed or lost because it is an allegation of the plaintiff, which presently is not substantiated. In fact, a perusal of the impugned order demonstrates that in Para No.2 thereof, the learned Trial Court has made an observation that when a complaint was filed by the plaintiff to the SDM, Ghumarwin and

SDPO Ghumarwin, alleging therein that the original Will got misplaced from the Office of the Sub-Registrar by the defendant No.1, an inquiry was conducted and the inquiry report revealed that no original document was submitted by the plaintiff for registration and what he had submitted, was only a photocopy of the said Will and the complaint was also dismissed.

20. Learned Trial Court erred in ignoring all these important aspects of the matter. Learned Trial Court allowed the application without any due application of judicial mind. In fact the findings returned by the learned Trial Court to the effect that merely giving an opportunity to the plaintiff to lead secondary would not dispense with the requirements of law with regard to adducing of secondary evidence, are self contradictory. This Court fails to understand as to what the learned Trial Court was trying to say while stating that an application praying for grant of opportunity to lead secondary evidence could only have been allowed if the application met the parameters of Section 65 of the Evidence Act, when, stood returned in the impugned order by the learned Trial Court that the application indeed met

the ingredients of Section 65 of the Evidence Act.

21. Therefore, in light of the above observations, as impugned order per se is not sustainable in the eyes of law, the present petition is allowed. Order dated 04.10.2017, passed by learned Civil Judge (Senior Division), Court No.1, Ghumarwin, District Bilaspur, H.P., in CMA No. 781-6 of 2016, in Civil Suit No. CS 102-1 of 2011, is quashed and set aside. Parties through counsel are directed to appear before the learned Trial Court on **17.11.2025.** Pending miscellaneous application(s), if any, also stand disposed of accordingly.

(Ajay Mohan Goel)
Judge

October 30, 2025
(Shivank Thakur)