Secondary Evidence Can be Produced Without Application - SC

written by Praveen Pandey | April 15, 2020

The bench comprising of Justice L Nageswara Rao and Justice Hemant Gupta of Hon'ble Supreme Court in the matter of *Dhanpat Vs. Sheo Ram (Deceased) Through Lrs. & Ors.[1]* on 19th March 2020, held that as per terms of Section 65(c) of the Evidence Act, there is no requirement to file an application during producing secondary evidence to put on record. Further, the Hon'ble Court observed that the court cannot deny considering the secondary evidence on the basis that the application for permission to lead the secondary evidence was not filed.

SC Allows Secondary Evidence Without Filing Of Application - FACTS

The present appeal was filed by Dhanpat ('Appellant') against the order passed by the High Court of Punjab & Haryana on 27th March 2014. Basically, it was a partition suit wherein the defendants had produced a will as a piece of evidence and had denied the claim of the plaintiffs for a share in the ancestral property. The certified copy of the registered will was produced during the trial and it was stated by the defendants that the original will was lost.

The disputed property in the concerned case belongs to Misri, who was the grandfather of the Sheo Ram ("Plaintiff") and Sohan Lal (defendant No.5) and defendant Nos.7 to 9 were his granddaughters. Chandu Ram was the father of the Plaintiff, defendant No.5 and defendant no. 7-9 and the husband of Chand Kaur who had inherited the suit land from his father, Misri.

In the said suit, the trial court has framed many issues but for deciding the present appeal. the Hon'ble Court focused on three issues, one of which was:

"Whether the Will dated 30.4.1980 was validly executed by Chandu Ram in favour of defendants No. 1 to 4?"

While going through the above mentioned issue, the trial court had found that the will is duly proved on the basis of the statement of the defendants' witnesses. Further, while hearing the arguments, the court did not find any point which signifies that a deviation from natural succession will make the will doubtful. The trial court also held that the execution of the Will is proved by the examining of the attesting witness only.

Further, the court stated that the scribe who was appeared as witness can not be treated as an attesting witness because he had not signed the will as a witness. On the basis of aforesaid findings, the learned trial court dismissed the suit filed by the Plaintiff.

Thereafter, an appeal was filed before the First Appellate Court wherein the

appellate court asserted the findings of the trial court and dismissed the suit filed by the plaintiff vide judgment dated 11th May 1987.
The second appeal has been filed by the Plaintiff before the Hon'ble High Court and the same has been allowed. The Hon'ble Court held that the will had been completely misread, misinterpreted and misconstrued.
ISSUE
Whether it is required to file an application for permission to lead the secondary evidence before the Court?
SUBMISSION
The counsel of the plaintiff-respondent submitted that the defendants have not produced the original will and also filed the secondary evidence without any application. Therefore, the secondary evidence filed by the defendants could not be produced to prove the execution of the will.
The counsel for the defendants submitted that they have produced a certified copy of the will which is collected from the office of Sub-Registrar. It was further stated that the defendants also produced the photocopy of the said will which was marked as evidence.
After hearing both the parties, the Hon'ble Supreme Court stated that Section 65(c) of the Evidence Act, 1872[2] is applicable in the present case as it is stated by the defendants that the original will is misplaced. Section 65 of the Evidence Act states that:
"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) 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 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 1[India] to be given in evidence2; 1[India] to be given in evidence2;"
(g) when the originals consists 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. In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."
The Hon'ble Apex Court relied upon the case of *M. Ehtisham Ali for himself and in place of M. Sakhawat Ali, since deceased v. Jamna Prasad, since*

deceased & Ors.[3] In the said judgment, the plaintiff stated that the original sale deed was lost but since it was registered, he can produce a certified copy of the evidence collected from the office of the Registrar as secondary evidence. In the said suit, it was not a matter of dispute about the correctness of the copy of the registered document. But the matter of dispute was about the not satisfactorily establishing the loss of the original sale deed.

Further, the Hon'ble Apex Court has also placed reliance upon the case of *Aher Rama Gova & Ors. v.State of Gujarat[4]* where the original dying declaration which was recorded by the Magistrate was lost and not available so the prosecution had filed a copy of dying declaration as secondary evidence along with the statement of Magistrate and Head Constable and there was no application filed to lead the said secondary evidence on record.

In the abovementioned cases, we find that there is no dispute between the parties regarding the filing of Secondary Evidence on record and the Hon'ble Court has not asked the parties for filing an application to led the evidence on record.

JUDGMENT

The Hon'ble Supreme Court held that "*There is no cross-examination of any of the witnesses of the defendants in respect of loss of original Will. Section 65 of the Evidence Act permits secondary evidence of existence, condition, or contents of a document including the cases where the original has been destroyed or lost. The plaintiff had admitted the execution of the Will though it was alleged to be the result of fraud and misrepresentation. The execution of the Will was not disputed by the plaintiff but only proof of the Will was the subject matter in the suit. Therefore, once the evidence of the defendants is that the original Will was lost and the certified copy is produced, the defendants have made out sufficient ground for leading of secondary evidence".*

The Hon'ble Court further observed and held that "*There is no requirement that an application is required to be filed in terms of Section 65(c) of the Evidence Act before the secondary evidence is led. A party to the lis may choose to file an application which is required to be considered by the trial court but if any party to the suit has laid foundation of leading of secondary evidence, either in the plaint or in evidence, the secondary evidence cannot be ousted for consideration only because an application for permission to lead secondary evidence was not filed."*

CONCLUSION

It is a common practice of the court that a litigating lawyer always files an application whenever it has to produce any evidence or document to lead on record. In the said case, the original will was lost, so a copy of the will was filed as secondary evidence and the same was objected by the other party because it was not filed along with the application for permission to produce the said document as secondary evidence before the court.

The Hon'ble bench of Supreme Court while deciding the said case has gone through Section 65(c) of the Evidence Act, 1872 and above-mentioned case laws and clearly stated that an application is not necessary for producing secondary evidence. The Supreme Court also stated that the court cannot deny taking the secondary evidence on the record because the said evidence is not filed along with an application.

- [1] Civil Appeal No.1960 of 2020

- [2] Indian Evidence Act, 1872
- [3] AIR 1922 PC 56
- [4] (1979) 4 SCC 500

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