IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

ORDER.

S.B. Civil Writ Petition No.6243/2005

Malkit Singh vs. The Special Court N.D.P.S., Sri Ganganagar & ors.

Under Article 226 of the Constitution of India.

Date of Order: October 25 ,2005.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Mr. Vikas Balia, for the petitioner.

REPORTABLE

BY THE COURT:

The present writ petition is against the order of the trial court dated 15.9.2005 by which the trial court allowed the application of the plaintiff-respondent under Section 65 of the Evidence Act and permitted the plaintiff to produce the copy of the family settlement dated 16.8.2003 as secondary evidence.

According to the learned counsel for the defendant-petitioner, the learned trial court has committed serious error of law in allowing the application of the plaintiff-respondent and allowed the documents to be taken on record as secondary evidence under Section 65 of the

Evidence Act. The trial court without deciding about the execution of the document, its existence and correctness of the copy produced by the respondent as secondary evidence, allowed the document to be admitted in evidence, which is contrary to the provisions of Section 63 of the Evidence Act. According to the learned counsel for the petitioner, in view of the order dated 15.9.2005, the petitioner will be precluded from submitting that there was no original family settlement in existence because the order under Section 65 of the Evidence Act can be passed after holding that original document was in fact executed and was in existence, therefore, if the court allowed the document to be admitted in evidence under Section 65 of the Evidence Act then at latter stage the party seeking to rely upon the copy of the document admitted as secondary evidence, may need not to prove the existence of original document and the court may presume that the document was in existence. In the alternative, once the document is admitted in evidence under Section 65 of the Evidence Act then the burden shifts upon the defendant to prove that the document was not in existence whereas if the court would have applied its mind and would have decided the issue about execution and existence of the document then it would have been the burden of the plaintiff to prove the execution and existence of the family settlement dated 16.8.2003. Therefore, according to the learned counsel for the petitioner, the sequence for

admitting the document as secondary evidence clearly shows that the court is under obligation to first determine about the execution of the document, its existence and after finding prima facie proof of the existence and execution of the document and on finding that the document sought to be produced is true and correct copy of the document which falls in any of the clauses of Section 63 of the Evidence Act then only the document could have been admitted by the court below.

The learned counsel for the petitioner relied upon several judgments in support of his above arguments but I do not find any reason to refer all those judgments because this Court is also of the view that a document which is or was in existence, for that document only secondary evidence can be produced. What documents are falling in the secondary evidence is given in Section 63 of the Evidence Act. But so far as the contention of the learned counsel for the petitioner that the petitioner will be deprived from raising the objection about the admissibility of the document subsequently during trial of the suit is concerned, I do not find any force in the submission of the learned counsel for the petitioner in view of the decision of the Hon'ble Apex Court delivered in the case of R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P. Temple and another ((2003) 8 SCC 752), wherein

Hon'ble the Apex Court held that objection as to admissibility of evidence can be classified as (1) objection that the document sought to be proved is itself inadmissible and (2) objection directed not against the admissibility of the document but against the mode of proof thereof on the ground of irregularity or insufficiency. Hon'ble the Apex Court held that objection under category (1) can be raised even after the document has been marked as “an exhibit” or even in appeal or revision, but the objection under category (2) can be raised when the evidence is tendered but not after the document has been admitted in evidence marked as an exhibit. The objection raised by the petitioner is falling in the first category of objection because, according to the petitioner, the original family settlement was never executed and, therefore, never came into existence at any point of time. This objection is not objection about the mode of proof of the document but it goes to the root of the issue about the admissibility of the document. Once it is proved that that the document was not in existence, then there arises no questions of its having any copy thereof and, therefore, the very foundation of the document sought to be produced as secondary evidence will be lost and that will make the document no evidence in the eye of law. In view of the law declared by the Hon'ble Apex Court in R.V.E. Venkatachala Gounder's case(supra), the petitioner is free and entitled to raise the objection about the admissibilityof the

secondary evidence as the issue about the existence of original document has not been decided by the trial court in the impugned order despite the fact that the petitioner specifically raised that ground before the trial court.

So far as the contention of the petitioner that when one seek permission to produce the document as secondary evidence under Section 65 of the Evidence Act then the burden lies upon him to prove that the original document was executed and was or is in existence and a copy sought to be produced is the document falling in any of the categories of the documents referred in Section 63 of the Evidence Act. For this it is suffice to say that the copy of the document sought to be produced by the plaintiff is alleged to be photo-stat copy of the original document. The photo-stat copy obtained by the process of photo-state machine is a copy of the documents by mechanical process and the photo-stat machine ensures creation of true and correct copy. Therefore, the document sought to be produced can be presumed to be true and correct copy of the original document under sub-section (2) of Section 63 of the Evidence Act. But as stated above, since the trial court has not decided whether in fact family settlement document was in fact executed and was or is in existence, therefore, mere because the document has been admitted as secondary evidence will not absolve

the plaintiff from proving the fact that the original document was in existence and executed. The trial court cannot ignore its own order (impugned) wherein said objection was raised by the petitioner and has not been decided by the trial court.

It will be further relevant to mention here that before seeking permission to produce the copy of the family settlement dated 16.8.2003 as secondary evidence, the plaintiff served a notice upon the defendant under Order 11 Rule 14, C.P.C. and the trial court by order dated 3.5.2005 directed defendant no.2 to produce family settlement dated 16.8.2005 but defendant no.2 submitted affidavit on 13.5.2005 and stated on oath that the said family settlement was never came into existence as it was never executed and, therefore, there arises no question of the said document to be in possession of defendant no.2. After taking note of this fact, since the trial court has allowed the application of the plaintiff under Section 65 of the Evidence Act, therefore, even after admission of the document as secondary evidence, the burden still lies upon the plaintiff to prove the document which he has produced as the copy of the original and the original was in fact executed and was in existence. Therefore, so far as the apprehension of the petitioner that by the impugned order dated 15.9.2005, the petitioner will be deprived from questioning the existence of the

document dated 16.8.2003 is concerned, is having no legal foundation.

I do not find any reason to set aside the order of the trial court dated 15.9.2005 and direct the trial court to hold an inquiry by taking evidence of the parties and decide the questions about the execution of the document in question and its due execution and pass a fresh order on plaintiff's application under Section 65 of the Evidence Act when the petitioner shall have right to cross-examine and produce his evidence for the same purpose during trial. There appears no reason to hold trial within trial.

In view of the above, I do not find any reason to interfere in the impugned order dated 15.9.2005 in the facts of the case. Hence the writ petition of the petitioner is hereby dismissed.

(PRAKASH TATIA),J.

mlt.