

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL WRIT JURISDICTION CASE NO.18535 OF 2012**

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1. BHARATJEE PRASAD S/O LATE MAHANTH PRASAD
RESIDENT OF VILLAGE- GOPALGANJ SARIAYA,
YADAVPUR ROAD, WARD NO. 4, P.O. + P.S. + DISTRICT-
GOPALGANJ

2. SMT. KRISHNAWATI DEVI @ NITA DEVI W/O BHARATJEE
PRASAD RESIDENT OF VILLAGE- GOPALGANJ SARIAYA,
YADAVPUR ROAD, WARD NO. 4, P.O. + P.S. + DISTRICT-
GOPALGANJ

.... PETITIONER/S

VERSUS

1. YOGENDRA PANDIT S/O LATE GOKHUL KOHAR
RESIDENT OF VILLAGE- BANJARI, P.O. + P.S. +
DISTRICT- GOPALGANJ

2. KANTI DEVI W/O LATE LAXMAN PRASAD RESIDENT OF
STATE BANK OF INDIA MAUNIA CHOWK, THANA ROAD
GOPALGANJ, P.O. + P.S. + DISTRICT- GOPALGANJ

3. GUDDU KUMAR SON OF LATE LAXMAN PRASAD
RESIDENT OF STATE BANK OF INDIA MAUNIA CHOWK,
THANA ROAD GOPALGANJ, P.O. + P.S. + DISTRICT-
GOPALGANJ

4. DIPU KUMAR SON OF LATE LAXMAN PRASAD RESIDENT
OF STATE BANK OF INDIA MAUNIA CHOWK, THANA
ROAD GOPALGANJ, P.O. + P.S. + DISTRICT-
GOPALGANJ

5. CHANDANI KUMARI MINOR DAUGHTER OF LATE
LAXMAN PRASAD THROUGH KANTI DEVI, NATURAL
MOTHER AND NEXT FRIEND RESIDENT OF STATE
BANK OF INDIA MAUNIA CHOWK, THANA ROAD
GOPALGANJ, P.O. + P.S. + DISTRICT- GOPALGANJ

6. ROSHANI KUMARI MINOR DAUGHTER OF LATE LAXMAN
PRASAD THROUGH KANTI DEVI, NATURAL MOTHER
AND NEXT FRIEND RESIDENT OF STATE BANK OF
INDIA MAUNIA CHOWK, THANA ROAD GOPALGANJ,
P.O. + P.S. + DISTRICT- GOPALGANJ

7. SHALU KUMARI MINOR DAUGHTER OF LATE LAXMAN
PRASAD THROUGH KANTI DEVI, NATURAL MOTHER
AND NEXT FRIEND RESIDENT OF STATE BANK OF
INDIA MAUNIA CHOWK, THANA ROAD GOPALGANJ,
P.O. + P.S. + DISTRICT- GOPALGANJ

8. SARASWATI KUER W/O LATE RAMASHANKAR PRASAD
RESIDENT OF STATE BANK OF INDIA MAUNIA CHOWK,
THANA ROAD GOPALGANJ, P.O. + P.S. + DISTRICT-
GOPALGANJ

.... RESPONDENT/S

WITH

CIVIL WRIT JURISDICTION CASE NO.19134 OF 2012

- =====
1. BHARATJEE PRASAD S/O LATE MAHANTH PRASAD
RESIDENT OF VILLAGE - GOPALGANJ SARIAYA,
YADAPUR ROAD, WARD NO. 4, P.O. + P.S. + DISTRICT -
GOPALGANJ
 2. SMT. KRISHNAWATI DEVI @ NITA DEVI W/O BHARATJEE
PRASAD RESIDENT OF VILLAGE - GOPALGANJ SARIAYA,
YADAPUR ROAD, WARD NO. 4, P.O. + P.S. + DISTRICT -
GOPALGANJ

.... PETITIONER/S

VERSUS

1. YOGENDRA PANDIT S/O LATE GOKHUL KOHAR
RESIDENT OF VILLAGE - BANJARI, P.O. + P.S. +
DISTRICT - GOPALGANJ
2. KANTI DEVI W/O LATE LAXMAN PRASAD RESIDENT OF
STATE BANK OF INDIA MAUNIA CHOWK, THANA ROAD
GOPALGANJ, P.O. + P.S. + DISTRICT - GOPALGANJ
3. GUDDU KUMAR SON OF LATE LAXMAN PRASAD
RESIDENT OF STATE BANK OF INDIA MAUNIA CHOWK,
THANA ROAD GOPALGANJ, P.O. + P.S. + DISTRICT -
GOPALGANJ
4. DIPU KUMAR SON OF LATE LAXMAN PRASAD RESIDENT
OF STATE BANK OF INDIA MAUNIA CHOWK, THANA
ROAD GOPALGANJ, P.O. + P.S. + DISTRICT -
GOPALGANJ
5. CHANDANI KUMARI MINOR DAUGHTER OF LATE
LAXMAN PRASAD THROUGH KANTI DEVI, NATURAL
MOTHER AND NEXT FRIEND RESIDENT OF STATE BANK
OF INDIA MAUNIA CHOWK, THANA ROAD GOPALGANJ,
P.O. + P.S. + DISTRICT - GOPALGANJ
6. ROSHANI KUMARI MINOR DAUGHTER OF LATE LAXMAN
PRASAD THROUGH KANTI DEVI, NATURAL MOTHER
AND NEXT FRIEND RESIDENT OF STATE BANK OF INDIA
MAUNIA CHOWK, THANA ROAD GOPALGANJ, P.O. + P.S.
+ DISTRICT - GOPALGANJ
7. SHALU KUMARI MINOR DAUGHTER OF LATE LAXMAN
PRASAD THROUGH KANTI DEVI, NATURAL MOTHER
AND NEXT FRIEND RESIDENT OF STATE BANK OF INDIA
MAUNIA CHOWK, THANA ROAD GOPALGANJ, P.O. + P.S.
+ DISTRICT - GOPALGANJ
8. SARASWATI KUER W/O LATE RAMSHANKAR PRASAD
RESIDENT OF STATE BANK OF INDIA MAUNIA CHOWK,
THANA ROAD GOPALGANJ, P.O. + P.S. + DISTRICT -
GOPALGANJ

.... RESPONDENT/S

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WITH
CIVIL WRIT JURISDICTION CASE NO.19411 OF 2012

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1. BHARATJEE PRASAD S/O LATE MAHANTH PRASAD R/O
VILLAGE- GOPALGANJ SARIAYA, YADAPUR ROAD,

WARD NO. 4, P.O.+P.S.+DISTRICT-GOPALGANJ

2. SMT. KRISHNAWATI DEVI @ NITA DEVI W/O BHARATJEE
PRASAD R/O VILLAGE- GOPALGANJ SARIAYA, YADAPUR
ROAD, WARD NO. 4, P.O.+P.S.+DISTRICT-GOPALGANJ
.... PETITIONER/S

VERSUS

1. YOGENDRA PANDIT S/O LATE GOKHUL KOHAR R/O
VILLAGE- BANJARI, P.O.+P.S.+DISTRICT- GOPALGANJ
2. KANTI DEVI W/O LATE LAXMAN PRASAD R/O STATE
BANK OF INDIA, MAUNIA CHOWK, THANA ROAD
GOPALGANJ, P.O.+P.S.+DISTRICT- GOPALGANJ
3. GUDDU KUMAR S/O LATE LAXMAN PRASAD R/O STATE
BANK OF INDIA, MAUNIA CHOWK, THANA ROAD
GOPALGANJ, P.O.+P.S.+DISTRICT- GOPALGANJ
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BANK OF INDIA, MAUNIA CHOWK, THANA ROAD
GOPALGANJ, P.O.+P.S.+DISTRICT- GOPALGANJ
5. CHANDANI KUMARI MINOR D/O LATE LAXMAN PRASAD
THROUGH KANTI DEVI, NATURAL MOTHER AND NEXT
FRIEND R/O STATE BANK OF INDIA, MAUNIA CHOWK,
THANA ROAD GOPALGANJ, P.O.+P.S.+DISTRICT-
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THANA ROAD GOPALGANJ, P.O.+P.S.+DISTRICT-
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THANA ROAD GOPALGANJ, P.O.+P.S.+DISTRICT-
GOPALGANJ
8. SARASWATI KUER W/O LATE RAMASHANKAR PRASAD
R/O STATE BANK OF INDIA, MAUNIA CHOWK, THANA
ROAD GOPALGANJ, P.O.+P.S.+DISTRICT- GOPALGANJ
.... RESPONDENT/S

APPEARANCE :
(IN ALL CASES)

FOR THE PETITIONERS : MR. S. S. DWIVEDI, SR. ADV.
MR. RANJAN KUMAR DUBEY, ADV.
MS. SANGEETA SHARMA, ADV.
MR. RAKESH CHANDRA, ADV.
FOR THE RESPONDENTS : MR. K. N. CHOUBEY, SR. ADV.
MR. RANJAN KR. SRIVASTAVA, ADV.

CORAM: HONOURABLE JUSTICE SMT. SHEEMA ALI KHAN
CAV ORDER

6 28-02-2013

These three writ applications have been filed challenging the order dated 31.08.2012 by which the Court below has allowed the application of the defendant no. 1 to admit three documents as secondary evidence.

CWJC No. 18535 of 2012 challenges the order by which the defendant has been allowed to mark the certified copy of the sale deed dated 17.08.1965 executed by Mahant Sah in favour of Gokula Kohar as an exhibit. CWJC No. 19134 of 2012 has been filed challenging the same order by which the Court below has allowed the petition dated 02.08.2012 filed by the defendant no. 1 to mark the certified copy of the Kirayanama (lease deed) dated 26.07.1977 executed by Gokula Kohar in favour of Rama Shankar Prasad as an exhibit. CWJC No. 19411 of 2012 challenges the same order by which defendant no. 1 has been permitted to mark the certified copy of the stamp register as an exhibit.

The order arises out of Title Suit No. 29 of 2009 by which the plaintiff has sought a declaration of title of the properties as described in Schedule-1 of the plaint and a declaration that the sale deed dated 17.08.1965 and the Deed of Gift dated 10.06.1981 are void and a nullity in the eyes of law. The defendant no. 1 has challenged the claim of the plaintiff that he has title to the said property and claims that his ancestors had purchased these lands vide sale deed

dated 17.08.1965. It is also the case of the defendant that the present Title Suit No. 29 of 2009 has been filed after the defendant no. 1 had filed Eviction Suit No. 2 of 2008.

There are a number of parties in the suit and a large number of witnesses and exhibits, and as such, the suit is taking sometime for disposal. During the pendency of the suit, the defendant no. 1 who is respondent no. 1 before this Court, has filed three applications before the Court below for permission to mark the documents described above as exhibits. The Trial Court has allowed them by the impugned order, which is under challenge before this Court.

The main question arose in these writ applications is that the Court below ought not have allowed the certified copies to be marked as exhibits, especially the sale deed dated 17.08.1965, it is submitted that the provisions of Section 65 of the Indian Evidence Act were not adhered to by the Trial Court while allowing the defendant no. 1 to mark the certified copies of the documents aforesaid as exhibits.

Section 65 of the Indian Evidence Act lays down the conditions under which secondary evidence may be allowed in a case. Section 65 of the Indian Evidence Act reads as follows:-

“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 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. 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.”

On the basis of the aforesaid provisions of law, it has been argued that the provisions of Section 65 of the Indian Evidence Act have not been fulfilled inasmuch as the documents do not satisfy the conditions under which the document should be marked has not been fulfilled.

In this context, this Court will refer to the proceedings and the various orders passed by the Court below before the impugned order was passed. On 29.05.2011, the defendant no. 1 filed an application under Order 11 Rule 2 of the Civil Procedure Code to produce certain documents. It would appear from the order dated 13.09.2011 that an application was filed that certain documents may be called from the Chapra Registry Office which was submitted in Court. On 19.09.2011, the application under Order 11 Rule 2 of the Civil Procedure



Code was heard. The certified copies of the documents were handed over to the concerned parties at the instance of the Court by defendant no. 1. The documents that were called from the Registry Office of Chapra and the records of Misc. Case No. 121 of 2008 were directed to be kept in the safe custody. At that stage, no objection was made with regard to these two documents; however they are not the subject matter of the dispute before this Court. As per the application filed on behalf of defendant no. 1, the documents which are the subject matter of dispute before this Court were also called from the Chapra Registry Office from the dasti summons and from the Collector, Gopalganj. From the order dated 08.02.2012, it would appear that the documents reached the Court below from the Registry Office, Chapra and from the Office of the Collector, Gopalganj, which were ordered to be kept in the safe custody, as per the request of defendants 1 and 9. On 24.02.2012, the application under Order 11 Rule 2 of the Civil Procedure Code was heard. In the affidavit filed on behalf of defendant no. 1, he has stated that the original copy of the sale deed dated 17.08.1965 was with his brothers and after partition, they were not producing the document and as such, they should be summoned in this suit. Apart from which, there was a prayer that the original copy of the stamp register be called from the Registry Office, Chapra so that the L.T.I. on the




register may be compared with the L.T.I. on the sale deed. The document from the Collectariate, Gopalganj has already been received and were in the safe custody and as such, dasti summons were issued to the brothers of the defendant no. 1 so that they could produce the original copy of the sale deed dated 17.08.1965. The prayer on behalf of the defendants 1 and 9 was accepted by the Court below. On 29.02.2012, the brothers of the defendant no. 1 appeared before Court below and filed an affidavit stating therein that the sale deed had been stolen in a dacoity. At that stage, it would appear that no objection was made on behalf of the plaintiff or the other parties. The documents so produced from the various authorities of the State of Bihar were kept in the safe custody for consideration during the hearing.

In the background of the aforesaid orders in the suit, which were passed in the presence of the parties, the impugned order dated 31.08.2012 was passed taking into account that the certified copies of all the three documents which were to be marked as exhibits had been received in the Court below and the defendants 1 and 9 had also laid evidence to indicate the reasons as to why the original sale deed could not be produced at the stage when the interlocutory application was heard and as such, has allowed the defendant no. 1 to mark the certified copies of the documents aforesaid as secondary evidence. Thus,

fulfilling the conditions as laid down under Section 65 of the Indian Evidence Act.


From the perusal of the facts and the order impugned, it is apparent that the suit was filed for a declaration that the sale deed dated 17.08.1965 is a null and void document. Obviously, the plaintiff did not have the custody of the documents and as such, it was essential that it should be produced. Ideally, as per the law, it ought to have been produced as a primary evidence, but there being an explanation as to why it could not be produced as primary evidence, the Court below has allowed it to be produced by way of secondary evidence. The objection taken on behalf of the petitioner, therefore, is not tenable. In fact, the petitioner ought to have filed an application for production of that document since it was his prayer that it ought to be held as a void and illegal deed, not binding on the plaintiff. This Court finds that sufficient grounds have been stated in the impugned order to allow the document to come by way of secondary evidence.

Both, the petitioners and the respondents have relied on certain judgments to support their respective cases. I shall first refer to the judgments referred by the plaintiff. In the case of *Land Acquisition Officer and Mandal Revenue Officer vs. V. Narasaiah* [(2001) 3 SCC 530], the market value of the lands had to be proved by the State to




determine the rate to be granted by way of compensation. The question arose as to whether the certified copy of the sale deed could be taken in evidence as there was a difficulty in tracing the parties for the purposes of proving the contents of the deed. Section 51 (a) of the Land Acquisition Act had allowed the certified copy of the registered documents to be accepted as evidence of the transaction recorded in such document. In this context, the Apex Court held that “it may be accepted as evidence” as the section indicates but there is no compulsion on the Court to accept such transaction as evidence. The Apex Court further held that the Court would eventually have to weigh the pros and cons to decide whether such transaction can be relied for understanding the real price of the land concerned. It has, therefore, been submitted on the basis of the aforesaid judgment that it is essential for the defendants to adduce evidence to show that the transaction in the sale deed was correct. This aspect of the matter cannot be decided at the stage when the document is being accepted as evidence. In any event, this aspect will have to be examined in the facts and circumstances of the case when the Court will have the opportunity to consider the probative value of the exhibit in question. As such, this case does not help the petitioner at all.

Counsel for the petitioner has also referred to the




judgment in the case of *Smt. J. Yashoda vs. K. Shobha Rani* [(2007) 5 S.C.C. 730], the Court has observed in this case that “secondary evidence as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who fails to prove it to be valid, the same party is not entitled to introduce evidence or its contents”. The facts indicate that respondent no. 1 denied that he had written a manuscript and had pleaded that Photostat copy may be examined by a hand-writing expert. However, it was not stated that the original documents was in possession of respondent no. 1. The parties also failed to explain under what circumstances the Photostat copy was prepared and who was in possession of the original document. The High Court, therefore, concluded that no foundational facts had been stated for leading secondary evidence and rejected the evidence. It may be stated that the matter went up to Supreme Court after final disposal of the case where the probative value of the document was considered and rejected. In the present case, the stage has not arisen as yet and as such, the ruling in the aforesaid case is not applicable.

In the case of *H. Siddiqui (dead) by lrs. Vs. A. Ramalingam* [(2011) 4 S.C.C.240], it has been argued that under Section 65 of the Indian Evidence Act, The Court has to consider when the original documents are not produced




at any time, nor, any factual foundation was led for adducing secondary evidence, the contents of the secondary evidence is inadmissible, until the non-production of the original is accounted for. In this case, the Trial Court decreed the suit observing that the parties has deposed that the original Power of Attorney was not in their possession, question of laying any further factual foundation did not arise. In this case, the Photostat copy of the Power of Attorney had been produced. The Apex Court deferred with the reasons of the Trial Court when it accepted the photocopy of the Power of Attorney executed by the respondent in favour of his brother in absence of any specific admission by the respondent having executed such document, and, therefore, the Apex Court held that that the reasoning was not correct and set aside the judgment delivered by the Trial Court and the High Court. It may be noted here that there are two facts on account of which this case is not applicable to the facts of the present case. Firstly, the Court has not considered the probative value of the evidence which has been marked as exhibit, and secondly, that a proper enquiry was conducted with respect to the non-production of the original document, at the behest of defendants 1 and 9 under Order 11 Rule 2 of the Civil Procedure Code. As such, this case would not be applicable to the facts of the present case.



On the other hand, Counsel for the respondents has referred to certain decisions. Firstly, he relies on the case of *Hussaini Mahto and Others vs. Hulash Mahto and Others* [AIR 2006 Jharkhand 87]. The Court has held that secondary evidence such as certified copy of the sale deed which was sought to be produced by way of additional evidence is permissible if the contents thereof are not denied by the plaintiff. The Court further held that since the sale deed is related to the year 10.04.1935, it did not require any formal proof in view of the fact that no affidavit was filed on behalf of the respondents challenging its validity. This ruling would specifically be applicable where there is a challenge to the original document produced from the Office of the Collector and the Registrar. No formal proof would be required with respect to such documents for the reason that the original has been produced and that they would come within the meaning of a 'public document' as defined under Section 74 of the Indian Evidence Act.

Counsel has further relies on the case of *Mahendra Pratap Singh vs. Sarju Singh and others* [AIR 1968 SC 707]. This case deals with the probative value of the secondary evidence which was permitted by the Trial Court during the final stage of hearing.

Lastly, Counsel for the petitioner submits that the order impugned does not refer to the orders dated 25.07.2011,



13.09.2011, 19.09.2011, 24.02.2012 and 29.02.2012. The submission aforesaid has to be rejected as the Court below has referred to the findings given by the Court on the interlocutory applications under Order 11 Rule 2 of the Civil Procedure Code and as such, it cannot be stated that the Court has not referred to the various orders. Moreover, in a suit while considering the interlocutory applications filed by the parties, the orders passed thereon become relevant and form part of the records and can be considered by the Court, not only at the stage of passing the interim order but also at the stage of final disposal of a suit of appeal, especially in the facts of this case.

Counsel for the petitioner has placed reliance in the case of *Mohinder Singh Gill and another vs. Chief Election Commissioner, New Delhi and Others* [AIR 1978 S.C. 851]. Specific reliance has been made to paragraph 8 of the order wherein it has been observed as follows:-

“The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons.” The ruling aforesaid is very true when the Court is judging the administrative orders or findings of a statutory body or functionary, but the rule cannot be applicable in a civil proceeding as there are certain orders passed in a suit which

remain valid even at the stage of hearing. For example, if the Court permits a party to recall his witness and evidence is taken on recall, the respondents of the case cannot argue that the evidence on recall may be struck off, as the order permitting recall attains finality for the purpose for which it was issued.

Considering all the arguments and facts of these cases, this Court finds that the order impugned does not suffer from any jurisdictional error or infirmity. These writ applications are thus dismissed.

(Sheema Ali Khan, J)

AFR/
Prabhakar Anand/-