

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Civil Writ Petition No. 10428/2022

Rakesh Kumar Jain S/o Shri Suresh Chand Jain (Type Wale), R/o
Kumher Gate, Bharatpur.

-----Petitioner/Defendant

Versus

Murti Mandir Shri Parshvanath Digamber Jain Mandir, Panchayati
Vasan Gate, Bharatpur Through Shri Sudhir Jain S/o Shri Shikhar
Chand Jain R/o Gudri Mohalla, Bharatpur, Mantri Digamber Jain
Samaj Parashvanath Mandir, Vasan Gate, Bharatpur.

-----Respondent/Plaintiff

For Petitioner(s) : Mr. Devendra Kumar Bhardwaj

For Respondent(s) :

HON'BLE MR. JUSTICE MAHENDAR KUMAR GOYAL

Order

31/10/2022

This writ petition under Article 227 of the Constitution of India has been filed by the petitioner/defendant (for brevity, "the defendant") assailing the legality and validity of the order dated 18.05.2022 passed by the learned Additional Chief Judicial Magistrate No.4, Bharatpur in Case No.62/2016 whereby, an application filed by the respondent/plaintiff (for brevity, "the plaintiff") under Section 65 of the Indian Evidence Act, 1872 (for brevity, "the Act of 1872") read with the Section 151 CPC, has been allowed.

The relevant facts in brief are that the plaintiff filed a suit for mandatory and permanent injunction against the defendant wherein, it was stated that Late Phoolchand Jain has executed a Will dated 17.11.2001 in its favour. During the course of trial, the

plaintiff moved an application under Section 65 of the Act of 1872 read with Section 151 CPC seeking permission of the Court to lead secondary evidence qua the certified copy of the Will dated 17.11.2001, which has been allowed by the learned trial Court vide its order dated 18.05.2022, impugned herein.

Assailing the order, learned counsel for the petitioner submits that in the application filed by the plaintiff under Section 65, no averment was made as to when the original Will was lost and from where. Relying upon a judgement of Hon'ble Apex Court of India in case of **U. Sree Vs. U. Srinivas: (2013) 2 SCC 114**, he submits that in absence of factual foundation as to existence of the original document, its secondary evidence is not permissible. He, therefore, prays that the writ petition be allowed, the order dated 18.05.2022 be quashed and set aside and the application filed by the plaintiff for secondary evidence be dismissed.

Heard. Considered.

In the present case, secondary evidence qua the certified copy of the Will has been permitted. A perusal of the written statement filed by the petitioner reveals that existence of the Will has not been disputed and denied therein; rather, has been admitted. It has been observed by the learned trial Court in its order dated 18.05.2022 that there was no reason for disbelieving the affidavit filed by the plaintiff in support of its application that original of the Will is lost. In view thereof, in the considered opinion of this Court, the learned trial Court did not err in permitting the secondary evidence of the Will.

Reliance placed by learned counsel for the petitioner on the judgement of Hon'ble Supreme Court of India in case of the **U. Sree** (supra) is misconceived inasmuch as therein the secondary

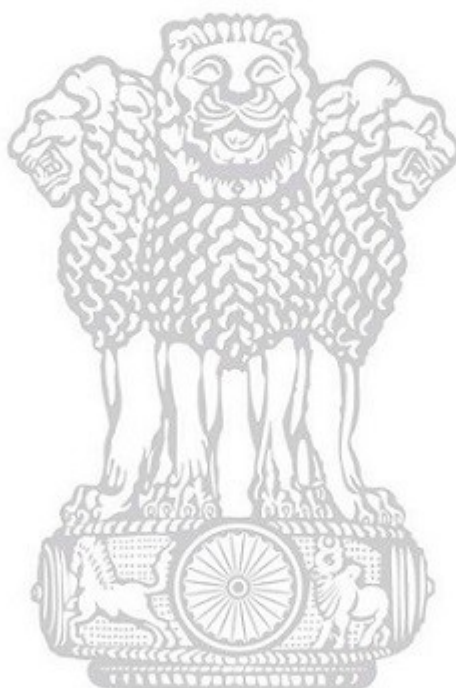
evidence was allowed by the learned Family Court qua a letter written by the party to the litigation to her father whereas, in the present case, the document in question is the certified copy of a registered Will.

The writ petition is devoid of merit and is dismissed accordingly.

(MAHENDAR KUMAR GOYAL),J

PRAGATI/66

RAJASTHAN HIGH COURT



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