

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WP227 No. 75 of 2016**

- Aniruddha Kumar Aasra S/o Amrit Lal Aasra, Aged About 60 Years R/o Nayapara, Raipur, P. S. And Post Raipur, Civil And Revenue District Raipur Chhattisgarh

---- **Petitioner****Versus**

1. Gajendra Kumar Aasra S/o Vallabhdas Aasra, Aged About 55 Years R/o House No. 10/487, Swami Vivekanand Ward No. 44, Budhapar, Raipur, P. S. And Post Raipur, Civil And Revenue District Raipur Chhattisgarh
 2. Laxmidas S/o Amrit Lal Aasra, Aged About 69 Years
 3. Komal Chand Aasra, S/o Amrit Lal Aasra, Aged About 65 Years
 4. Raaghunath Aasra S/o Amrit Lal Aasra, Aged About 58 Years
 5. Ku. Neena D/o Amrit Lal Aasra, Aged About 50 Years
- No.2 to 5 are R/o Nayapara, Raipur, P. S. And Post Raipur, Civil And Revenue District Raipur Chhattisgarh
6. Dheerendra Kumar S/o Jayanti Lal Aasra, Aged About 32 Years
 7. Paresh Kumar S/o Jayanti Lal Aasra, Aged About 30 Years
 8. Dharamveer S/o Jayanti Lal Aasra, Aged About 28 Years
 9. Chetan Kumar Aasra S/o Amrit Lal Aasra, Aged About 55 Years
- No.6 to 9 are R/o Kalibadi, Raipur, P. S. And Post Raipur, Civil And Revenue District Raipur Chhattisgarh
10. Jyotsna Ben W/o Vinod Ram Vadher, Aged About 51 Years R/o Vani Plot, Seri No. 5, Porbandar, Gujrat
 11. Bharti Ben W/o Jagdeesh Jajal, Aged About 27 Years R/o Badvar, Surendra Nagar, Gujrat

---- **Respondents**

For Petitioner	:	Ms. Priyanka Mehta, Advocate
For Respondent No.1	:	Shri H.B. Agrawal, Sr. Adv. with Ms. Meera Jaiswal, Advocate

Hon'ble Shri Justice Goutam Bhaduri**Order On Board****12/07/2018**

1. Heard.
2. The present petition is against the order dated 17.11.2015 whereby an application filed by the petitioner/defendant to lead secondary evidence to prove two WILLS dated 17.11.1972 & 04.11.1973, was dismissed.
3. Learned counsel for the petitioner/defendant submits that the defendant has made a categorical submission that a suit was filed by the plaintiff for title & permanent injunction for the property owned by Late Kasturba Ben. According to the plaintiff, the property was bequeathed in favour of the plaintiff by a WILL dated 17.11.1984. It is submitted that the property was initially owned by one Thakarsi Bhai, the husband of Kasturba Ben, who bequeathed the property by WILL dated 17.11.1972 which was the first WILL. Subsequently, Kasturba Ben after became the owner after death of her husband, bequeathed the property in favour of Vijaya Ben by a WILL dated 04.11.1973 subsequently Aniruddha Kumar Aasra S/o Amrit Lal Asra became the owner of property, therefore, the devolution of the property is through the WILL dated 04.11.1973 and inheritance. It is further submitted that the plaintiff has admitted the fact in his written-statement to the counter claim that WILL dated 17.11.1972 exists and with respect to other WILL dated 04.11.1973 he stated that the defendant had made the submission that the WILL has been taken away by fraud and thereby the existence of the WILL is proved by the averments of the plaint at para 7. It is submitted that in the circumstances when the existence of the WILL has been made clear and averment is made that it is been taken away by fraud, the trial Court should have allowed the application under Section 65 (b) of the Indian Evidence Act, 1872 (for short 'the Act, 1872) to lead the secondary evidence

and the notice is not required under Section 66 of the Act, 1872, consequently, the order may be set aside.

4. Per contra, learned counsel for the respondent submits that only existence of WILL dated 17.11.1984 is in favour of the plaintiff, therefore, the existence of other WILL cannot be proved and further the defendant before prayer to lead secondary evidence should have asked for notice to produce document under Order 11 Rule 12 CPC, therefore, the order cannot be faulted.

5. Perused the documents filed along with the petition. The application pertains seeking permission to lead secondary evidence to prove two WILLS (i) one is dated 17.11.1972 and (ii) another is dated 04.11.1973. The perusal of the counter claim of para B, the defendant/petitioner has stated that one Thakarsi Bhai during his life time on 17.11.1972 has executed a WILL in favour of his wife Smt. Kastur Bai and entire property was given to her. As against this contention, the reply was filed by the plaintiff, the contentions were admitted thereby the existence of the WILL dated 17.11.1972 is not denied.

6. The relevant part of Section 65 (b) of the Indian Evidence Act, 1872 reads as under:-

“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) xxx xxx xxx

(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;”

7. Reading of the aforesaid provision would clearly show that when the existence, condition or contents of the original have been proved to be

admitted in writing then secondary evidence relating to the document may be given.

8. Reading of para B of the counter claim along with the reply of the counter claim by the defendant would show that the existence of the WILL dated 17.11.1972 is admitted, therefore, the issue would be covered under the sub-section b of Section 65 of the Act, 1872, which permits to adduce the secondary evidence. Accordingly, the Court below fell into error to overlook such admission of existence of WILL and accordingly should have allowed the application to lead secondary evidence to prove the WILL dated 17.11.1972 by secondary evidence.

9. Now coming to the second WILL dated 04.11.1973. Para 7 of the plaint, the plaintiff has averred that on 29.06.2000 when they received all the documents of proceedings of the mutation from the Municipal Corporation then they came to know that on the basis of a WILL name of Vijaya Ben was recorded. It is not in dispute that Vijaya Ben is the mother of the petitioner herein. Para 4 of the written-statement filed by the petitioner/defendant herein, it is stated that Kasturba Bai died on 06.03.1985 and it is stated that at the moment of the death of Jamuna Das, the plaintiff and his brother were present there and after the death of Jamuna Das, the plaintiff had taken away all the documents which includes the WILL dated 04.11.1973 and took over the possession of suit property.

10. At this juncture, in the background of aforesaid existing pleadings, if Section 66 of the Act, 1872, sub-section 3 is perused it postulates that the notice to produce the original document to lead secondary evidence is dispensed with when it appears or is proved that the adverse party has obtained possession of the original by fraud or force.

11. For the sake of brevity Section 66 of the Act, 1872 with the proviso clause is

reproduced hereunder:-

“66.Rules as to notice to produce.—Secondary evidence of the contents of the documents referred to in section 65, clause (a) , shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, ¹[or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

(1) xxx xxx xxx

(2) xxx xxx xxx

(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;”

12. The Supreme Court in the case of **Rakesh Mohindra Vs. Anita Beri & others {2016 (1) C.G.L.J. 46 (SC)}** has held thus in para 17, 22 & 24:-

“17. The pre-conditions for leading secondary evidence are that such original documents could not be produced by the party relied upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original documents is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot be accepted.

22. It is well settled that if a party wishes to lead secondary evidence, the Court is obliged to examine the probative value of the document produced in the Court or their contents and decide the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. It is equally well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law.

24. After considering the entire facts of the case and the evidence adduced by the appellant for the purpose of admission of the secondary evidence, we are of the view

that all efforts have been taken for the purpose of leading secondary evidence. The trial court has noticed that the photocopy of the Exhibit DW-2/B came from the custody of DEO Ambala and the witness, who brought the record, has been examined as witness. In that view of the matter, there is compliance of the provisions of [Section 65](#) of the Evidence Act. Merely because the signatures in some of the documents were not legible and visible that cannot be a ground to reject the secondary evidence. In our view, the trial court correctly appreciated the efforts taken by the appellant for the purpose of leading secondary evidence.”

13. Applying the aforesaid principles with the facts of this case it would emerge with respect to the WILL dated 17.11.1972, the existence of the WILL has been admitted by the plaintiff. Likewise with respect to the other WILL dated 04.11.1973, the pleading exists that the said WILL existed but was taken away by fraud and force by other party. Therefore, in facts of this case notice to produce the documents as contemplated in Section 66 of the Act, 1872 would not be applicable rather the facts will take it under the proviso clause of Section 66 which dispense with the notice to produce original documents before a party prays to lead secondary evidence.

14. Considering the facts, the specific averments have been made about the admission of one document i.e. WILL dated 17.11.1972 and the second document i.e. the WILL dated 04.11.1973, as it is alleged that by fraud or force the same was possessed by the other party. In view of the principles as has been enumerated herein above, the application to lead secondary evidence in respect of both the documents are allowed. No order as to costs.

Sd/-

Goutam Bhaduri
Judge

Ashu