Before Amol Rattan Singh, J.

VIDYA DEVI AND OTHERS—*Petitioners*

versus

SUDESH KUMAR AND OTHER—*Respondents*

CR No.3771 of 2017

October 06, 2018

Indian Evidence Act, 1872—S.65 and 66(2)—Application for secondary evidence—Notice to be issued in terms of S.66 of Evidence Act—Discretion granted to Court to consider necessity of notice being issued before leading secondary evidence—Notice not required when the adverse party has knowledge of the nature of documents to be produced—Petition dismissed.

Held, that discretion has been granted to the Court to consider the necessity of a notice being issued under the said provision, before leading secondary evidence in terms of Section 65 of the said Act. Also, clause (2) of the proviso to Section 66 specifically postulates that notice would not be required to be issued to the opposite party when, from the nature of the case, the adverse party would know that he/she would be required to produce the will.

(Para 18)

Ekta Thakur, Advocate, *for the petitioners.*

Prashant Gupta, Advocate, for Suman Jain, Advocate, for respondent no. 3 (in CR No. 3771 of 2017).

Aditya Kumar Sharma, Advocate, for respondent no. 1 (in CR No. 2689 of 2018)

AMOL RATTAN SINGH, J. (ORAL)

CR No. 3771 of 2017

(1) By this petition, the petitioners challenge the (plaintiffs in the suit) order of the learned trial Court [(Civil Judge (Junior Division), Chandigarh], dated 02.05.2017, by which the application of the respondents-defendants, i.e. respondents no. 2 and 3 herein, seeking to lead secondary evidence with regard to the will set up by the said defendants in their favour, stated to be executed by the late father of the parties, i.e. Chhaju Ram, has been allowed.

(2) It has been noticed in the detailed order that has been impugned herein, that the will set up by the respondents was shown by them to be a registered will dated 08.03.2006 executed by the aforesaid Chhaju Ram, entered at serial no. 4392 of Book no. 4392, Volume No. 282, on the same date, i.e. 08.03.2006, with it also noticed that it was proved by DW Mohan Lal who appeared as a witness in the Court.

(3) The contention of the respondents-defendants, to the effect that the original will was in the custody of plaintiff no. 1 (petitioner no. 1 herein, i.e. the mother of the parties), was also noticed by the trial Court.

(4) The stand of the petitioners-plaintiffs was that the application for leading secondary evidence was not maintainable in the absence of proof of execution of the will, with the plaintiffs denying the existence of the will itself, i.e. it had never actually been executed by Sh. Chhaju Ram, and therefore the attested copy of the will being set up by the respondents-defendants, was of no evidentiary value.

(5) It was also contended that DW Mohan Lal had not seen the original will on the court file and in the absence of the original will, it could not deemed to have been proved, with it again emphasized on behalf of the defendants that no such will had been executed.

(6) The defendants also raised an objection that no notice having been given to the plaintiffs in terms of Section 66 of the Indian Evidence Act, 1872, the application under Section 65, for leading secondary evidence, was not maintainable.

(7) The learned trial Court, after having considered the aforesaid arguments, recorded a finding (as per the case of the defendants), that the will being a registered will, a copy of which was brought from the record of the office of the Sub-Registrar, U.T., Chandigarh, by DW-4 Rakesh Kumar, the attested copy of the same having been exhibited as Ex. DW-2/1, there would be no reason for not allowing the application for secondary evidence.

(8) As regards the contention raised on no notice having been issued in terms of Section 66 of the Evidence Act, it was held that such notice would not be required in a circumstance where the adverse party knew that the will would be required to be produced, [though the plaintiffs (petitioners herein) were alleging that the will set up by the defendants was a forged and fabricated one].

(9) Consequently, the application under Section 65 of the India Evidence Act was allowed by that Court, vide the impugned order.

(10) Before this Court, Ms Thakur, learned counsel for the petitioners, has reiterated the contentions raised before the learned trial Court, to the effect that the will set up by the respondents-defendants being a wholly forged and fabricated document, with no notice having been issued to the petitioners, in terms of Section 66, the impugned order is liable to be set aside.

(11) She relies upon a judgment of a co-ordinate Bench of this Court in ***Chaman Lal*** *versus* ***Davin***[1], in support of her statement, from which she specifically points to paragraph 16 which reads as follows:-

> "In the present case, will is not a notice; plaintiff is not supposed to produce the will. It could not be proved beyond doubt by positive evidence that plaintiff has obtained the original will by playing fraud. Plaintiff did not admit that he had original will at the time of his evidence in the Court; plaintiff never admitted that will was ever lost; plaintiff had always been within the jurisdiction of the Court. Hence, none of the six exception of Section 66 of the Evidence Act were available before the defendants claiming exemption of notice under Section 66 of the Act to the plaintiff to produce the will."

(12) In that case too (which was a Regular Second Appeal against the judgment and decree of the courts below), the plaintiff-appellant had filed a suit seeking partition of the property and a 1/4th share in that property, with the defendants therein having set up a will in their favour executed by the father of the parties.

(13) As per paragraph 9 of the said judgment, the will in that case was an unregistered will, not even a copy of which was ever produced in Court.

(14) I do not see how that judgment would be in any way applicable to the circumstance of the present case, in view of the fact that learned counsel for respondents-defendants no. 1 and 2 has pointed to the written statement filed by them before the trial Court, paragraph 07 of which reads as follows:-

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[1] 2010 (2) PLR 758

> "Wrong and denied. The faith, honour and respected which is being given to plaintiff no. 1 is apparent from the fact and original documents of title of House, receipts, original will etc. are in the custody of plaintiff no. 1. So plaintiffs are having the knowledge of the will since the year 2003. No urgency is there in this case."

(15) Thus, very obviously the stand of the respondents, right from the beginning, has been that the original will is with the first plaintiff, i.e. their mother, who also had all original documents of title etc., of the house.

(16) Thus, with the petitioners-plaintiffs denying the existence of the will, to which contention the respondents have specifically replied in the written statement itself that it was in the custody of the first petitioner-plaintiff, with learned counsel for the petitioners even before this Court denying the existence of the will, the need for issuing a notice under Section 66 of the Evidence Act, would stand obviated in my opinion too.

(17) The said provision reads as follows:-

> **"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, [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) when the document to be proved is itself a notice;
>
> (2)when, from the nature of the case, the adverse party must know that he will be required to produce it;
>
> (3)when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4)when the adverse party or his agent has the original in Court;

(5)when the adverse party or his agent has admitted the loss of the document;

(6)when the person in possession of the document is out of reach of, or not subject to, the process of the Court."

(18) Thus, discretion has been granted to the Court to consider the necessity of a notice being issued under the said provision, before leading secondary evidence in terms of Section 65 of the said Act. Also, clause (2) of the proviso to Section 66 specifically postulates that notice would not be required to be issued to the opposite party when, from the nature of the case, the adverse party would know that he/she would be required to produce the will.

(19) That being so and the copy of the will set up by the respondents having been also admitted to have been registered, as per the testimony of a Clerk from the office of the Sub-Registrar, Chandigarh (DW-4), I see no reason to allow this petition.

(20) Consequently, the petition is dismissed; but with this Court to observe that all observations of the trial Court as also of this Court, with regard to the witnesses as were examined by the defendants, to be observations at this stage only in the context of the application seeking to lead secondary evidence, with the trial Court naturally to appraise all such evidence in support of the will set up by the respondents-defendants wholly on its own merits as regards the authenticity of the will.

CR No. 2689 of 2018

(21) It is not disputed that though this petition arises from a separate suit filed by the same plaintiffs, i.e. the petitioners, against the same defendants, the subject matter essentially is the same, i.e. the will set up by the respondents-defendants.

(22) Hence, the orders passed in CR No. 3771 of 2017 would apply on all fours to the present petition also, which is consequently also dismissed in the same terms.

Dr. Payel Mehta