

**IN THE HIGH COURT OF JUDICATURE FOR THE STATES OF
PUNJAB AND HARYANA, AT CHANDIGARH**

Regular Second Appeal No. 22 of 2015(O&M)

Date of Decision: January 07, 2015

Joginder & another

....Appellants

Versus

Abhay Singh(Dead) by LRs & others

....Respondents

CORAM: HON'BLE MR. JUSTICE MAHAVIR S. CHAUHAN.

Present: Mr. Rajesh Lamba, Advocate, for the appellants.

1. *Whether Reporters of local papers may be allowed to see the judgment? Yes*
2. *To be referred to the Reporter or not? Yes*
3. *Whether the judgment should be reported in the Digest? Yes*

Mahavir S. Chauhan, J (ORAL):

Abhay Singh (Dead) by LRs and Akhay Singh (Dead) by LRs (here-in-after referred to as 'the plaintiffs') brought a civil suit (Civil Suit No.RBT-362/14) for declaration to the effect that they and the defendants are owners in possession of land measuring 27 Kanals 9 Marlas comprised in Khewat No. 25, Khatauni No. 53, Rectangle No. 13, Killa No. 11(1-2), 19 (8-0), 20(4-8), Rectangle No. 33, Killa No. 11/1/2(0-16), 20/2(5-3), 21/1(3-10), 21/2(4-10) situated in the revenue estate of village Behbalpur, tehsil Ballabgarh, district Faridabad (here-in-after referred to as 'the suit land') to the extent of 1/5th share each; and for perpetual prohibitory injunction restraining the defendants from dispossessing them therefrom. According to the plaintiffs the suit land was under occupation of their father Nathan as "gair Marusi" and on Nathan's death it was succeeded to by plaintiffs, predecessor-in-interest of defendants No. 2 to 6 and father in law of defendant No.1 and they (the plaintiffs) alongwith Chiranji, Shyam Singh and Lohre had purchased the suit land from Ganga Lal of village Raipur

vide sale deed No. 435 dated 18.06.1957. On Shyam Singh's demise his share has been inherited by his widow Resham (defendant No. 1) while posthumous Chiranji his share in the suit land has devolved upon defendant Nos. 2 to 4 and share of Lohre, after his death, has devolved upon defendants No. 5 and 6. Before his death Shyam Singh colluded with Ganga Lal and got executed a bogus sale deed No. 873 dated 16.05.1972 in his own favour even though Ganga Lal had no right to execute it. Based on sale deed dated 16.05.1972 mutation No. 1137 was also sanctioned in Shyam Singh's favour and taking advantage of wrong entries in the revenue records defendants were attempting to dispossess the plaintiffs from the suit land.

02. Defendants No. 1 to 4 contested plaintiffs' claim by pleading, besides a few routine preliminary objections, that after purchase of the suit land vide sale deed No. 873 dated 16.05.1972, Shyam Singh had become absolute owner of the suit land and before his death he had bequeathed the suit land upon Joginder vide Will dated 09.12.2002 and mutation No. 1887 was also sanctioned in his favour.

03. Defendants No. 5 and 6 admitted that plaintiffs, alongwith Chiranji, Shyam Singh and Lohre, had purchased the suit land from Ganga Lal of village Raipur vide sale deed No. 435 dated 18.06.1957 but on Lohre's death they, alongwith their mother Dayawati and sister Amarwati, had inherited his share and had sold it to defendants No. 7 to 9.

04. Defendants No. 7 to 9 also concurred with what was stated by defendants No. 5 and 6 in their written statement.

05. Necessary issues were framed, evidence was taken, parties were heard by learned Civil Judge (Senior Division), Faridabad (here-in-after referred to as 'the trial court') and vide judgment/decreed dated 15.10.2012

plaintiffs' suit was decreed declaring them owners in possession, as co sharers, of the suit land to the extent of 2/5th share on the basis of sale deed No. 435 of 18.06.1957, declaring sale deed No. 837 dated 16.05.1972 and mutation No. 1137 based thereon as illegal, null and void and restraining the defendants from dispossessing the plaintiffs from the suit land. Two of the defendants, namely Joginder and Resham (appellants herein) assailed trial court's judgment/decreed dated 15.10.2012 by way of Civil Appeal No. 120 of 2012 but it has been dismissed by the Court of learned Additional District Judge, Faridabad (here-in-after referred to as 'the first appellate court') vide judgment/decreed dated 28.10.2014.

06. Judgment/decreed dated 28.10.2014 passed by the learned first appellate court is under challenge in the instant regular second appeal brought by Joginder and Resham.

07. Learned counsel representing the appellants argues that the courts below have overlooked that original sale deed No. 435 of 18.06.1957 has not been brought on record and only a certified copy thereof has been made part of the record which could not be taken into consideration because requirement of law is that primary evidence or say best evidence should be brought forth; and, even otherwise, sale deed No. 873 dated 16.05.1972 was executed in the year 1972 and mutation No. 1137 based thereupon was sanctioned in favour of the Shyam Singh immediately thereafter and, as such, the suit filed in the year 2004 was hopelessly barred by time.

08. No other and further point has been urged.

09. Order XIII Rule 1 of the Code of Civil Procedure, 1908 (here-in-after referred to as 'C.P.C.') says that on or before settlement of issues all the documentary evidence in original should be produced and the Court is

enjoined to receive all the documents so produced. Rule 3 states that the Court 'may, at any stage of the suit, reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection'. Rule 4 requires the Court to endorse every document which has been 'admitted in evidence' (a) the number and title of the suit, (b) the name of the person producing the document, (c) the date on which the document is produced and (d) a statement of its having been so admitted, and the endorsement has to be signed or initialled by the Judge. Thus, there are two stages relating to documents filed in Court - one is the stage when all the documents are filed by the parties in the Court and the second where the documents are formally proved and tendered in evidence. It is at the latter stage that the Court has to decide whether the documents so tendered are to be admitted or rejected. The words '*admitted in evidence*' mean the making of the document part of the judicial record of the case. The endorsement by the Court as provided in Order XIII Rule 4 C.P.C. is intended to be a record of the fact that the document 'has been admitted' in evidence after the necessary legal formalities have been complied with. Under Order XIII Rule 6, C.P.C. where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in Clauses (a), (b) and (c) of Rule 4, sub-rule (1), together with a statement of its having been admitted, and the endorsement shall be signed or initialled by the Judge. Finally Order XIII Rule 7, C.P.C., provides that every document which has been admitted in evidence (or a copy thereof where a copy has been substituted for the original under Rule 5), shall form part of the record of the case and documents not admitted shall not form part of the record and shall be

returned to the person producing the same.

10. It is now well settled, by a long series of decisions, to which it is unnecessary to refer, that there is a basic difference between the mode of proof of a document and its admissibility. The mode of proof of a document is a matter of procedure while its admissibility is a matter of substantive law, such as the Registration Act or the Stamp Act et al. If the objection is as to the admissibility of the document, then mere marking of the document as an "Exhibit" does not preclude any objection being raised later as to its admissibility. But so far as the mode of proof is concerned, it is well-settled that, if an objection as to the mode is not raised at the stage when the document is marked as evidence in the case under Order XIII Rule 4, C.P.C., such an objection cannot be raised at any subsequent stage.

11. Privy Council in *Gopal Das v. Sri Thakurji*, AIR 1943 PC 83, referring to Order XIII Rule 4, C.P.C. specifically, laid down in unambiguous terms:

"The endorsement 'admitted against the plaintiff's in the form generally employed in O.13, R. 4, for documents tendered by the defendants just as the plaintiffs' documents are marked 'admitted against the defendant'. The endorsement means that the document is admitted in evidence as proved."

Privy Council also observed:

"Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof. A strictly formal proof might or might not have been forthcoming had it been insisted on at the trial. In the present instance, it does not appear that the objection was taken at the proper time or that it would have been of any avail had it been taken."

12. It was also pointed out by the Privy Council that the Sub-Registrar's endorsement under sub-section (2) of S. 60 of the Registration Act, 1877, showed that once it was shown that a person claiming to be Parshotham Das and to have been the son of one Harish Chandra had presented the receipt Exhibit KK for registration and that person admitted execution, and was identified by two persons mentioned in the endorsement and the scribe, what all remained was to show that the person admitting execution before the Registrar was this Parshotham Das and no 'imposter'. There is, their Lordships pointed out, "a presumption that the registration proceedings were regularly and honestly carried out. The Privy Council, as already stated above, upheld the contention that if a document is admitted under O. 13, R. 4, C.P.C. no objection as to mode of proof could be raised at any later stage.

13. In P.C. Punushothama Reddiar V. S. Perumal- AIR 1972 SC 608, Hon'ble Supreme Court reiterated the position of law by observing:

“Before leaving this case it is necessary to refer to one of the contention taken by Mr. Ramamurthi, learned counsel for the respondent. He contended that the police reports referred to earlier are inadmissible in evidence, as the Head Constables who covered those meetings have not been examined in the case. Those reports were marked without any objection. Hence it is not open to the respondent now to object to their admissibility-see Bhagat Ram V. Khetu Ram and another, AIR 1929 PC 110.”

14. Again in R.V.E. Venkatachala Gounder V. A.V. & V.P. Temple, AIR 2003 SC 4548, it has been laid down:

“... Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: - (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging

it to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been tendered in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to marking of the document as an exhibit."

15. Summarizing the position, I hold that any objection as to the mode of proof of a document has to be taken at the stage of marking of a document as an "Exhibit" at the trial under O. 13, R. 4, C.P.C. If no objection is raised at that stage, it cannot be permitted to be raised at any stage subsequently in the same Court or in the Court of appeal. If, for example, the original sale deed or a certified copy thereof is marked as an "Exhibit" without objection, as in the case on hand, it cannot be contended later that it cannot be looked into as none connected with it has been called as a witness.

16. Further, question is with regard to admissibility of certified copy of the sale deed No. 435 dated 18.06.1957 granted by a Sub-Registrar and marked as Exhibit P1 by the learned trial court admittedly without objection having been raised to its admission in evidence by the defendants including the present appellants.

17. I shall first deal with the question as to the admissibility of 'secondary evidence' which has been allowed to be marked without objection and without proving the conditions for adducing such secondary evidence. I shall thereafter discuss the question whether a certified copy granted by a Sub-Registrar can at all be treated as 'secondary evidence' even though it is only a copy of a copy.

18. Part II of the Indian Evidence Act, 1872 (here-in-after referred to as 'the Evidence Act') deals with 'Proof'. Chapter IV (Ss. 61 to 90A) deals with 'documentary evidence'. Section 61 states:

" 61 : The contents of documents may be proved either by primary evidence or by secondary evidence."

19. 'Primary evidence' of documents is defined in Section 62 as 'the document itself produced for inspection of the Court; 'Secondary evidence' of documents is defined in Section 63 as : (1) certified copies under the provisions 'hereinafter' contained, (2) copies made from the original by mechanical process, (3) copies made from or compared with original, (4) counter parts and (5) oral accounts of the contents of a document given by some person who has himself seen it. Illustration (c) to Section 63 states that 'a copy of a copy' is not secondary evidence unless it has been compared with the original. Section 64 enjoins that a document must be 'proved' by primary 'evidence except in cases 'hereinafter' mentioned and Section 65 refers to the conditions to be satisfied before secondary evidence relating to document can be given. It cannot be disputed that a certified copy granted by the Sub-Registrar is a copy of a copy. Therefore, it becomes necessary to decide incidentally whether such a copy given by a public authority in respect of a copy entered in his records, can be treated as 'secondary evidence'. As will be presently noted, the Privy Council and the Supreme Court have treated certified copies so granted as 'secondary evidence'. I shall now refer to these aspects. First, I shall deal with the question of the effect of not raising objection to the adducing of secondary evidence.

20. The concepts of primary evidence and secondary evidence are

fundamental to the consideration of the above question. As in the case of marking of documents under Order XIII Rule 4, C.P.C. the principle of waiver has been applied whenever secondary evidence is adduced without objection. If no objection is raised at the stage when secondary evidence is adduced, no objection can be permitted at any later stage as held in *Williams v. Wilcox*, (1838) 8 Ad & El. 314 : 112 ER 857. In this case a copy which was secondary evidence was filed as evidence and as no objection was raised, Lord Denman held that no objection can be raised later. Objections as to sufficiency of search cannot be permitted later. (See *Halsbury's Laws of England* (4th Ed. Vol. 17, para 140). The position in Canada is the same as stated in *Guerin v. Fox*, (1898) QB 15 SC 199 : 22 Emp Dig p. 211 fn. K. In this case it was held that the "rule of law, that the evidence offered must be the best evidence and that secondary evidence can be received only when the impossibility of producing the best has been established, is enacted in the interests of the parties and is not founded upon considerations of public policy, and that the objection to such evidence may be considered to be waived by the party interested in opposing it when it is not made at the time the evidence is offered". Likewise, in *Canadian Bank of Commerce v. Bellamy*, (1915) 33 WLR 8: 9 WWR 587: 25 DLR 133 (Sask), the Canadian Court has held that when secondary evidence is admitted without objection, it may be acted upon.

21. "The rule", says Sarkar on Evidence (13th Ed. p. 646) (S. 65), "excluding secondary evidence, when that which is primary is attainable, is not so rigid as to be enforced if no objection is made by the party against whom the inferior evidence is offered. It frequently happens that secondary evidence is admitted, and thus becomes primary, when it might have been

excluded if proper objection had been taken (Green leaf S. 88; Jones S.20).

If secondary evidence is sought to be put in instead of the original, the objection must be taken at the earliest point of time and not at the time of argument or at the appellate stage. *Dolgobind v. Maqbul*, AIR 1936 Cal 164; *Rama Ch. v. Ranganayaki*, AIR 1941 Madras 612; *Bacharabhai v. Mohanlal*, AIR 1956 Bom 196; *Subbarao v. Venkata Rama Rao*, AIR 1964 AP 53. In *P. C. Purushotham Reddiar v. S. Perumal*(supra) it is also laid down by the Supreme Court in regard to proof of 'contents' of a document, as follows :

"It was next urged that even if the reports in question are admissible, we cannot look into the contents of the document. This contention is again unacceptable, once a document is properly admitted, the contents of that document are also admitted in evidence though those contents may not be conclusive evidence."

22. It, thus, emerges that marking of secondary evidence as "Exhibit", if not objected to at the trial cannot be objected to later, and the 'contents' of such Exhibit can also be looked into.

23. With regard to the contention that sale deed No. 873 dated 16.05.1972 was executed in the year 1972 and mutation No. 1137 based thereupon was sanctioned in favour of the Shyam Singh immediately thereafter and, as such, the suit filed in the year 2004 was hopelessly barred by time, it only needs to be stated that mutation does not create or extinguish rights in respect of the property (See *Swarani v. Smt. Inder Kaur*, 1996 (2) Apex Court Journal 470 (SC) and a sale deed cannot be ignored only on the ground that it has not been reflected in the revenue records (See *Shivdev Singh versus Chief Settlement Commissioner*, 1974 PLJ 160). Further, where entries in the record of rights in favour of adversary of the rightful owner, as in the instant case, are factually incorrect, limitation to seek declaration cannot be

related to such incorrect entries, instead, it has to count from the day on which defendant actually threatens plaintiff's ownership and/or possession over the property in question (See Sant Singh and another versus Smt. Labh Kaur, 1984 PLJ 138) and mere entry of mutation in favour of the defendant would not necessarily furnish a cause of action to the plaintiff to sue the defendant for declaration of his title because where the plaintiff continues in possession of the property on assumption of title entry of mutation in the record of rights does not cast a cloud on his title and does not furnish him with a cause of action (See Ibrahim @ Dharambir versus Smt. Sharifan @ Shanti, 1979 PLJ 469). Therefore, inspite of the fact that sale deed No. 873 dated 16.05.1972 was executed in the year 1972 and mutation No. 1137 based thereupon was sanctioned in favour of the Shyam Singh immediately thereafter, suit filed by the plaintiffs in the year 2004 was not barred by limitation.

24. Nothing to the contrary could be shown.

25. For the reasons recorded above, the appeal is found to lack in merit and not to involve any question of law, much less a substantial question law, and, as such, is dismissed *in limine*.

26. With the dismissal of the appeal, pending miscellaneous applications, if any, are rendered infructuous and are disposed of accordingly.

[Mahavir S. Chauhan]
Judge

January 07, 2015
adhikari