

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

R.S.A. No. 294 of 2013

Date of Decision:- 16.05.2017

Shamsher Singh and others

....Appellants

vs.

Bahal Singh and others

....Respondents

CORAM:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. M.K. Garg, Advocate,
for the appellants.

Mr. H.S. Saini, Advocate,
for the respondents.

DAYA CHAUDHARY, J.

The present regular second appeal has been filed by the appellants to challenge judgment and decree dated 30.10.2012 passed by the Additional District Judge, SAS Nagar Mohali and judgment/decree dated 31.3.2009 passed by the Additional Civil Judge (Sr. Division), Derabassi.

A suit for declaration and permanent injunction was filed by plaintiff-respondents to the effect that they were co-owners and possessed equal shares of the suit land measuring 9 bighas 30 biswas of the property in dispute and mutation in respect thereof in favour of defendants was liable to be set aside. The suit property was previously owned by Jawala

Singh and was sold to the plaintiffs vide registered sale deed dated 11.6.1981 for a sale consideration of ₹ 7000 and its possession was also delivered to the plaintiffs. The sale deed was submitted to the revenue authorities for sanctioning of the mutation in their names but it was not sanctioned. The property continued to remain in the name of Jawala Singh in the revenue record. Jawala Singh died on 20.1.1993 and after his death the mutation was sanctioned in favour of the defendants i.e. legal heirs of Jawala Singh on 19.7.1993.

Notice in the suit was issued to defendants and written statement was filed jointly by all defendants stating that Jawala Singh neither sold the land in dispute to plaintiffs on 11.6.1981 nor any possession was delivered. Jawala Singh continued to be owner in possession of land in dispute till his death upto the year 1993. Thereafter, legal heirs of Jawala Singh became owner in possession. It was also mentioned in the written statement that the sale deed was forged and fabricated by the plaintiffs in collusion with the witnesses, who belonged to some other place as no witnesses from the concerned village was cited as marginal witnesses of the sale deed. The plaintiffs never raised any objection regarding ownership and possession of the defendants over the suit property. The plaintiffs claimed their right on the basis of sale deed after a long period.

The Civil Court framed the following issues:-

- “1. Whether the plaintiffs purchased land in suit from Jawala Singh vide sale deed dated 11.6.81 for a consideration of Rs. 7,000/- if so its effect? OPP
2. Whether plaintiff is entitled for declaration on the

facts pleaded? OPP

3. Whether the suit is within time? OPD

4. Whether plaintiff is estopped from filing the instant suit by his own act and conduct? OPD

5. Relief.”

The suit of the plaintiffs was decreed in their favour and against the defendants and they were declared to be co-owners in possession of equal shares of land measuring 9 bighas and 18 biswas. Defendants were also restrained from alienating/transferring/mortgaging/encumbering and exchanging the land in dispute in any manner.

Aggrieved by the judgment/decreed dated 31.3.2009 passed by the Civil/trial Court, appeal was filed before the Additional District Judge, Mohali by the appellants/defendants. However, appeal was dismissed and judgment and decree passed by the trial Court was upheld vide judgment dated 30.10.2012.

Aggrieved by the judgments and decrees passed by both the Courts below, the present appeal has been filed by defendant-appellants by raising various grounds.

Learned counsel for the appellants submits that the findings recorded by both the Courts below are not based on proper appreciation of evidence and same are liable to be reversed. The plaintiff-respondents failed to prove the execution of sale deed in accordance with the provisions of the Indian Evidence Act as even a single attesting witness was not examined. The only witness who was examined as PW-2, admitted in his

cross-examination that he did not know the parties of the sale deed. Learned counsel also submits that although secondary evidence to prove the sale deed was allowed subject to loss of documents but the conditions precedent were not complied with as loss of original sale deed was not proved before the trial Court. In the absence of such condition, the evidence was inadmissible. Learned counsel for the appellants also submits that suit of the plaintiffs was barred under Section 34 of the Specific Relief Act but still the same has not been taken into consideration. Learned counsel also submits that the findings recorded by both the Courts below with regard to fraud were not based on proper evidence as no pleading qua fraud was there and only the forgery was mentioned in the written statement. Learned counsel for the appellants has also relied upon the judgments rendered in cases Mehar Chand Das vs. Lal Babu Siddique and others, 2007(2) RCR (Civil) 628, Hanuman vs. Vijay Singh, 1997(2) RCR (Civil) 509, Benga Behera and another vs. Braja Kishore Nand and others, 2007(3) RCR (Civil) 240, Rambhau Sadashivappa Jatkar vs. Tryambak Shenfal Satbharkre, 2006(3) CCC 257, Rosammal Issetheenammal Fernandez (dead) by LRs vs. Joosa Mariyan Fernandez, 2000(4) RCR (Civil) 247, Bhagat Ram and another vs. Suresh and others, 2004 (1) RCR (Civil) 285 and Haryana Urban Development Authority and another vs. Satpal Gupta, 2006(1) RCR (Civil) 151 in support of his arguments.

Learned counsel for the respondents submits that the judgments passed by the trial Court as well as Lower Appellate Court are well reasoned and based on proper appreciation of evidence. The appellants

have lost before the Courts below and there is no reason to interfere with the findings recorded by both the Courts. Learned counsel for the respondents also submits that Jawala Singh was owner in possession of the property in dispute and the appellants are claiming their right on the basis of forged and fabricated sale deed in collusion with certain witnesses. Not only the possession was with Jawala Singh but mutation was also sanctioned in his favour. A specific finding was given by both the Courts below that ownership and possession of the land in dispute was with the respondents and appellants have no concern with the suit property. The appellants could not prove from the statement of witnesses as to why they remained silent for such a long period upto death of Jawala Singh and even after his death. Learned counsel for the respondents has also relied upon judgments rendered in **Ramesh Dutt and others vs. State of Punjab and others, 2009(15) SCC 429, M.T.W. Tenzing Namgyal and others vs. Motilal Lakhotia and others, 2003(1) RCR (Civil) 766, Gurunath Manohar Pavaskar and others vs. Nagesh Siddappa Navalgund and others, 2008(1) RCR (Civil) 563, Shantibai and others vs. Phoolibai and others, 2007(5) RCR (Civil) 131, Mohinder Singh vs. Krishan Lal and others, 2009(2) RCR (Civil) 642, Gian Kaur vs. Raghubir Singh, 2011(4) SCC 567, Amar Singh vs. Man Phool, 1992 (1) RRR 557, Lal Singh vs. Ajit Singh and another, 2008(3) RCR (Civil) 650 and Smt. Swarn Kanta and another vs. Amar Chand Tamra and others, 2011(2) PLR 308** in support of his contentions.

Heard arguments of learned counsel for the parties and have

also perused the judgments of both the Courts below as well as other

documents available on the file.

Admittedly, respondent-plaintiffs filed a suit for declaration and permanent injunction. As per case of the appellant-defendants, plaintiff-respondents are co-owners in possession in equal shares of the suit land measuring 9 bighas 30 biswas and mutation no. 4037 was sanctioned in favour of defendants and same are liable to be set aside. The prayer for permanent injunction is for restraining defendants from alienating the suit property. As per case of the plaintiffs the suit property was initially owned and possessed by Jwala Singh, who sold the same to the plaintiffs vide registered sale deed dated 11.6.1981 for a sale consideration of Rs.7000/- and possession thereof was also delivered. The plaintiffs became owner in possession of that land by way of said registered sale deed. Sale deed was given to revenue authorities for sanction of mutation in their name but it was not sanctioned and property continued to remain in the name of Jwala Singh in the revenue record. Said Jwala Singh died on 20.1.1993. Thereafter mutation of inheritance was sanctioned in favour of defendants on 19.7.1993. Said claim of plaintiffs was disputed by defendants by filing written statement on the ground that land in dispute was never sold by Jwala Singh to the plaintiffs and possession thereof was also not delivered. Defendants are legal representatives of Jwala Singh and they were in possession of said property being his legal heirs after his death. It was also mentioned in the written statement that Jwala Singh continued to be owner in possession of land in dispute till his death and thereafter, his legal heirs who are defendants in the suit became owner in possession. The alleged sale deed had been forged and fabricated by the plaintiffs in collusion with

the witnesses who belonged to some other village not to the village of Jwala Singh. The suit of the plaintiffs was decreed in their favour by holding that the plaintiffs are co-owners in possession of equal shares of land measuring 9 bighas 18 biswas as mentioned in the plaint. Accordingly, the mutation no. 4037 regarding inheritance of Jwala Singh in favour of defendants was ordered to be corrected in favour of plaintiffs and defendants were restrained from alienating, transferring, mortgaging and exchange of the land in dispute in any manner. Defendants Shamsher Singh and others filed appeal against judgment and decree of the trial Court which was dismissed and the the judgment and decree passed by the trial Court was upheld.

Aggrieved by said judgment and decree passed by both the Courts below, the present appeal has been filed by the defendants, wherein the judgements and decrees passed by both the Courts below have been challenged on the ground that both the Courts below have failed to prove the execution of sale deed in accordance with the provisions of the Indian Evidence Act, 1872.

Another ground taken is that suit of the plaintiff was barred under Section 34 of the Specific Relief Act as no claim or possession was there in favour of the plaintiffs. There was no witness from the village and plaintiffs kept silent for 18 long years and never bothered to approach the revenue authorities.

On perusal of the evidence available on the file and by considering the statements of the witnesses, it is evident that the possession of the land in dispute remained with Jawala Singh till his death and thereafter, mutation was sanctioned in favour of his legal heirs. The

plaintiffs-respondents remained silent for approximately 18 years and never bothered to approach any revenue authority for sanction of mutation and correction of khasra girdawaris neither during the lifetime of Jawala Singh nor immediately after his death. The suit was filed after death of Jawala Singh through Attorney Smt. Neeru Sharma, who is wife of Patwari Jagdish Kumar. The alleged sale deed is dated 11.06.1981 whereas the said land had already been acquired by the PSEB for laying towers line vide award dated 97 dated 19.09.1978 by the Land Acquisition Collector, PSEB and mutation was sanctioned by Assistant Collector, Grade II vide Sr.No.3448 dated 06.04.1979, meaning thereby, the land already stood acquired and an award passed and thereafter, mutation was also sanctioned by competent Authority. Though, the suit was filed with unexplained delay but the issue framed relating to delay was not pressed. Plaintiffs have claimed two reliefs in the suit; first relief is of declaration being owners in possession of the suit land in view of Article 58 whereas limitation provided is three years from the date of accruing of his right to suit i.e. from the date of execution of sale deed and the second relief is for correction of revenue record.

As per provisions of Section 45 of the Punjab Land Revenue Act, a suit for correction of entry in the revenue record can be filed under this section, which shows that the suit was time barred. As per statement of DW-1 Baldev Singh, he was known to both the parties. He has stated that after the death of Jawala Singh, the defendants were owners in possession of the suit property and plaintiffs never got the possession. It has also been admitted in his statement that the plaintiff never cultivated the suit land and never claimed any right over it. Similarly, DW-2 Surinder Singh has stated

that mutation of inheritance was sanctioned in favour of the defendants-appellant qua suit property being in actual physical possession of the suit property. They were cultivating the suit land on the asking of Jawala Singh. DW-3 Shamsheer Singh has also stated that earlier, Jawala Singh was owner in possession of the land in dispute and he died on 20.01.1993. Death certificate of Jawala Singh was also exhibited as DW1/B. He has also stated that he used to cultivate the land after the death of Jawala Singh and Jawala Singh never executed sale deed in favour of the plaintiffs and they never remained in possession of the suit property.

It is a settled proposition of law that the secondary evidence is permissible only in case it is made out that original document which is sought to be placed on record by way of secondary evidence has been lost or it is proved that such document was ever in existence. In the present case, neither it has been proved on record by the plaintiffs-responses that original sale deed was ever lost or was in existence but it was not produced by them. Both the Courts below have decided the claim of the plaintiffs without making out a case as to how secondary evidence was admissible when original sale deed was never produced before the Court and same was not exhibited on record.

In the present case, the plaintiffs have been permitted to adduce secondary evidence without providing the existence, execution and loss of agreement to sell relating to property in dispute. Secondary evidence could have been allowed in case the plaintiffs were able to prove the existence, execution and loss of said agreement to sell. Therefore, it is submitted that to permit secondary evidence of any document which has been destroyed or

lost by the person in whose possession it was, it is to be proved by that person that such document has been destroyed, misplaced or lost. It is also an admitted fact that photocopy of the original agreement which was produced as secondary evidence was not proved to show as to whether the original agreement to sell was properly stamped.

It has been held in a catena of judgments that the un-stamped secondary evidence of a document cannot be permitted to be lead unless it is ascertained that original document cannot be produced for justifiable reasons. Disputed document is not a counter-part of the original document and as such, it is not admissible under the provisions of the Indian Evidence Act, 1872. This view has been taken in judgments of this Court titled as **Gopal Singh Vs. Shish Pal and others, 2006(2) RCR Civil 79 and Mukesh Kumar @ Mota Vs. State of Haryana, 2011 (1) RCR Civil 675.** The ratio of said judgements is that in case the Court is to allow secondary evidence of a document, which has been destroyed by a person in whose possession it was and in whose favour it was created and is an enforceable legal right. An obligation is normally on the Court not to allow it to be produced by way of secondary evidence. The secondary evidence of such a document may be tampered with or changed or it would be against public policy to take a chance of running the risk of fraud being committed. Therefore, secondary evidence, in such circumstances, whether document itself has been destroyed by the person by whom it has been created or to enforce legal right, could not have been allowed to be lead.

In the present case, it has not been proved on record while allowing the secondary evidence that the original agreement to sell was lost

and a complaint in this regard was made to the police or it was destroyed. The photocopies brought on record by way of additional evidence cannot be allowed without fulfilling the conditions as per provisions of Section 65 of the Indian Evidence Act. The alleged agreement to sell was not only admitted but it was not properly stamped and same could not be admitted into evidence in any manner. The photocopies of original document cannot be allowed as secondary evidence. Both the Courts, below, while passing the impugned judgements, have not taken into consideration the settled proposition of law that photocopy of document cannot be allowed to be taken as secondary evidence without proving the destruction or loss of the original document. This view has also been held in judgements of Hon'ble the Apex Court in case **Smt. J.Yashodha Vs. K.Shobha Rani, reported as 2007 (1) RCR (Rent) 466** as well as in **Ashok Duli Chand Vs. Madahavlal Dubey and another, 1975 (4) SCC 664**.

In view of facts and law position as discussed above, both the judgements of Trial Court as well as First Appellate Court are not based on proper appreciation of evidence and settled proposition of law and deserve to be set aside. Accordingly, the present appeal is allowed and judgement and decree of the Lower Appellate Court dated 30.10.2012 are hereby set aside.

May 16, 2017
poonam

(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned

Yes

Whether reportable

Yes