

HIGH COURT OF CHHATTISGARH, BILASPUR

First Appeal No. 23 of 2008

1. Smt. Kadir Bee, W/o Late Ishrat Khan, Aged about 65 years, R/o Rajatalab, Raipur, District Raipur (C.G.)
2. Smt. Saiyad Nisha, W/o Abdul Sattar Baig, Aged about 34 years, R/o Shantinagar, Raipur, District Raipur (C.G.)
3. Smt. Samsun Nisha, W/o Mohd. Yusuf, Aged about 32 years, R/o Rajatalab, Raipur, District Raipur (C.G.)
4. Smt. Fakhrun Nisha, W/o Azaz Ahmad Qureshi, Aged about 30 years, R/o Budhapara, Raipur, District Raipur (C.G.)
5. Smt. Mehrun Nisha, W/o Sarvar Khan, Aged about 25 years, R/o Tikrapara, Raipur, District Raipur (C.G.)
6. Smt. Shahzadi Begum, W/o Israr Khan, Aged about 22 years, R/o Bairanbazar, Raipur, District Raipur (C.G.)

---- Appellants/Plaintiffs

versus

1. Abdul Aziz (Dead), Legal Heirs :-

(1)A. Smt. Zahida alias Zubeda Begum (Dead) through her Lrs.:

(a) Naeem Khan S/o Late Abdul Aziz, R/o Near Chirag Wale Baba, Sanjay Nagar, Kamele, Raipur (C.G.)

(b) Mohd. Aslam S/o Late Abdul Aziz, Employee Sahakari Nagarik Bank, R/o Nayee Basti MOVA, Raipur (C.G.)

(c) Mohd. Ilyas S/o Late Abdul Aziz, R/o Nayee Basti, MOVA, Raipur (C.G.)

(1)B. Mohd. Nayim Khan, S/o Late Abdul Aziz, Aged about 28 years, R/o Behind Barlota Bhawan, Raipur, District Raipur (C.G.)

(1)C. Mohd. Aslam S/o Late Abdul Aziz, Aged about 25 years, R/o Behind Barlota Bhawan, Raipur, District Raipur (C.G.)

(1)D. Smt. Shahnaj Bano, W/o Mohd. Hafeez, Aged about 37 years, R/o Behind Barlota Bhawan, Raipur (CG)

(1)E. Smt. Shamim Bano W/o Mohd. Kalam (dead) through her legal heirs:

(a) Wasim Raza S/o Mohd. Kalam, aged about 14 years.

(b) Mohd. Shabir S/o Mohd. Kalam, aged about 12 years

Through their legal Guardian Mohd. Kalam, R/o Chhotapara, Raipur,
District Raipur (C.G.)

(1)F. Smt. Guddi Bai alias Naseem, W/o Kadir, Aged about 23 years, R/o
Pahadi Chowk, Gudiyari, Raipur, District Raipur (C.G.)

2. Manohar Lal (Dead) through his Lrs.:

(a) Anil Krishnani S/o Late Shri Manohar Lal, R/o Samta Colony, Main Road,
Near Dr. Pandey Nursing Home, Raipur (C.G.)

3. Mohd. Shafi Khan, S/o Ishrat Khan, Aged about 36 years, R/o Rajatalab, Raipur,
District Raipur (C.G.)

4. Mohd. Rauf Khan, S/o Late Ishrat Khan, Aged about 34 years, R/o Pandri,
Raipur, District Raipur (C.G.)

5. Yaseen Khan Kadri, S/o Late Ishrat Khan, Aged about 29 years, R/o Bairanbazar,
Raipur, District Raipur (C.G.)

---- Respondents/Defendants

For Appellants	:	Smt. Hamida Siddiqui, Advocate
For Respondents	:	None appears

Division Bench : Hon'ble Mr. Justice Manindra Mohan Shrivastava
Hon'ble Mrs. Justice Rajani Dubey

Judgment On Board

20/06/2018

Per Manindra Mohan Shrivastava, J.

1. This appeal is directed against the judgment and decree dated 29th July 2005 passed in Civil Suit No.7-A/2005 by which the learned trial Court has dismissed the suit of the appellants/plaintiffs.

2. Appellants/plaintiffs filed a suit on the pleadings inter alia that the

properties in dispute were purchased by Late Ishrat Khan, husband of plaintiff No.1-Kadir Bi and father of plaintiffs No. 2 to 8, vide two sale deeds dated 11.11.1932 and 19.3.1934 from two different parties. According to plaintiffs' case, vide sale deed dated 11.11.1932, Late Ishrat Khan purchased the house in dispute from Mohd. Ahmed Khan, Mohd. Aziz Khan, Mohd. Ibrahim Khan and Mst. Hafiz Bi, widow of Mohd. Ishaque Khan. Vide another sale deed dated 19.3.1934, house was purchased from Mohd. Afzal Khan. Plaintiffs' case has been that the property in dispute purchased under the two sale deeds from two different parties belonged to Late Ishrat Khan and remained in his possession and after his death, the plaintiffs and defendants No. 4 to 7, who are sons of Late Ishrat Khan, remained in actual and physical possession of the property in dispute. The plaintiffs having come to know that defendant No.1, knowing fully well that the property in dispute was purchased by Late Ishrat Khan in the year 1932 & 1934, dishonestly sold the property in dispute to defendant No.2 Manohar Lal vide two sale deeds dated 1.3.1986 and 11.3.1986, it gave them the cause of action when it was found that on the basis of two sale deeds, Manohar Lal started claiming the property to be his own and started raising construction of house. On these pleadings, plaintiffs sought declaration that the two sale deeds dated 1.3.1986 and 11.3.1986 be declared illegal and inoperative in law and the vacant possession of the land in dispute be delivered and further that the defendants be restrained by an injunction from interfering with the possession of the plaintiffs.

3. On the other hand, case of the defendants was that no sale transaction took place in favour of Ishrat Khan under so called sale deed dated 11.11.1932 and 19.3.1934. According to the defendants, there was no sale transaction and plaintiffs rested their case on the basis of some fictitious document which was never executed.

Sons of Ishrat Khan who were impleaded as defendants No. 3 to 7 remained ex-parte. No written statement was filed by them.

4. The plaintiffs/appellant, in order to prove their case, examined three witnesses. Defendant did not examine any witness. Learned trial Court

framed as many as seven issues. Out of these, the first issue was whether Ishrat Khan acquired title in respect of the property in dispute on the basis of sale deed dated 11.11.1932 and 19.3.1934. All other issues related to possession and as to whether the defendant No.2 Manohar Lal acquired valid title in respect of the property in dispute by virtue of two sale deeds dated 1.3.1986 and 11.3.1986 executed in his favour and whether the plaintiffs were entitled to decree prayed for.

5. The learned trial Court recorded a finding that the plaintiffs have failed to prove that there was sale of the property in dispute in favour of Ishrat Khan by Mohd. Ahmed Khan, Mohd. Aziz Khan, Mohd. Ibrahim Khan and Mst. Hafiz Bi under so called sale deed dated 11.11.1932 or by Afzal Khan vide sale deed dated 19.3.1934. The finding of the learned trial Court is primarily based on the consideration that the plaintiffs failed to produce the original sale deeds dated 11.11.1932 and 19.3.1934 and even though the records of the Registrar Office were produced, it does not contain any thumb impression or signature of the parties to the alleged transaction or any of the witnesses and, therefore, it is doubtful.
6. Learned counsel for the appellants/plaintiff argues that the learned trial Court fell in error of law and fact both in holding that plaintiffs failed to prove the execution of sale deed and its due registration in favour of Ishrat Khan by respective vendors under two sale deeds dated 11.11.1932 and 19.3.1934. Learned counsel for the appellants argues that though the original sale deed was not produced to prove sale of the property in dispute, nevertheless, the plaintiffs' witness No.1 Mohd. Abdul Shakil, In-charge Record Keeper in the office of Dy. Registrar Raipur was examined by the trial Court. He produced original records of Registrar Office and clearly deposed before the Court that the certified copies (Ex.P-1 & P-2) were issued on the basis of records of the office of the Registrar. He further deposed that photocopy of sale deed used to be retained in the office of the Registrar only in those cases where sale deed were executed. Therefore, this evidence was sufficient to prove not only execution but also registration of sale deed resulting in transfer of title in respect of property

in dispute in favour of Ishrat Khan. According to learned counsel for the appellants/plaintiffs, the retention of photocopy of the two sale deeds in the records of Sub-Registrar, Raipur, taken together with the oral evidence of Abdul Shakil (PW1) prove not only execution of sale deed but also registration. Learned trial Court, it is argued, gave undue weightage to the fact that the evidence of Abdul Shakil (PW1) does not show that in the register of the office of the Registrar, the signature or thumb impression of the parties or witnesses were not found. Learned counsel for the appellant would further argue that even if the original sale deed could not be produced before the trial Court, Section 65 of the Evidence Act, 1872 permitted the parties to lead secondary evidence. Moreover, the document being a very old one, Section 90 of the Evidence Act would come to the aid of the plaintiffs and presumption has to be raised with regard to execution and attestation of document. In support of her submissions, learned counsel for the appellant/plaintiff places reliance on the judgment of the Supreme Court in the case of **Kaliya Vs. State of Madhya Pradesh** (2013) 10 SCC 758.

7. On the other hand, learned counsel for the respondent supports the impugned judgment and decree passed in favour of the respondent-defendants and submits that the plaintiffs were never permitted to lead secondary evidence. He would submit that in the absence of proof of execution of sale deed and proof of other elements of 'sale' as defined under Section 54 of the Transfer of Property Act, it cannot be said that Ishrat Khan had acquired valid title in respect of the property in dispute and therefore, the trial Court did not commit any illegality in dismissing the suit of the plaintiffs.
8. We have heard learned counsel for the parties and perused the records of the case.
9. The entire case of the plaintiffs rests on proof of sale of the property in dispute in two sale deeds dated 11.11.1932 and 19.3.1934 (Ex.P-1 & P-2).
10. The plaintiffs along with the suit, filed a certified copy said to be issued

from the office of Sub-Registrar Raipur. The original sale deed was not produced before the Court by either of the parties. Upon perusal of the records, we find that though the plaintiffs had initially filed application under Section 65 of the Evidence Act for grant of permission to lead secondary evidence, a perusal of the order in order sheet dated 28.8.2001 shows that the application for grant of permission to lead secondary evidence was dismissed as not pressed by the plaintiffs. However, by the same order, learned trial Court allowed plaintiffs' prayer for calling records from the office of Sub-Registrar.

11. At the first place, the plaintiffs having failed to produce the original document, could not be allowed to lead secondary evidence unless a permission was granted in that behalf. Once the plaintiffs' application under Section 65 of the Evidence Act was rejected, course of action adopted by the trial Court was not permissible under the law. Direction for production of original records of the Registrar Office was only to allow secondary evidence to be led in proof of execution of registration of sale deed dated 11.11.1932 and 19.3.1934.

12. Even though, since the learned trial Court directed for production of original records and plaintiffs examined Abdul Shakil, In-charge Record Keeper as PW-1 we have gone through the evidence of this witness. All that this witness deposed before the Court is that he has brought the original records and that a copy of sale deed was available in the records of the Registrar on the basis of which certified copy was issued to the plaintiff. Though the witness deposed that on the basis of a copy of sale deed lying in the records, certified copy was issued, in the cross-examination, this witness admits that the records did not contain the thumb impression or signature of the parties to the sale transaction or any of the witness.

13. It would thus be seen that the plaintiffs' case rests only on the certified copy of the sale deed which do not contain the signature or thumb impression of any of the parties or their witnesses. Even the copy of two sale deeds, said to be available in the records, is not stated to contain signature or thumb impression of the parties to the transaction or the

witnesses. The parties to the transaction were not available to be examined as they are dead. No witness has been examined. There is no other material on record to prove execution of sale deed. There is no evidence on record to prove that there was an intention to sell the property for consideration either paid or promised to be paid or part paid and partly promised to be paid. Sale deed was executed in favour of Ishrat Khan by respective vendors named in so called sale deed dated 11.11.1932 and 19.3.1934. Thus, the plaintiffs completely failed to prove execution of sale deed so as to transfer a valid title in favour of Late Ishrat Khan.

14. Much reliance has been placed by learned counsel for the appellants/plaintiff on the oral evidence of Abdul Shakil (PW1) that it has been deposed by him that as per the then prevalent practice, copy of only those documents were retained in the office which were executed, therefore, a presumption will have to be drawn that sale deed was executed. We are unable to accept this submission. In the absence of there being proof of actual execution of the document of sale, particularly when the plaintiffs were not allowed to lead secondary evidence, the evidence of Abdul Shakil (PW1) would not, by itself, carry such a great probative value as to hold that a transaction of sale had taken place in which consideration passed, transaction of sale was completed, possession transferred in favour of late Ishrat Khan.

15. Reliance placed in the case of **Kaliya** (supra) is of no help because that deals with a situation where the party has been permitted to lead secondary evidence by allowing his application under Section 65 of the Evidence Act. In the present case, application was dismissed as not pressed.

16. Section 90 of the Evidence Act would also not come to the aid of the plaintiffs, because it does not create presumption in respect of an ordinary copy of a document. It is only when the document is executed then only the presumption, in particular circumstances, would be available to be made regarding genuineness of the document in so far as execution and attestation thereof is concerned.

17. In the result, we do not find any error in the impugned judgment and decree warranting interference in this appeal.

18. The appeal is accordingly dismissed.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Rajani Dubey)
Judge