

RSA-1320-1988 (O&M)

402

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

**RSA-1320-1988 (O&M)
Date of decision : 17.12.2018**

Sarabjit Singh

... Appellant

Versus

Charanjit Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Deepak Sabherwal, Advocate
for the appellant.

None for the respondent.

AMIT RAWAL, J.

The appellant-defendant No.1 is aggrieved of the judgment and decree of the lower Appellate Court, whereby the suit for declaration and in alternative, for joint possession, dismissed by the trial Court, has been decreed by the lower Appellate Court.

The following substantial questions of law arises for determination in the present regular second appeal:-

1. Whether the plaintiffs could succeed in a suit by propounding the mortgage deed dated 24.08.1983, allegedly executed by the plaintiff, in favour of the defendant, to be illegal and ineffective, in the absence of the original mortgage or examination of the witnesses.
2. Whether in the absence of the secondary evidence, the lower Appellate Court could have decreed the suit of the

RSA-1320-1988 (O&M)

respondents-plaintiffs.

The plaintiff instituted the suit seeking declaration that no mortgage deed was executed by him in favour of defendant No.1-Sarabjit Singh, which was reflected in the jambandi in respect of the suit property. It was stated that he was the owner of land to the extent of 5/12th share and defendant Nos.2 to 4 were other co-sharer. Kulwant Singh, deceased brother of plaintiff, mortgaged 8 kanals of land comprised in khasra No.14//22 in favour of Gurbax Singh, who further sold his mortgage rights in favour of Jit Singh. Sat Pal Singh mortgaged 8 kanals of land in favour of Jit Singh and 8 kanals of land in favour of Satnam Singh/defendant. The possession of the land measuring 2 acres was delivered to the mortgagees. The plaintiff also mortgaged 4 kanals of land out of khasra No.14//23 on 19.11.1982 and placed Jit Singh mortgagee, in possession of the aforementioned khasra number. Jit Singh/defendant had been shown in possession of the same. However, Sarabjit Singh son of Shabdal Singh, started claiming to be mortgagee, on the basis of the impugned mortgage deed in respect of land measuring 12 kanals 15½ marals, out of land Khewat No.40, Khatoni No.57 of Khasra No.14/17, 14/18 and 2 kanals 17½ marals out of khasra No.23. The plaintiff never created the mortgage deed in favour of Sarabjit Singh nor appeared before the Sub-registrar or received any consideration. The alleged signatures on the mortgage deed were on account of influence of Sarabjit Singh along with local police.

Defendant Nos.2 to 4 supported the case of the plaintiff.

Since the parties were at variance, the trial Court framed the following issues:-

1. Whether the plaintiff is entitled for the declaration as

RSA-1320-1988 (O&M)

alleged in the head note of the plaint? OPP

2. *Whether the mortgage deed dated 24.8.83 as alleged is void and illegal? OPP*

3. *Relief.*

The plaintiff in support of the aforementioned averments in the plaint examined himself as PW1, Sat Pal Singh as PW2 and Kashmira Singh as PW3 and did not produce any documentary evidence except the jamabandi for the year 1979-80, which was annexed with the plaint. On the other hand, the defendants examined Jit Singh as DW1 and Balraj Singh DW2 and brought on record various documents (Ex.D1 to Ex.D5).

On the basis of the preponderance of evidence, the trial Court by holding that the plaintiff miserably failed to prove ingredients of fraud and misrepresentation, dismissed the suit. The lower Appellate Court reversed the findings by holding that the plaintiff's evidence had gone unnoticed.

Learned counsel appearing on behalf of the appellant-defendant No.1, submitted that for claiming the right in the aforementioned suit, it was obligatory upon the plaintiff to discharge the onus, as per the provisions of Section 101 of the Indian Evidence Act. No witness of the mortgage deed has been examined or mortgage deed had seen the light of the day nor any application for secondary evidence, was moved, thus, there is no compliance of Order 6 Rule 4 of CPC. The lower Appellate Court being the last court of fact and law was required to determine the points of determination, as per the provisions of Order 41 Rule 31 of the Code of Civil Procedure. It is not necessary that the Court below has to, in the absence of the contesting defendant, decree the suit by relying upon the statements in evidence, thus, urges this Court for setting aside the judgment

RSA-1320-1988 (O&M)

and decree of the lower Appellate Court.

This Court vide order dated 28.09.2018 permitted the appellant to serve the respondents through publication and munadi, which has been effected. There is no representation on behalf of the respondents.

Since the appeal is of the year 1988, I proceed to decide the appeal on merits.

I have heard learned counsel for the appellant-defendant, appraised the paper book as well as the records of the Courts below and of the view that there is force and merit in the submissions of Mr. Sabharwal and the substantial questions of law, as noticed above, are liable to be answered in favour of the appellant-defendant No.1, for, the provision of Section 101 of the Indian Evidence Act, requires a party asserting a claim to be proved on record, in accordance with law. Neither the original mortgage deed or its certified copy, since it was a registered document, by way of secondary evidence, has seen the light of the day or brought on record. No witness of the mortgage deed has been examined to prove the ingredients of Order 6 Rule 4 of CPC, which would not only require the plaintiff to assert and plead, but to prove. It is a settled law that the plaintiff has to stand to his own legs and cannot be permitted to take the advantage of the defendants being *ex parte*. The lower Appellate Court being the last Court of fact and law was, thus, required to notice all these factors, whether the pleaded case of the plaintiff had been proved through direct and cogent evidence. In the absence of the same, in my view, the finding arrived at by the lower Appellate Court suffers from grave illegality and perversity.

In view of what has been noticed above, the judgment and decree of the lower Appellate Court is not sustainable in the eyes of law and

RSA-1320-1988 (O&M)

the same is hereby set aside and that of the trial Court is restored.

Resultantly, the present regular second appeal by answering the substantial questions of law in favour of the appellant-defendant No.1, is allowed.

17.12.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned **Yes/ No**

Whether Reportable **Yes/ No**