

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

RSA No.327 of 1989 (O&M)

Date of decision : 01.11.2018

Madan Lal

...Appellant

Versus

Shankar and others

...Respondents

**CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL**

Present: Mr. Atul Lakhanpal, Sr. Advocate with  
Ms. Babli Kumari, Advocate for the appellant.

Mr. O.P. Sharma, Advocate for the respondents.

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**ANIL KSHETARPAL, J. (ORAL)**

The defendant-appellant is in the Regular Second Appeal against the judgment passed by the learned First Appellate Court reversing the judgment and decree passed by the trial Court.

The plaintiffs-respondents, three brothers Shankar, Manphul and Amin Lal, have challenged the sale deed dated 10.04.1980 executed by their fourth brother i.e. Sohan Lal in favour of the appellant by filing the suit on 09.12.1981. The plaintiffs-respondents claimed that the property in dispute was originally owned by their father Ganga Bishan, jointly devolved upon them through the registered Will executed by their father on 28.09.1970. It is claimed that the property is joint and undivided and, therefore, their brother Sohan Lal had no right to execute the sale deed. Defendant No.1, the purchaser, the appellant contested the suit and pleaded that defendant No.2 (Sohan Lal-fourth brother of the plaintiffs) was exclusive owner of the plot and he has sold the property and transferred the

possession to defendant No.1-appellant for valuable consideration.

Learned trial Court after appreciating the evidence found that the suit property had already been partitioned and, therefore, the sale deed executed by defendant No.2 was valid. The Court further noticed that the plaintiffs jointly as well as individually have been executing the various sale deeds of specific plots with specific boundaries and size, therefore, it is safe to record that the property has been divided between the brothers. The sale deeds executed by the plaintiffs are Ex.D1 to Ex.D6. With these findings, the learned trial Court dismissed the suit, however, learned First Appellate Court has chosen to reverse the findings of the trial Court and set aside the sale deed dated 10.04.1980 in favour of defendant No.1-appellant. Learned First Appellate Court also passed a decree for possession of the property even after holding that all the four brothers are joint owners of the property in dispute.

This Court has heard the learned counsel for the parties at length and with their able assistance gone through the judgments passed by both the Courts below and the records.

In the considered view of this Court, the following substantial questions of law arise for determination by this Court:-

1. Whether a sale executed by a co-owner out of the joint property would be sale of undivided share?
2. Whether a prior permission to lead secondary evidence is required to be obtained by the party to the litigation under Section 65 of the Indian Evidence Act, 1872?
3. Whether once the plaintiffs have themselves been treating the

property to be their individual separate ownership, can be permitted to challenge the sale deed executed by their other brother with respect to a specific portion of the property?

In the present case, the First Appellate Court has reversed the judgment while recording these reasons:-

- i) That the trial Court has wrongly noticed that none of the plaintiffs has appeared in evidence whereas in fact Shankar-plaintiff No.1 has appeared in evidence.
- ii) In the written statement, the defendants had not taken the plea that there was partition between the brothers and, therefore, the evidence led is beyond pleadings.
- iii) Since prior permission to lead secondary evidence had not been taken, therefore, the certified copies of the sale deeds were not admissible in evidence.
- iv) There was no evidence of partition of the property.

No doubt, Shankar-plaintiff No.1 has appeared in evidence and, therefore, there was small error in the judgment of the trial Court.

As regards, second reason given by the learned Appellate Court that the evidence of partition of the property is beyond pleadings is clearly erroneous because defendant No.2 (fourth brother) did not choose to contest the suit. Defendant No.1 had pleaded that he had purchased the property through a registered sale deed and he was put in possession. This suit has been filed by the plaintiffs in collusion with defendant No.2.

As per Order 6 Rule 2 CPC, only facts are required to be pleaded in a concise manner and not the evidence. The pleadings have to be only with respect to the material

facts. Hence, the First Appellate Court erred in refusing to go into the evidence of partition on the ground that it was beyond pleadings.

As noted above, the certified copies of six sale deeds executed by the plaintiffs jointly as well as individually were produced. Since, the original sale deeds were in possession of the Vendees who were not the parties to the suit, therefore, the certified copies thereof were produced and official from the office of the Sub-Registrar, Registration Authority was examined who proved the correctness of the certified copies issued by their office. Shankar-plaintiff No.1, when appeared in evidence has stated that approximately two years after the death of their father, all the brothers got separated. He further went on to say that the property was not divided but in the next sentence, he stated that the agricultural land had been divided whereas non-agricultural land continues to be joint. He further went on to state that non-agricultural land situated in Mandi Adampur, the property in dispute has been divided into plots. He stated that at the time of death of their father, 14 bighas land was received jointly by the sons but he could not tell that how much out of these 14 bighas land was sold by them. He was given suggestion that after the death of their father-Ganga Bishan, all the four brothers have sold the plots in Mandi Adampur. He was specifically asked but he denied that they have not sold the property falling to their share by the registered sale deeds. In such circumstances, learned trial Court correctly ordered that these documents have wrongly been marked and they are exhibited as Ex.D1 to Ex.D6. It is not disputed before this Court that through these sale deeds specified plots with boundaries and the properties located on all four sides were sold by the plaintiffs as well as by defendant

No.2 and the possession thereof was delivered. The land is not an agricultural land. It is part of urbanized area. The plots with specific size and boundaries apart from duly identified by the properties located on all the four directions were being sold consistently by the plaintiffs as well as by defendant No.2 jointly as well as individually. In these circumstances, it does not lie in mouth of the plaintiffs to assert that the property is still joint between the parties.

Last reason assigned by the Court is also equally erroneous because once the evidence with regard to the partition as discussed in the subsequent paragraphs was permissible to be led, the evidence of DW2, DW3 and DW4 who deposed that the brothers had partitioned the property could not be ignored. The trial Court has noticed that this part of the statement of these three witnesses was not challenged by the plaintiffs in cross-examination. Once the evidence of the witnesses has not been challenged in the cross-examination, such part of the evidence is deemed to have been admitted.

Now let us deal with the questions of law framed above.

1. Whether a sale executed by co-owner out of the joint property, can be set aside or such sale would be treated as a sale of undivided share?

The answer to question No.1 is simple and straight. If a co-owner sells a specified portion of the property out of the undivided property, such sale at the most can be treated as sale of undivided share. Such sale deed cannot be set aside on the ground that it is sale from undivided property. Reference in this regard can be made to **Ram Chander Vs. Bhim Singh, 2008(3) Punjab Law Reporter 747.** Hence, question No.1 is

answered in favour of the appellant and the First Appellate Court has committed a grave error in setting aside the sale deed.

2. Whether a prior permission to lead secondary evidence is required to be obtained by the party to the litigation under Section 65 of the Indian Evidence Act, 1872?

As regards the requirement of prior permission to produce secondary evidence, it may be noted that Chapter V of the Indian Evidence Act, 1872 provides that the party is required to produce primary evidence. However, Section 63 provides for and defines the secondary evidence in absence of primary evidence. Section 65 of the Indian Evidence Act, deals with the circumstances under which the secondary evidence can be led. The distinction between the primary evidence and secondary evidence is nature of evidence. In absence of primary evidence, secondary evidence can be examined by the Court subject to fulfillment of the requirements of Section 65 of the Indian Evidence Act. There is no requirement that before leading secondary evidence, prior permission of the Court is required to be obtained. No doubt, a practice has developed to seek prior permission to lead secondary evidence and granted/refused by the Courts, however, this practice is not supported by the statutory provision. Therefore, merely because a prior permission has not been sought, the evidence which has come on file in the form of secondary evidence cannot be ignored, if it fulfills the requirement of Section 65 of the Indian Evidence Act.

Sections 63, 65, 74 and 79 of the Indian Evidence Act, which are relevant for the decision of the present case are extracted as under:-

**63. Secondary evidence.** — *Secondary evidence means and includes —*

- (1) certified copies given under the provisions hereinafter contained;*
- (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;*
- (3) copies made from or compared with the original;*
- (4) counterparts of documents as against the parties who did not execute them;*
- (5) oral accounts of the contents of a document given by some person who has himself seen it.*

*Illustrations*

- (a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.*
- (b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.*
- (c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.*
- (d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.*

**65. Cases in which secondary evidence relating to documents may be given.**— Secondary evidence may be given of the existence, condition or contents of a document in the following cases: —

- (a) when the original is shown or appears to be in the possession or power—*

*of the person against whom the document is sought to be*

*proved, or  
of any person out of reach of, or not subject to, the  
process of the Court, or  
of any person legally bound to produce it,  
and when, after the notice mentioned in section 66, such  
person does not produce it;*

*(b) when the existence, condition or contents of the original  
have been proved to be admitted in writing by the person  
against whom it is proved or by his representative in  
interest;*

*(c) when the original has been destroyed or lost, or when the  
party offering evidence of its contents cannot, for any other  
reason not arising from his own default or neglect, produce  
it in reasonable time;*

*(d) when the original is of such a nature as not to be easily  
movable;*

*(e) when the original is a public document within the  
meaning of section 74;*

*(f) when the original is a document of which a certified copy  
is permitted by this Act, or by any other law in force in  
[India] to be given in evidence;*

*(g) when the originals consist of numerous accounts or other  
documents which cannot conveniently be examined in Court  
and the fact to be proved is the general result of the whole  
collection.*

*In cases (a), (c) and (d), any secondary evidence of the  
contents of the document is admissible.*

*In case (b), the written admission is admissible.*

*In case (e) or (f), a certified copy of the document, but no  
other kind of secondary evidence, is admissible.*

*In case (g), evidence may be given as to the general  
result of the documents by any person who has examined  
them, and who is skilled in the examination of such*

*documents.*

**74. Public documents.** — *The following documents are public documents: —*

*(1) documents forming the acts or records of the acts —*

*(i) of the sovereign authority,*

*(ii) of official bodies and tribunals, and*

*(iii) of public officers, legislative, judicial and executive, [of any part of India or of the Commonwealth], or of a foreign country;*

*(2) public records kept [in any State] of private documents.*

**79. Presumption as to genuineness of certified copies.** —

*The Court shall presume [to be genuine] every document purporting to be a certificate, certified copy or other document, which is by Law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer [of the Central Government or of a State Government, or by any officer [in the State of Jammu and Kashmir] who is duly authorized thereto by the Central Government]:*

*Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.*

*The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.”*

Section 63 provides that what evidence can be given/led in secondary evidence. Section 65 deals with the eventualities when secondary evidence may be given of the existence, condition, or contents of a document. Section 79 provides that the Court shall presume every document

to be genuine purporting to be a certified copy which is by law declared to be admissible as evidence of any particular fact. Sub-Section (f) of Section 65 provides for certified copy of a document can be produced in evidence as secondary evidence, if permitted by the Evidence Act or by any other law enforce. At this stage, one can safely refer to Section 57 of the Registration Act, which permits the Registering Officer to issue certified copies and such certified copies shall be admissible for the purpose of proving the contents of the original document. Section 57 of the Registration Act, is extracted as under:-

**“57. Registering officers to allow inspection of certain books and indexes, and to give certified copies of entries.—**

*(1) Subject to the previous payment of the fees payable in that behalf, the Books Nos. 1 and 2 and the Indexes relating to Book No. 1 shall be at all times open to inspection by any person applying to inspect the same; and, subject to the provisions of section 62, copies or entries in such books shall be given to all persons applying for such copies.*

*(2) Subject to the same provisions, copies of entries in Book No. 3 and in the Index relating thereto shall be given to the persons executing the documents to which such entries relate, or to their agents, and after the death of the executants (but not before) to any person applying for such copies.*

*(3) Subject to the same provisions, copies of entries in Book No. 4 and in the Index relating thereto shall be given to any person executing or claiming under the documents to which such entries respectively refer, or to his agent or representative.*

*(4) The requisite search, under this section for entries in Books Nos. 3. and 4 shall be made only by the registering*

*officer.*

*(5) All copies given under this section shall be signed and sealed by the registering officer, and shall be admissible for the purpose of proving the contents of the original documents.*

*(B) As to the procedure on admitting to registration ”*

This Court has further examined Order 11 of Part G of Chapter 1 of Volume 1 of the Rules and Orders of Punjab and Haryana High Court, wherein the word “permitted” is used. However, the Rule do not provide that any prior permission of the Court would be required before a party is permitted to lead secondary evidence. Order 11 only provides that if the secondary evidence is permitted, the Court should see that the conditions under which such evidence can be let in, exist. This order cannot be read in a manner to hold that before a secondary evidence is permitted, a prior permission to lead secondary evidence is required. Order 11 of Part G of Chapter 1 of Volume 1 of the Rules and Orders of Punjab and Haryana High Court is extracted as under:-

*“11. As regards the mode of proof the provisions of the Indian Evidence Act should be carefully borne in mind. The general rule is that document should be proved by primary evidence, i.e. the document itself should be produced in original and proved. If secondary evidence is permitted, the Court should see that the conditions under which such evidence can be let in, exist.”*

This Court has come across various judgments passed by the Courts wherein different High Courts have taken a view that prior permission to lead secondary evidence is not required and the evidence so led by the party can be in the nature of primary evidence or secondary

evidence. Even if it is assumed that formal permission is required, that can be granted by the Court while examining and evaluating the evidence. The practice of seeking prior permission by moving an application to that effect results in unnecessary delay of the trial. If the application is accepted or rejected, the order so passed by the trial Court is further challenged before the Higher Court which again results in delay of the trial. Such delay can be very well avoided by the Courts by examining the evidence and granting permission if required after satisfying that requirements of Section 63 and Section 65 of the Evidence Act stand complied with. Reference in this regard can be made to two judgments of the Delhi High Court, first, 2009 (32) RCR (Civil) 54, Sanyogta Prakash Vs. Dhira Bala Malhotra and others, second, 2009(12) RCR (Criminal) 701, Prem Chandra Jain (deceased) represented by LRs Shri Bharat Bhushan Jain, Advocate and others Vs. Sri Ram (deceased) represented by LRs Shri Sunil Kumar Arora and others, the judgment passed by the Allahabad High Court in the case of Hameed and others Vs. Kanhaiya, 2004 AIR (Allahabad) 405. Reference in this regard can also be made to the judgments of this Court in the case Harjinder Singh Vs. Ranjit Kaur and others, 2016(3) RCR (Civil) 229, Rajesh Yadav and others Vs. Balbir Singh and others 2014(5) RCR (Civil) 941, Harbans Kaur and others Vs. Beant Kaur and others 2014(9) RCR (Civil) 3009, Anupam Jain wife of Rakesh Jain Vs. Kulwant Gupta wife of Surinder Kumar and others 2016(3) RCR (Civil) 220.

The attention of the Court has been drawn to the judgment passed by the Larger Bench of this Court reported as 1980 HLR 273, Gutari Vs. Shiv Charan and others. In the aforesaid judgment, the Court decided

the question whether a certified copy issued by the Registering Authority is per se admissible being public document or not. The Larger Bench held that the certified copy of a true copy of the original cannot be a public document and, therefore, cannot be received in secondary evidence either under Clause 'e' or Clause 'f' of Section 65 of the Indian Evidence Act. In the aforesaid judgment, the Court was dealing with a case of certified copy of registered Will produced in evidence. The parameters for proof of a Will and registered sale deed are entirely different. The sale deed is required to be compulsorily registered if it is conveying immoveable property worth more than ₹100/-. Whereas the Will is not necessarily required to be registered in law. Still further, the sale deed is not required to be attested by the two attesting witnesses whereas the Will as per Section 63 of the Indian Succession Act, 1925 is required to be attested by two attesting witnesses. Hence, the aforesaid judgment would have no application.

The attention of the Court has further been drawn to a Division Bench judgment passed by the Madhya Pradesh High Court reported as **2006(1) RCR (Civil) 685, Rekha Vs. Smt. Ratnashree**. In the aforesaid judgment also, the Court dealt with an issue to the effect that certified copy of the registered sale deed is not a public document but a private document and certified copy of the registered sale deed cannot be admitted as secondary evidence being a public document. However, the aforesaid judgment also does not laid down that the prior permission is required to be obtained by the party before he can be permitted to lead secondary evidence.

In view of the aforesaid discussion, question No.2 is also answered in favour of the appellant.

3. Whether once the plaintiffs have themselves been treating the property to be their individual separate ownership, can be permitted to challenge the sale deed executed by their other brother with respect to a specific portion of the property?

Once, it is proved on file that some co-owners jointly or severally have been selling a specified portion of the property with specific boundaries, they cannot be permitted to challenge the sale by other co-owners who is similarly situated. Such co-owners who had themselves been selling the property are estopped from claiming that sale by other co-owners with respect to a specified portion of the property is bad in law. Hence, question No.3 is also answered in favour of the appellant.

Learned First Appellate Court has further erred in passing a decree for possession, although, there was no prayer to that effect. The plaintiffs while filing the suit had prayed that the sale deed dated 10.04.1980 be declared to be illegal and ineffective against the rights of the plaintiffs and a decree for injunction be passed in their favour. No prayer for grant of relief of possession was made.

In view of the above, the judgment passed by the First Appellate Court is set aside and that of the trial Court is restored.

Regular Second Appeal is allowed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

**01.11.2018**

*Pawan*

**(ANIL KSHETARPAL)  
JUDGE**

**Whether speaking/reasoned:-**

**Yes/No**

**Whether reportable:-**

**Yes/No**