

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.149 of 2006Judgment reserved on: 6-1-2020Judgment delivered on: 9-1-2020

Kranti Kumar, S/o Late Pyarelal Shrivastava, aged
50 years, R/o Subhash Ward, Jagdalpur, District
Bastar (C.G.)

(Plaintiff)
---- Appellant

Versus

1. Ku. Kiran Shrivastava, D/o Late Pyarelal
Shrivastava, aged 42 years,

2. Akhilesh Shrivastava, S/o Late Pyarelal
Shrivastava, Branch Manager, Gramin Bank, Basaguda,
District Dantewara (C.G.)

3. Alok Shrivastava, S/o Late Pyarelal Shrivastava,
aged 40 years,

All R/o Subhash Ward, Jagdalpur, District Bastar
(C.G.)

(Defendants)
---- Respondents

For Appellant: Mr. H.B. Agrawal, Senior Advocate with
Ms. Richa Dwivedi, Advocate.

For Respondents No.1 and 3: -

Mr. R.K. Pali, Advocate.

For Respondent No.2: -

None present, though served.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. This second appeal preferred by the appellant /
plaintiff was admitted for hearing by formulating
the following substantial question of law: -

"Whether both the Courts below were

justified in holding that plaintiff has no title over the suit land by ignoring the fact that he has purchased the suit land from Motilal Jain by registered sale deed dated 30/10/1979 (Ex.P1c)?"

(For the sake of convenience, parties hereinafter will be referred as per their status shown and ranking given in the suit before the trial Court.)

2. The plaintiff and the defendants are brothers and sister. The plaintiff brother filed suit against his two brothers and one sister stating inter alia that he purchased the suit house by registered sale deed 30-10-1979 (Ex.P-1C) from one Motilal Jain and became title holder and as such, it is the self-acquired property in which the defendants are licensees and despite request, they have not vacated the suit house and therefore he is entitled for decree of declaration of title and recovery of possession along damages which was opposed by the defendants by filing written statement stating that Motilal Jain had no right and title to sell the property in fact, Motilal Jain was money lender involved in the business of money lending and it was a money transaction for which the sale deed was executed and thereafter the entire amount was paid by the father of the parties through the plaintiff, but the plaintiff fraudulently got his name registered in the sale deed, as such, it is the joint family property of the parties and the

plaintiff is not entitled for decree.

3. The trial Court upon appreciation of oral and documentary evidence on record, dismissed the suit finding that it is not the self-acquired property of the plaintiff, but it is the ancestral property of the parties which the first appellate Court has also agreed and dismissed the appeal. Questioning that judgment & decree, this second appeal has been preferred in which substantial question of law has been framed which has been set-out in the opening paragraph of this judgment.

4. Mr. H.B. Agrawal, learned Senior Counsel appearing for the appellant herein / plaintiff, would submit that Ex.P-1C confers exclusive title to the plaintiff, as he has purchased the suit property from Motilal Jain and even if the original sale deed has not been filed, he is entitled for decree on the basis of certified copy of sale deed. He placed reliance upon the decisions of the Supreme Court in the matters of Kalyan Singh, London Trained Cutter, Johri Bazar, Jaipur v. Smt. Chhoti and others¹ and Haji Mohammad Ekramul Haq v. The State of West Bengal² and also on the decision of the Bombay High Court in the matter of Baban Girju Bangar v. Namdeo Girju Bangar and others³ to

1 (1990) 1 SCC 266

2 AIR 1959 SC 488

3

buttress his submission.

5. Mr. R.K. Pali, learned counsel appearing for respondents No.1 and 3, would support the submissions of Mr. H.B. Agrawal and would adopt his submissions.

6. I have heard learned counsel for the parties and considered their submissions made herein-above and went through the record with utmost circumspection.

7. It is the plaintiff's case that he has purchased the suit property by registered sale deed Ex.P-1C from Motilal Jain and became title holder, thus, it is the self-acquired property. Whereas, it is the defendants' case that it is the joint family property and the suit land was mortgaged in favour of Motilal Jain and while returning back, by registered sale deed, the plaintiff got his name registered in the registered sale deed. In order to prove his title, the plaintiff has not filed the original sale deed, but has only filed the certified copy of the sale deed as Ex.P-1C and officer from the office of the Sub-Registrar has been called to prove the same who has stated that it is the true copy of the copy kept in the office of the Sub-Registrar. However, the plaintiff has not laid any foundation for leading secondary evidence of the contents of the sale deed dated 30-10-1979.

8. Section 61 of the Indian Evidence Act, 1872 (for short, 'the Evidence Act') provides for proof of contents of documents and the contents of documents may be proved either by primary or by secondary evidence. Section 62 of the Evidence Act states that primary evidence means the document itself produced for the inspection of the Court. Secondary evidence, as a general rule is admissible only in the absence of primary evidence and secondary evidence has been defined in Section 63 of the Evidence Act. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence. Section 64 of the Evidence Act provides that documents must be proved by primary evidence except in the cases mentioned in Section 65. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the seven exceptional cases in which secondary evidence is admissible. The conditions laid down in the said section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a

document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the section. (See J. Yashoda v. K. Shobha Rani.)⁴

9. It is well settled law that foundation must be first laid for reception of secondary evidence.

10. In the matter of H. Siddiqui (Dead) by LRs. v. A. Ramalingam⁵, their Lordships of the Supreme Court have laid down the principles of law regarding granting of secondary evidence as under:-

"12. The provisions of Section 65 of the 1872 Act provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide *Roman Catholic Mission v. State of Madras*⁶, *State of*

4 (2007) 5 SCC 730

5 (2011) 4 SCC 240

6 AIR 1966 SC 1457

*Rajasthan v. Khemraj*⁷, *LIC v. Ram Pal Singh Bisen*⁸ and *M. Chandra v. M. Thangamuthu*⁹.) “

11. Similarly, in the matter of **Kaliya v. State of Madhya Pradesh**¹⁰, the Supreme Court has held that the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced and held as under: -

“13. Section 65(c) of the 1872 Act provides that secondary evidence can be adduced relating to a document 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. The court is obliged to examine the probative value of documents produced in the court or their contents and decide the question of admissibility of a document in secondary evidence. (Vide *H. Siddiqui v. A. Ramalingam* (supra) and *Rasiklal Manikchand Dhariwal v. M.S.S. Food Products*¹¹.) However, the secondary evidence of an ordinary document is admissible only and only when the party desirous of admitting it has proved before the court that it was not in his possession or control of it and further, that he has done what could be done to procure the production of it. Thus, the party has to account for the non-production in one of the ways indicated in the section. The party further has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. When the party gives in evidence a certified copy/secondary evidence without proving the circumstances entitling him to give secondary evidence, the opposite party must raise an objection at the time of

7 (2000) 9 SCC 241

8 (2010) 4 SCC 491

9 (2010) 9 SCC 712

10 (2013) 10 SCC 758

11 (2012) 2 SCC 196

admission. In case, an objection is not raised at that point of time, it is precluded from being raised at a belated stage. Further, mere admission of a document in evidence does not amount to its proof. Nor mere marking of exhibit on a document does not dispense with its proof, which is otherwise required to be done in accordance with law. (Vide *Roman Catholic Mission v. State of Madras* (supra), *Marwari Khumhar v. Bhagwanpuri Guru Ganeshpuri*¹², *R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami and V.P. Temple*¹³, *Dayamathi Bai v. K.M. Shaffi*¹⁴ and *LIC v. Rampal Singh Bisen* (supra).)"

12. Certified copy of the registered sale deed can be permitted to be filed it being the secondary evidence of the registered sale deed. In **Kalyan Singh** (supra), in paragraph 25, it has clearly been held by their Lordships of the Supreme Court that a certified copy of a registered sale deed may be produced as secondary evidence in the absence of the original.

13. The Supreme Court also in the matter of **Lakhi Baruah and others v. Padma Kanta Kalita and others**¹⁵ with reference to Section 90 of the Evidence Act has clearly held that foundation having not been laid for admission of secondary evidence under Section 63 by proof of loss or destruction of the original and the copy having not been produced from proper custody, presumption would not be available.

It has been observed as under: -

12 (2000) 6 SCC 735

13 (2003) 8 SCC 752

14 (2004) 7 SCC 107

15 (1996) 8 SCC 357

"17. The position since the aforesaid Privy Council decisions being followed by later decisions of different High Courts, is that presumption under Section 90 does not apply to a copy or a certified copy even though thirty years old: but if a foundation is laid for the admission of secondary evidence under Section 63 of the Evidence Act, 1872 by proof of loss or destruction of the original and the copy which is thirty years old is produced from proper custody, then only the signature authenticating the copy may under Section 90 be presumed to be genuine."

14. Reverting to the facts of the present case in light of the aforesaid decisions of the Supreme Court, it is quite vivid that the plaintiff has simply filed certified copy of the sale deed Ex.P-1C and has not laid any foundation for admission of secondary evidence under Section 63 read with Section 65 of the Evidence Act by proof of loss or destruction of the original. Certified copy of the sale deed Ex.P-1C, in absence of foundation for leading secondary evidence, has to be excluded as a piece of evidence though it has been marked and exhibited at the instance of the plaintiff and as such, in absence of foundation for leading secondary evidence of Ex.P-1C — sale deed, both the Courts below are justified in dismissing the suit of the plaintiff and in not holding the suit property to be his exclusive property which is neither perverse nor contrary to law. The substantial question of law is answered accordingly. The second appeal deserves to be and is hereby dismissed affirming

the judgment and decree of the first appellate Court. No order as to cost(s).

15. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma