In the High Court of Punjab and Haryana, at Chandigarh

Regular Second Appeal No. 2334 of 2018 (O&M)

Date of Decision: 08.07.2022

Reserved on 27.05.2022

Sewa Singh

... Appellant(s)

Versus

Balwinder Kaur and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Sahil Soi, Advocate
for the appellant(s).

Mr. Mandeep Singh Sachdev, Advocate
for the respondent No.1.

Anil Kshetarpal, J.

1. While assailing the concurrent findings of facts, arrived at by both the Courts below, the plaintiff has filed the present appeal.

2. The plaintiff filed a suit for grant of decree of declaration to the effect that he along with defendant No.2 and 3 are owners in possession of the land measuring 6 kanals and 18 marlas, in addition to other land recorded in their names out of the land comprised in khewat/khatauni No. 189/305-314, as per jamabandi for the year 2008-2009 along with the declaration that mutation No. 934 sanctioned on the basis of the registered sale deed dated 21.01.1980, in favour of the plaintiff and his father, is wrong, for declaring that the order passed by the Assistant Collector Ist Grade (Tehsildar) Bhulath, District Kapurthala and the Collector-cum-Sub Divisional Officer (Civil), Bholath, District Kapurthala on 08.11.2013 are

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illegal, null and void along with the consequential relief of permanent injunction restraining the defendants from alienating, transferring or creating any charge and from taking possession of the land described above.

3. After having heard the learned counsel representing the parties, at length, this Court is of the opinion that the following questions of law arise in the present case:-

> "I) Whether a registered sale deed is required to be attested by two attesting witnesses?
>
> II) If the answer to the aforesaid question is in the negative, then the further question which would arise is whether a registered sale deed is necessarily required to be proved by examining the witnesses in the evidence".

4. Breifly the facts of the case are that as per the case of the plaintiff, Sh.Mohinder Singh and Sh.Lakhwant Singh sons of Sh.Jagat Singh, resident of village Bholath Sharki, Tehsil Bholath, District Kapurthala, sold the land measuring 6 kanals and 18 marlas through sale deed executed on 19.01.1980 which was registered on 21.01.1980 in favour of Sh.Sohan Singh son of Sh.Lal Singh to the extent of half share and in favour of the plaintiff (Sh.Sewa Singh) to the extent of the remaining half share. The actual physical possession of the above land was delivered to the plaintiff and his father Sh.Sohan Singh. It is claimed that the plaintiff along with the defendant No.2 and 3 are now the owners in possession of the property. The defendant No.2 and 3 are the plaintiff's brothers. He also sought declaration that Late Sh. Lakhwant Singh is left with no share in the joint khata and the entry in the revenue record in favour of Smt.Balwinder

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Kaur widow of Late Sh.Lakhwant Singh and the *ex parte* order of partition, which has been affirmed in appeal, are both illegal. The defendant No.1, while contesting the suit, has alleged that she is owner of the property and has no knowledge about any sale deed referred to. In substance, the defendant No.1 has asserted as under:-

> *"2. That para No.2 of the plaint is wrong hence denied. The plaintiff is beating about the bush and telling a cock and bull story which has nothing to do with merit of the case. The defendant has no knowledge about any sale deed referred by the plaintiff in this para concerning the land in dispute. Had there been any such genuine sale deed the plaintiff would have produced before the revenue court in partition proceedings. The plaintiff did not bother about the partition proceedings of the land and now the plaintiff is telling a long story which has no concern with the land of the defendant, since 21.01.1980, the plaintiff kept sleeping and now the suit is barred by limitation".*

5. The defendant No.2 and 3 have supported the case of the plaintiff.

6. On appreciation of the pleadings, the trial Court has culled out the following issues:-

> *"1. Whether the plaintiff is entitled to the relief of declaration, as prayed for? OPP.*
>
> *2. Whether the plaintiff is entitled to the relief of permanent injunction, as prayed for? OPP.*
>
> *3. Whether the suit is not maintainable in the present form? OPD*

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4. Whether the plaintiff has got no locus standi or cause of action to file the present suit? OPD

5. Whether the plaintiff is estopped by her own act and conduct from filing the present suit? OPD.

6. Whether the plaintiff has not come to the Court with clean hands, and has suppressed the material facts from the court? OPD

7. Whether the suit is bad for mis joinder and non joinder of necessary parties? OPD

8. Whether the suit is barred by limitation? OPD

9. Relief".

7. The plaintiff, in order to prove his case, appeared in the witness box as PW.1 and produced the original sale deed. It would be noted here that in lieu of the examination-in-chief, the affidavit of the plaintiff was filed on 29.10.2014, which reads as under:-

"2. That above said Mohinder Singh and Lakhwant Singh executed a sale deed dated 19-1-1980 registered on 21-1-1980 of the above said land measuring 6 Kanals 18 Marlas comprised in Khewat/Khata No. 9/48 Khasra Nos. 6//25/2/1 Min/1-5, 11//5/1 Min/0-12, 6/1 Min/1-1, 6//24/1/1/1-18, 25/2/1/0-12, 11//5/1/1-10 in favour of my father Sohan Singh son of Lal Singh son of Ghasita to the extent of ½ share and in my favour to the extent of ½ share. I ***have brought the original sale deed today with me in the court. It was thumb marked by my father namely Sohan Singh as purchaser****. The sale deed*

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was scribed by Balbir Singh deed writer, is permanently residing abroad and is not likely to return to India in near future. The attesting/marginal witness namely Hazara Singh Nambardar of village Bhadas has also since died. Certified copy of sale deed dated 21-1-1980 is Ex.P-1".

8. The plaintiff was cross-examined on 13.11.2014. It is noted here that on 29.10.2014, the plaintiff tendered his affidavit in the evidence but the defendant did not object to the exhibition of the sale deed. The statement of the plaintiff reads as under:-

PW1 on SA
Statement of Sewa Singh son of Sohan Singh son of Lal Singh, resident of Village Akala, Tehsil Bholath, District Kapurthala.

I tender into evidence my duly sworn affidavit Ex.PA which may be read as a part of my examination in chief.

XXXXX(Deferred on the request of learned counsel for the defendant)

Dated: 29.10.2014 *Sd/-(Indu Bala)*
CJ(JD)Kpt."

9. The plaintiff was cross-examined on 13.11.2014. Thereafter, the plaintiff examined Sh.Balkar Singh as PW.2, Smt.Daljeet Kaur, official from the office of the Deputy Commissioner as PW.3 in order to prove the certified copy of the sale deed. She brought Bahi No.1/270 containing the record of sale deeds No.2212 and 2287 dated 09.01.1980. The sale deed No. 2286 dated 27.01.1980 was proved. She proved the certified copy of the sale deed produced by the plaintiff. It is noted here that two copies of the sale deeds have been produced on the file. One is a certified true copy of the sale deed issued by the office of the Sub-Registrar. The photocopy of the sale

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deed pasted at page No.99 of the register of the Sub-Registrar has been certified to be true copy of the original. This copy is signed by both the vendors namely Sh.Mohinder Singh and late Sh.Lakhwant Singh. At the time of registration of the sale deed, Sh.Mohinder Singh and late Sh.Lakhwant Singh have signed in presence of the Sub Registrar. There is another photocopy of the sale deed which was given to the purchaser. However, this copy appears to have not been signed by late Sh.Lakhwant Singh on both the pages, however, at the time of registration, late Sh.Lakhwant Singh was not only present but has signed the document in the presence of the Registrar. It would be noted here that the sale deed is dated 19.01.1980 whereas it was registered on 21.01.1980.

10. The defendant No.1, in order to prove her case, appeared as DW.1. her deposition with regard to the sale deed is as under:-

> *"4. That the Plaintiff is claiming a sale deed dated 21.1.1980 regarding which the sale deed dated 21.1.1980 no mutation hs been sanctioned so far and the Plaintiff has been sleeping over this sale deed till date which shows that the alleged sale deed has not been duly executed i.e. the Plaintiff has admitted in his cross-examination that the husband of the defendant was posted at Kashmir and was not present at Bholat before the Sub Registrar, more so the alleged sale deed has no signature of Lakhwant Singh deceased, i.e. the husband of the deponent. The absence of the signatures of said Lakhwant Singh appears to be the main cause of rejection of the said sale deed by the Revenue Department till date. The Plaintiff went in appeal upto*

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the Commissioner, Jalandhar Division, Jalandhar but no relief has been procured by the plaintiff in any litigation. The Plaintiff is harassing the deponent for none of her fault being widow and old lady who is running from pillar to post, even inspite of her best efforts to get rid off these litigations".

11. Primarily, both the Courts below have dismissed the suit on the ground that the plaintiff has failed to prove the sale deed in his favour. In substance, the trial Court has recorded the following reasons to dismiss the suit:-

i) The plaintiff has not examined any other witness except PW.2 Smt.Daljeet Kaur, official from the office of Sub-Registrar.

ii) The plaintiff has failed to explain as to why no mutation on the basis of sale deed has ever been sanctioned.

iii) The plaintiff has not given any reason as to why he has been sleeping over his rights with respect to the sale deed, which shows that the sale deed has not been duly executed.

iv) A perusal of sale deed (Ex.P1) shows that on the sale deed, there is no signature of late Sh.Lakhwant Singh, the husband of defendant No.1.

v) No witness to prove the contents of the sale deed has been produced.

vi) The plaintiff has concealed that he filed a suit for grant of a decree of permanent injunction, which was dismissed.

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The defendant No.2 and 3 have, though, admitted the sale deed, but neither stepped into the witness box nor examined any witness in their favour.

12. The First Appellate Court has held as under:-

I) The appellant has challenged the orders dated 13.02.2013 and 08.11.2013 passed by the Assistant Collector Ist Grade, Bholath and the Collector, Bholath, respectively. But these orders have not been proved on the record.

II) The original sale deed has not been produced nor any permission has been sought to lead secondary evidence.

III) The sale deed (Ex.P1) does not bear the signatures of late Sh.Lakhwant Singh. This fact has also not been denied by the plaintiff in his cross-examination.

Apart from the aforesaid, the reasons given by the trial Court were reiterated.

13. This Court while analyzing the arguments of the learned counsel representing the parties has also re-appreciated the evidence. The written arguments filed by the learned counsel have also been examined.

14. In the first instance, both the Courts below have erred in observing that the original sale deed was not produced in evidence. There is no requirement of placing record the original sale deed on the file of the Court. The plaintiff as already noticed, while appearing in evidence on 29.10.2014, has stated that he has brought the original sale deed in the Court. The learned counsel representing the defendants did not raise any objection nor he requested the Court to retain the original sale deed on the

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record of the case.

15. It would be noted here that the term "Sale" is not only defined, but the procedure for its execution has been laid in Section 54 of the Transfer of Property Act, 1882 (hereinafter referred to as "the 1882 Act"), which is as under:-

> *"**54. "Sale" defined**.—"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.*
>
> ***Sale how made**.—Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.*
>
> *In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.*
>
> *Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.*
>
> ***Contract for sale**.—A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.*
>
> *It does not, of itself, create any interest in or charge on such property".*

16. On a careful reading of Section 54 of 1882 Act, it is evident that tangible immovable property of the value of one hundred rupees and upwards can be transferred only by a registered document. There is no

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requirement that the sale deed is required to be attested by two attesting witnesses. In fact, there are very few documents which are required to be attested by the attesting witnesses which includes, primarily, a Will, mortgage deed and gift deed.

17. Now, the statutory provisions which require the attention are Section 68 and 72 of the Indian Evidence Act, 1872, and the same are extracted as under:-

> *"**68. Proof of execution of document required by law to be attested**. — If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:*
>
> *Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied".*
>
> *69 to 71 XXXX XXXX XXXX XXXX*
>
> ***72. Proof of document not required by law to be attested**. — An attested document not required by law to be attested may be proved as if it was unattested".*

18. Section 68 of the 1872 Act lays down the procedure for proving the execution of document required by law to be attested. As alreay noticed, the sale deed is not the document required by law to be attested. Hence,

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Section 68 of the 1872 Act shall not be applicable but Section 72 of the 1872 Act shall apply. Consequently, a document which is not required to be attested by the two witnesses but has been attested is required to be proved as if it is unattested, in accordance with the other provisions of the 1872 Act. Section 61 of the 1872 Act provides that the contents of a document can be proved either by primary evidence or secondary evidence. The primary evidence means the document itself is produced for inspection of the Court whereas secondary evidence means and includes the certified copies and other copies. Section 61, 62 and 63 of the 1872 Act are extracted as under:-

> *"**61. Proof of contents of documents**. — The contents of documents may be proved either by primary or by secondary evidence.*
>
> ***62. Primary evidence**. — Primary evidence means the document itself produced for the inspection of the Court.*
>
> *Explanation 1. —Where a document is executed in several parts, each part is primary evidence of the document.*
>
> *Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.*
>
> *Explanation 2. — Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.*

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> ***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".*

19. It is evident that Section 62 of the 1872 Act defines what is primary evidence. The primary evidence means the original document itself produced for the inspection of the Court. Explanation-I and II of Section 62 of the 1872 Act are relevant. Explanation-I provides that where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, is the primary evidence as against the parties executing it. Explanation-II provides that where a number of documents are made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest, but where they are all copies of a common original, they are not primary evidence of the contents of the original. In ***Prithi Chand v. State of Himachal Pradesh AIR 1989 SC 702***, a carbon copy of the injury report

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may be admitted as primary evidence when it was prepared by the doctor by a uniform process while preparing the original. As is evident from the provisions of the Indian Registration Act, 1908 (hereinafter referred to as "the 1908 Act") minimum two copies of the sale deed are required to be prepared. One copy which is scribed and signed by all the parties on the stamp papers signed is returned by the Registrar to the parties after its registration and endorsement. Whereas the other copy which is, again, signed by all the parties is kept in the record and pasted or copied in the register maintained in the office of the Sub-Registrar. The aforesaid copy which is retained in the office of the Sub-Registrar, signed by all the parties, is an original, therefore, is a primary evidence as defined in Section 62 of the 1872 Act.

20. It may be noted here that there is no requirement that the original document must be kept in the record/file of the Court. It is sufficient to bring the original for perusal of the Court by the party which can be examined and returned by the Court while keeping its copy on record. In fact, the trial Court has erred in failing to record the aforesaid fact on 29.10.2014, but the learned counsel representing the defendant also did not object to the admissibility of the document.

21. Once there was no objection, the document was admitted in evidence and marked as Ex.P1. A wrong practice has been established by the Courts to adjourn the case for cross-examination which not only results in wastage of the precious time of the Court but also causes inconvenience to the parties and the witnesses. The Courts can preferably insist upon supply of a copy of the affidavit to the other party, a day or two before the date

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fixed for evidence so as to grant sufficient opportunity to the opposite counsel to come prepared for cross-examination. In the present case, unfortunately, the Court did not adopt proper procedure. It simply adjourned the case on the request of the learned counsel representing the defendant for 14 days. Whenever the documents are exhibited in the evidence, the Presiding Judge is required to record as to whether the primary evidence has been produced or not? If a copy is placed on the file of the Court but primary evidence is shown to the court for comparison, which, on being examined, is found correct, then there is no requirement of keeping the primary evidence on the court file.

22. It is regretful that the trial Court has neither followed the procedure while recording the statement in examination-in-chief nor has marked the sale deed properly as exhibits. In the examination-in-chief, Sh.Sewa Singh has stated that he has brought the original sale deed and produced its photocopy on record. His cross-examination was deferred by the Court without marking the copy of the sale deed as an exhibit. The Court also did not record that the original sale deed has been produced, examined, compared and returned. When Sh.Sewa Singh appeared in the cross-examination, the learned counsel representing the defendant did not cross-examine the witness by specifically calling upon him to produce the original sale deed, namely the primary document. On the reading of the cross-examination, it is evident that the family of Sh.Sewa Singh had purchased the various properties from late Sh.Lakhwant Singh by three different sale deeds. Sh.Sewa Singh states that he personally knew late Sh.Lakhwant Singh who resides 3 Kms. away from his village. He had seen

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him reading and writing. It has been stated that he has brought two sale deeds out of three. He stated that he canont tell as to whether late Sh.Lakhwant Singh had signed Ex.P1 or not but he specifically stated that late Sh.Lakhwant Singh signed on the other copy of the sale deed which was retained by the Sub-Registrar. He also deposed that late Sh.Lakhwant Singh also signed in the note-book/diary of the scribe where the entry of the sale deed was recorded. He also stated that the appeal arising from the order of partition is pending before the Commissioner.

23. On a careful reading of the statement of Smt.Daljeet Kaur, it is evident that she brought the original record along with and verified that the certified copy of the sale deed is a correct copy in accordance with the original as per the official record. The learned counsel representing the defendant cross-examined Smt. Daljeet Kaur mainly on the ground that the copy of the sale deed which is duly signed by the parties is not properly pasted at page 99, therefore, it may have been inserted later on. Smt.Daljeet Kaur specifically denied the aforesaid fact. She stated that the pasting was partial

24. Thus, it is evident that the Court neither marked the photocopy of the sale deed produced in the deposition of Sh.Sewa Singh as Ex.P1 nor marked the certified copy of the sale deed as an exhibit. In such circumstances, this Court, while exercising its powers under proviso to Order XIII Rule 4 CPC added by the States of Punjab and Haryana, is marking the certified copy issued by the office of the Sub-Registrar as Ex.P1. Order XIII Rule 4 CPC is extracted as under:-

"4. Endorsements on documents admitted in evidence.-—(1) Subject to the provisions of the next following sub-rule, there

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shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:-

(a) the number and title of the suit,

(b) the name of the person producing the document,

(c) the date on which it was produced, and

(d) a statement of its having been so admitted; and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.

Provided that where the Court is satisfied that the document, not endorsed in the manner laid down in the above rule, was in fact, admitted in evidence, it shall treat the document as having been properly admitted in evidence unless non-compliance with this rule has resulted in miscarriage of justice".

25. It may be noted here that on the reverse side of page 1 of the sale deed, the Joint Sub-Registrar while registering the sale deed Ex.P1 on 21.01.1980 has made the following endorsements:

"Mohinder Singh and Lakhwant Singh have been read over the contents of the written document which are admitted to be correct. They also admit that they have got scribed the same. Hazara Singh and Wariyam Singh, witnesses, identified the

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afore-stated persons. They have stated that in their presence, the afore-stated persons received ₹7,000/- from Sh.Sohan Singh. Hazara Singh witness is personally known to me. Let the written document be registered. Date 21.01.1980. Signatures and seal of Joint Sub-Registrar, Bholath".

LTI Hazara Singh

Signatures in Gurmukhi (Punjabi) Mohinder Singh

Signatures in English Lakhwant Singh

LTI Sohan Singh

Signatures in Urdu language – Wariyam Singh".

26. It is also evident from the reading of the cross-examination that the learned counsel representing the defendant did not call upon the plaintiff to bring the original of the sale deed which was exhibited as Ex.P1. In any case, once Mrs.Dilpreet Kaur, an official from the office of the Sub-Registrar, has been examined, who brought along with, the original register/note book in which the sale deed was pasted, there is no room left for doubting the correctness of the sale deed.

27. It would be noted here that both the Courts below have ignored the sale deed on the ground that late Sh.Lakhwant Singh has not signed the sale deed which is factually incorrect. As already noticed, from a perusal of the copy pasted in the office of the Sub-Registrar, it is evident that the sale deed has been signed by late Sh.Lakhwant Singh as well as his brother Sh.Mohinder Singh at two different places. On the first page, after the recitals of the sale deed come to an end, the signatures of both the brothers are appended. Late Sh.Lakhwant Singh has signed in fluent English. On the

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reverse side, the Sub-Registrar has made his endorsement while registering the document. Such an endorsement is in two parts. In the first part, which is signed by the Sub-Registrar as well as Sh.Mohinder Singh shows that the sale deed was produced for registration on 21.01.1980 between 1.00 to 2.00 p.m. In the second part of the endorsement, the Sub Registrar registered the document which is signed by both the brothers, namely late Sh.Lakhwant Singh and Sh.Mohinder Singh. There were two witnesses of the sale deed who were also present. The Registrar, Kapurthala counter signed the same.

28. The second signatures exist on the copy of the sale deed which was supplied to the vendees. The first page of the sale deed is signed by Sh.Mohinder Singh. No doubt, on the second page also, the signatures of late Sh.Lakhwant Singh do not exist, however, the endorsement of the Sub-Registrar on the reverse of the first page is duly signed by late Sh.Lakhwant Singh. Thus, the absence of signatures of late Sh.Lakhwant Singh on two pages of the sale deed is due to an oversight. There is no evidence to prove that the signatures of late Sh.Lakhwant Singh as many as at four different places on 19.01.1980 as well as on 21.01.1980 were not appended by him. It would be noted here that the defendant, while appearing in evidence, have taken a stand that her husband was posted in Kashmir and he did not come for execution of the sale deed, however, she did not produce any evidence to prove the same. Once she was asserting that late Sh.Lakhwant Singh did not sign the document or he was at Kashmir, at the relevant time, being posted there, she was required to prove that fact. Under Section 114 of the 1872 Act, there is a presumption that a registered document has been validly executed and registered. Reference in this regard can be made to the

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judgment of the Supreme Court in ***Prem Singh v. Birbal (2006) 5 SCC 353***. Furthermore, in ***Hansraji v. Yashodhanand AIR 1996 SC 761***, the Court held that the sale deed is not required to be attested by two witnesses and hence, Section 68 of the 1872 Act is not applicable.

29. Keeping in view the aforesaid discussion, the question No.1 is answered in the negative and it is held that the registered sale deed is not required to be attested by the two attesting witnesses.

30. This Bench, now, proceeds to analyse the reasons recorded by both the Courts below while dismissing the suit. The first reason assigned by the trial Court is with regard to the non-examination of the attesting witnesses which has already been discussed in detail and needs no further elaboration. It is reiterated that the attesting witnesses are not required in case of a sale deed.

31. The second reason assigned is also erroneous. Firstly, it is not a case where no mutation on the basis of the sale deed was recorded by the revenue authorities. In fact, mutation No. 934 dated 18.08.1992 was sanctioned by the revenue authorities on the basis of the sale deed dated 19.01.1980 which was duly registered on 21.01.1980. The same is exhibited as Ex.P4. Though, there is an error in the aforesaid mutation. The share of Sh.Mohinder Singh was correctly mutated, however, the share of late Sh.Lakhwant Singh was not mutated. The revenue authorities have committed error while noting that Sh.Jagat Singh has sold the property in place of late Sh.Lakhwant Singh. In fact, Jagat Singh is the father of Lakhwant Singh. The revenue authorities also committed an error in noting down the sale deed number, which is recorded as 228, whereas, its correct

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number is 2287. The entry of mutation of the sale deed is only an executive function of the authority and it neither creates any cause of action nor it affects theright, title or interest of the parties. The ownership of the tangible immovable property stands transferred by registered sale deed. Hence, the second reason assigned is erroneous.

32. The next reason assigned by the trial Court about the plaintiff having slept over his rights is also erroneous. The mutation has been sanctioned, though it suffers from an error which is procedural in nature.

33. The next reason assigned is also factually incorrect as late Sh.Lakhwant Singh has signed the sale deed at four different places in both the copies.

34. The next reason assigned is with regard to the non-production of attesting witnesses. Though there was no requirement in view of the previous discussion, however, the plaintiff while appearing in evidence has positively stated that the scribe of the document has shifted abroad, whereas, one witness, namely Hazara Singh, Numberdar, has died. In such circumstances, both the Courts below have erred in ignoring the sale deeds.

35. The next reason assigned is the effect of non-examination of the marginal witnesses which has already been discussed elaborately and hence, does not need any further discussion.

36. The next reason assigned is with regard to concealment of the fact with respect to a previous suit having been filed by the plaintiff.

37. A perusal of the record shows that the plaintiff along with Amrik Singh filed a suit for grant of decree of injunction on 29.05.2013 which was dismissed as the plaintiff failed to produce any evidence. It

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would be noted here that it was a suit simplicitor for grant of decree of injunction restraining the defendants from forcibly dispossessing him. The plaintiff has not disclosed the filing of such suit in the plaint of this suit. Now, the question is as to whether such concealment is fatal to the case of the plaintiff or not. No doubt, as per the amended provisions of Code of Civil Procedure, the plaintiff is required to disclose such fact, however, it is not provided that if such disclosure is not made or there is an unintentional failure/mistake, the same would result in dismissal of the suit itself. A suit for injunction is based upon the cause of action which is asserted in the plaint of that suit. In the present case, the plaint of the previous suit has not been produced. Hence, it is not possible to conclude as to whether the suit is based on the same cause of action or not. Furthermore, there was no declaration sought in the previous suit, whereas, the present suit is for declaration. Hence, failure to disclose the previous suit is not fatal to the case of the plaintiff.

38. The last reason assigned by the trial Court is with regard to non-appearance of defendant No.2 and 3 in evidence. The defendant No.2 and 3 are not the contesting defendants. They have admitted the execution of the sale deed. They are the plaintiff's brothers. Hence, even if they have failed to step into the witness box as witnesses, it shall not adversely affect the case of the plaintiff.

39. Now, this Bench proceeds to examine the reasons recorded by the First Appellate Court. It may be noted here that no doubt, the plaintiff has failed to prove the orders passed by the authority in the partition proceedings, however, that by itself does not affect the main relief sought in

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the suit which is with respect to the declaration of title.

40. The next reason assigned by the First Appellate Court is with regard to the non-production of the original sale deed dated 19.01.1980 (Ex.P1). This aspect has already been elaborately discussed. Both the Courts below have further failed to notice that the aforesaid sale deed is more than 30 years old. Section 90 of the 1872 Act allows the court to raise the presumption of correctness and genuineness of a 30 years old document brought from proper custody.

41. The next reason assigned is to the effect that the plaintiff himself admitted that Ex.D1 does not bear the signatures of late Sh.Lakhwant Singh is selective reading of the statement. Once two copies of the primary document itself are available on the file which prove that late Sh.Lakhwant Singh did sign the document, the statement of the plaintiff is rendered immaterial.

42. The remaining reasons recorded by the First Appellate Court are the same as given by the trial Court which have already been elaborately discussed.

43. Now the Bench proceeds to examine the arguments of the learned counsel representing the respondent No.1. The first argument is with regard to the proof of sale deed. It would be noted here that on a careful reading of the sale deed (Ex.P1), it is evident that late Sh.Lakhwant Singh has executed the sale deed qua his share to the extent of 4 kanals and 10 marlas whereas Sh.Mohinder Singh, his brother, has executed the sale deed to the extent of 2 kanals and 8 marlas. The signatures of late Sh.Lakhwant Singh do exist on four different places in both the copies of the

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sale deed. It is also evident from the reading of the written statement as well as the defendant's deposition that she has not specifically denied the execution of the sale deed by late Sh.Lakhwant Singh. In such circumstances, it was for the defendant to prove that the aforesaid signatures are not of late Sh.Lakhwant Singh. In cross-examination, she has taken a stand that late Sh.Lakhwant Singh was a serving Colonel posted in Kashmir at the relevant time and he never came back to Bholath. As this fact was asserted by her, therefore, she was required to prove it. As regards the non-examination of the marginal witnesses, the matter has already been discussed in detail. The reliance placed by the learned counsel representing the appellant on ***Perumal Konar v. Esakki alias Mookandi 2014 (2) Madras Weekly Notes (Civil) 717*** is wholly misplaced. On a careful reading of the said judgment, it is evident that the sale deed was registered before the Sub-Registrar, Palayamkottai, which had no territorial jurisdiction. In fact, the sale deed was required to be registered in Seidhunganallur. Moreover, the Court, in the facts of the case, found that the sale deed is surrounded by suspicious circumstances. The learned counsel further relies upon ***M/s Kamakhya Coal Private Limited v. Shri Parag Gogoi 2021(4) Gauhati Law Times 353***. In the aforesaid case, the main question was as to whether the appellant – a limited company after having been dissolved was in existence or not? In para 17, the Court formulated the questions which were involved. The Court decided the case in the peculiar facts of that case. The learned counsel representing the appellant draws the attention of the Court to the head note/catch words under heading "e" in the copy of the aforesaid judgment. Such catch words/heading is not a part of the judgment. The

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catch words are the interpretation of a law journal. Hence, they have no relevance. On the reading of para 43, it is evident that the Court itself found that Section 68 of the 1872 Act does not apply to a registered sale deed. The next judgment relied upon by the learned counsel is in ***Thimma Naiaka v. Papana alias Kempe Gowda 2013 (7) RCR (Civil) 658***. In the facts of the aforesaid case, the Court found that the *onus probandi* lied upon the plaintiff to satisfy the Court's conscientious. In the facts of the case, the Court observed that none of the attesting witnesses have been produced and the factum of their non-availability is also not satisfactorily explained. Thus, the aforesaid judgment is also given in the facts of that case.

44. The next judgment relied upon by the learned counsel representing the respondent No.1 is in ***Kultar Singh v. Jagtar Singh 2020 (2) RCR (Civil) 332***. The Court found that the sale deed is a suspicious transaction. The aforesaid judgment is also in the facts of the case, therefore, does not support the case of the defendants.

45. The next argument of the learned counsel is to the effect that the sale deed, in original, has not been produced on record. It would be noted here that once the sale deed was exhibited on 29.10.2014 without any objection from the defendant and the affidavit of the witness to the effect that he has brought the original has not been rebutted, the objection taken by the learned counsel has no substance. The second part of the argument with regard to the examination of the attesting witness needs no further discussion.

46. The next argument of the learned counsel is with regard to the requirement that the case of the plaintiff is required to stand on his own legs. In the present case, the plaintiff has proved his case by producing the

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original sale deed and also while appearing in evidence and examining the official of the Sub-Registrar, who brought the note book where anothercopy of the sale deed (primary evidence) is pasted.

47. The next argument of the learned counsel is with regard to failure of the plaintiff to challenge the mutation during all these years. It is noted here that the mutation is only an executive function of the revenue authorities and it neither gives rise to any cause of action nor it decides the right of ownership. Hence, an incorrect mutation does not affect the rights of the plaintiff. The ownership is transferred in accordance with the registered sale deed, although, in this case, the mutation was incorrectly entered.

48. The next argument of the learned counsel is regarding the delay of 22 years. It may be noted here that the plaintiff claims to be the owner in possession of the property. No evidence has been produced that the plaintiff is not in possession. It is recorded in the sale deed that the possession has been delivered. In such circumstances, the suit filed by the plaintiff for declaration that he is owner in possession, cannot be said to be barred by time.

49. The next argument of the learned counsel is with regard to exclusion of the jurisdiction of the Civil Court once the partition proceedings have been finalized. The learned counsel refers to Section 158 of the Punjab Land Revenue Act, 1887 (hereinafter referred to as "the 1887 Act") while relying upon ***Mam Chand v. Smt. Bhago Devi and Others 2011(53) RCR (Civil) 370***.

50. No doubt, a suit challenging the orders passed in the partition proceedings is not maintainable, however, it may be noted here that the

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plaintiff was proceeded against *ex parte* and when he filed an appeal against the order of partition, the same was dismissed on the ground that the plaintiff will have to, first, get the mutation corrected. In such circumstances, the plaintiff is entitled to file fresh partition proceedings after the judgment of this Court, particularly when the Court has found merit in his case and is granting a decree of declaration that the sale deed was executed by late Sh.Lakhwant Singh in plaintiff's favour with respect to the land measuring 4 kanals and 10 marlas. Such decree will have to be given effect to by the revenue authorities and thereafter, the plaintiff can file a suit for recall of the partition order or for fresh partition.

51. The next argument of the learned counsel is based on Order II Rule 2 CPC. It is asserted that a previous suit for injunction filed by the plaintiff has been dismissed. It may be noted here that for taking objection under Order II Rule 2 CPC, the defendant is required to prove the pleadings of the previous suit which has not been placed on record. It is also evident that neither any issue on Order II Rule 2 CPC was framed by the Courts below nor any finding has been given on the aforesaid fact. The later part of Part-II of Order II Rule 2(2) CPC is applicable only if both the suits are based on the same cause of action. In the absence of such pleadings, it is not appropriate to record any finding in this regard. Hence, the argument is found without merit and the same is dismissed.

52. The next argument of the learned counsel is on the maintainability of the suit. He claims that a mere suit for declaration is not maintainable because the plaintiff is not the owner. It would be noted here that before the trial Court, issue No.3 to this effect was framed, however, the

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aforesaid issue was answered against the defendant. Furthermore, the plaintiff claims to be owner in possession. As per the registered sale deed, the possession has been delivered to him. In any case, the property is joint. Every co-owner is deemed to be in possession. Hence, the plaintiff being owner is entitled to maintain the suit.

53. The next argument of the learned counsel representing the respondent is with regard to failure of the plaintiff to prove the sale deed. The learned counsel relies upon the judgment in ***Abdul Rahman v. Mariam Nessa 2018 (3) Gauhati Law Journal 334***. This matter has already been elaborately examined and hence, needs no further discussion.

54. The last argument of the learned counsel is failure of the defendant No.2 and 3 to challenge the mutation or possession of the respondent. In the considered view of this Court, it does not affect the rights of the plaintiff who has independent right in accordance with the sale deed. In the considered view of this Court, such argument has no substance because the rights of the plaintiff and of defendant No.2 and 3 are joint. Hence, this argument has no substance.

55. Keeping in view the aforesaid discussion, the judgments passed by both the Courts below are not sustainable, hence, the same are set aside. Resultantly, the suit filed by the plaintiff shall stand decreed to the extent that the plaintiff is declared co-owner in possession of the land to the extent of 6 kanals and 18 marlas on the basis of the sale deed dated 19.01.1980 which was registered on 21.01.1980. The mutation No. 934 dated 18.08.1992 is directed to be rectified in accordance with the sale deed. However, the suit qua the relief of declaration with respect to the orders

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passed in the partition proceedings is disposed of with the observation that the plaintiff shall be entitled to file an application for recall of the aforesaid orders or file a fresh proceeding for partition, if so advised, in view of the subsequent development.

56. The defendant No.1 is also restrained from alienating, transferring or creating any charge or from taking the possession of the land which is the subject matter of sale deed dated 19.01.1980.

57. With the observations made above, the appeal is allowed. The miscellaneous application(s) pending, if any, shall stand disposed of.

(Anil Kshetarpal)
Judge

July 08, 2022
"DK"

Whether speaking/reasoned :Yes/No
Whether reportable : Yes/No

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