

Nand Singh Vs. Sewa Singh and ors.

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Court : Punjab and Haryana

Decided On : Oct-18-1957

Reported in : AIR1959P& H609

Judge : A.N. Grover, J.

Acts : [Registration Act, 1908](#) - Sections 49; [Evidence Act, 1872](#) - Sections 91; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115

Appeal No. : Civil Revn. Case No. 129/P of 1952

Appellant : Nand Singh

Respondent : Sewa Singh and ors.

Advocate for Def. : Baldev Singh and; K.S. Kawatra, Advs.

Advocate for Pet/Ap. : Tirath Singh, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

A.N. Grover, J.

1. One Buta Singh was an occupancy tenant of one half of 17 bighas and 6 biswas of land situate in village Phul. The occupancy rights in the remaining half portion belonged to Mst. Karmo. On 18th Jeth 2001 Bk. Buta Singh created a mortgage with possession of his share of the occupancy rights in favour of Sewa Singh. The mortgage is said to have been created by means of pawisht a document which admittedly was not registered. A mutation, however, was effected, date of the same being 10th Jeth 2002 Bk. The entry with, regard to the mortgage was also incorporated subsequently in the jamabandi of the year 2002-2003 (Exhibit P-A.).

2. Before the mutation took place in favour of Sewn Singh, Buta Singh had died, and NandSingh, Bachan Singh and Harpal Singh had succeeded to his occupancy rights and were entered as such in the revenue records. Thus Sewa Singh and Joginder Singh to whom Mst. Karmo had made a gift out of her share, came to be recorded in joint possession of the land. It is alleged by Sewa Singh that about the time of numani in the year 2005 Bk. Joginder Singh and others illegally dispossessed Sewa Singh from his one half share in the land.

3. Sewa Singh instituted a suit for recovery of possession on the allegation that he was a mortgagee with possession and that he had been forcibly and illegally evicted. The suit was resisted mainly by Nand Singh. On 20-9-1951, the court of first instance decreed the suit. In appeal the learned District Judge of Barnala affirmed the decree of the first court. Nand Singh being dissatisfied with the decrees of the Courts below, preferred a petition for revision under Section 115 of the Code of Civil Procedure. The petition has been preferred in view of the provisions contained in Section 49 of the Patiala and East Punjab States Union Judicature Ordinance No. X of 2005 Bk.

4. The principal contention raised on behalf of the petitioner is that the document containing the writing or the *nawisht* being unregistered, the transaction of mortgage could not be proved and that no other evidence was admissible by way of mutation entries or *jamabandi* entries to prove the terms of the mortgage. It was urged that the suit had been decreed on the finding that Sewa Singh was the mortgagee and was entitled to possession by virtue of the mortgage in his favour.

It was argued that this matter could be raised in revision because there was no legal evidence on which the suit could be decreed. The view of the learned District Judge that although the original document was not admissible for want of registration, nevertheless, the factum of mortgage could be proved by independent evidence, was challenged by the counsel for the petitioner and he called my attention to the provisions of Section 49 of the Indian Registration Act.

According to his contention the order sanctioning the mutation showed that the scribe and the witnesses of the writing, *nawisht*, admitted the same to be correct and it was upon the basis of that writing that the mutation was sanctioned. The *jamabandi* entries were also made in pursuance of the mutation. As the basis for the mutation in favour of Sewa Singh was a document which was inadmissible for want of registration, consequently the mutation entries as well as *jamabandi* entries could not be admitted into evidence to prove the mortgage in favour of Sewa Singh. My attention was invited to a decision, of *Monroe J. in Babu vs Dalip Singh*, AIR 1940 Lah. 311.

In that case it was laid down that where an exchange between the parties was not an oral but a written transaction, without production of the written instrument or evidence of its loss, the transaction could not be proved and before any notice was taken of the instrument it must be shown to have been registered. It was also laid down that plaintiffs not being in possession and the onus of showing a good title being on them, it should be held that they had failed to prove the title and their suit for possession failed.

5. The observations of their Lordships of the Privy Council in *Pratansingh Moholalbai v. Keshavlal Harilal Setalwad*, AIR 1935 P. C. 21, were also pressed into service. In that case it was sought to put in evidence a document which was alleged to have the effect of varying a mortgaged deed. It was found by their Lordships that the document required registration and was not admissible in evidence and that it was not open to give secondary evidence of the said document by producing some other evidence which in that case consisted of an entry in the plaintiff's journal.

6. Reliance was also placed on an unreported judgment *Kaku Ram v. Msl. Dalip Kaur*, Letters Patent Appeal No. 17 of 18-5-2006 Bk. (2-9-1949) decided on 18-7-1951 by *Teja Singh C. J. and Gurnam Singh J.* of the Pepsu High Court. In that case the

transaction relating to a mortgage was evidenced by a document but the document was not registered. It was contended before that Bench that since the document had been given effect to by a mutation and the revenue records showed that mutation relating to the simple mortgage had been sanctioned a presumption should be raised in favour of the mortgage.

The learned Judges did not accept that contention on the ground that the transaction of mortgage having been evidenced by a document which was compulsorily registrable but was not registered, it could not be given effect to by a mutation. Moreover it was pointed out that neither a copy of the mutation had been produced nor had the plaintiff placed on record the jamabandi entry in which the mutation was incorporated.

7. There can be little doubt that if an instrument is not registered according to law other evidence in proof of the terms of a transaction is inadmissible. The effect of the combined operation of the provisions of Section 49 or the Indian Registration Act and Sec. 91 of the Indian Evidence Act is that if a document is not receivable as evidence of a particular matter for want of registration, other proof of the matter, oral or otherwise, will be excluded by Section 91 of the Indian Evidence Act provided the transaction embodied is a contract, grant or disposition of property and the proof tendered relates to the terms of the transaction.

At the same time it is well settled that if the evidence sought to be given does not relate to the terms of a transaction but relates merely to the factum or existence of a transaction, other evidence will be properly receivable, not being excluded by Section 91 of the Indian Evidence Act (Vide Monir's Evidence Act, Fourth Edition, Volume 1, p. 510).

8. In the present case it is contended on behalf of the respondent that the mutation entries and, in any case, the jamabandi entries constitute independent evidence from which the factum of the mortgage can be established without offending in any manner the provisions of Section 49 of the Indian Registration Act and Section 91 of the Indian Evidence Act. The jamabandi entries raise a presumption of correctness and further establish unless rebutted that the respondent is the mortgagee and that the petitioner, has stepped into the shoes of the original mortgagor namely Buta Singh and has been entered as mortgagor along with others.

Reliance is placed on behalf of the respondent on the fact that the petitioner examined the plaintiff as his witness who stated quite clearly in his evidence that the land in dispute had been mortgaged by Buta Singh in his favour for Rs. 2400/-. As such the plaintiff should be treated as a witness of truth : vide decision of their Lordships of the Privy Council reported in Shatrugan Das v. Sham Das, AIR 1938 P.C. 59. It was also urged before me that Sewa Singh had actually got a part of the suit property redeemed by payment of Rs. 545/- as the same was subject to a previous mortgage. I was referred to Exhibit PH and the order dated 3-4-2003Bk. in this connection, which substantiate the respondent's contention.

9. In view of all that has been stated above it seems to me that this petition for revision can be disposed of on the ground that there is no excess or absence of jurisdiction nor have the court below acted illegally or with material irregularity. The view taken by the lower appellate court does not seem to be altogether wrong inasmuch as it has relied on the principle mentioned above that the factum of

mortgage could be proved by independent evidence other than the writing which was unregistered and which purported to create a mortgage. The jamabandi entries which have not been rebutted by any evidence clearly establish the fact that Sewa Singh was the mortgagee and the petitioner along with others was a mortgagor.

Therefore, it cannot be said that any such decision has been given which merits setting aside in exercise of the revisional jurisdiction of this Court. In any case, even if it be considered that the decision given by the learned District Judge is erroneous, that alone would not justify any interference in revision. In the result the petition is dismissed but I leave the parties to bear their own costs in this Court.

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