CIVIL APPELLATE SIDE.

Before Falshaw, J.

SANT RAM, SON OF WADHAWA RAM, THROUGH L. MEHR CHAND, MUKHTAR-I-AM,—*Appellant.*

versus

GHASITA RAM AND OTHERS,—*Respondents.*

Regular Second Appeal No. 341 of 1951

1954

Feb., 23rd

Evidence Act (I of 1872)—Section 63—Secondary evidence—Entry in deed-writer's register—Admissibility of.

Held, that an entry in a deed-writer's register which contains all the essential particulars contained in the document itself and is also signed or thumb-marked by the person executing the document amounts to a copy within the meaning of the 3rd clause in section 63 of the Evidence Act and is admissible in evidence.

Hafiz Muhammad Suleman and others v. *Hari Ram and others* (1), and *Mst. Gurdevi* v. *Mangal Ram* (2), referred to .

(1) A.I.R. 1937 Lah. 370
(2) 52 P.L.R. 14

Regular Second Appeal from the decree of the Court of Shri Sher Singh, District Judge, Jullundur, dated the 19th day of January, 1951, reversing that of Shri Basant Lal, Sub-Judge, 1st Class, Jullundur, dated the 28th November, 1949, and dismissing the suit and leaving the parties to bear their own costs.

D. N. AGGARWAL, for Appellant.

K. C. NAYAR, for Respondent.

JUDGMENT

Falshaw, J.

FALSHAW, J. The suit from which this second appeal has arisen was instituted in the following circumstances. Gharibu since deceased, father of Ghasita Ram, Parkash and Sardari defendants, mortgaged one-half of a house and *haveli* with possession in favour of Missar Mulraj defendant for Rs. 926/4/- by a registered deed dated the 25th of June, 1928, but the mortgagor was allowed to remain in occupation of the mortgaged property under a rent deed executed by him the same day in favour of Missar Mulraj for a period of one year. Apparently Gharibu remained in possession even after one year and it is alleged that on the 31st of March, 1935, he executed another rent deed for a period of one year from the 12th Har Sambat 1992 to the 11th Har Sambat 1993 corresponding to the 26th of June 1935 to the 24th of June 1936. Thereafter Gharibu apparently remained in possession until he died and thereafter his sons remained.

On the 2nd of April, 1943 Missar Mulraj sold his mortgagee rights to Sant Ram Plaintiff for Rs. 926/4/- by a registered deed in which one of the conditions was that Missar Mulraj would be responsible for the return of the consideration in case of defect in his title or obstruction in securing

possession of the property, and in lieu of delivering possession he also executed a rent deed in favour of Sant Ram. Thereafter Sant Ram filed an ejectment suit against Missar Mulraj and the sons of Gharibu and also claimed arrears of rent, but this suit was dismissed on the 8th of March, 1948 on the finding that no relationship of landlord and tenant existed between Sant Ram and Missar Mulraj. Sant Ram then instituted the present suit on the 12th of June, 1948 in which he claimed possession of one half of the house and *haveli* on the basis of his title as mortgagee with possession, and he also claimed Rs. 358/13/- as interest by way of damages from Missar Mulraj from the 2nd of April, 1943 to the date of the suit. In the alternative he claimed to recover Rs. 1,285/1/4 from Missar Mulraj as being the purchase price of the mortgagee rights together with the same amount as interest.

Sant Ram, son of Wadhawa Ram through L. Mehr Chand, Mukhtar-i-am
v.
Ghasita Ram and others

Falshaw, J.

The suit was contested by all the defendants on every possible point, both the original mortgage in favour of Missar Mulraj by the father of defendants 2 to 4 and the sale by Missar Mulraj of his mortgagee rights in favour of the plaintiff being denied. The sons of Gharibu also claimed that the property was joint family property and that the mortgage was without consideration and necessity, and that the debt was raised for immoral purposes. The plea of limitation was also raised.

The trial Court decided on all points in the plaintiff's favour except that the sale by Missar Mulraj of his mortgagee rights was only proved to be for consideration to the extent of Rs. 626/4/- i.e, Rs. 300 less than the ostensible price. The plaintiff was accordingly granted a decree against all the defendants for possession of the mortgaged property, but was held not to be entitled to interest

Sant Ram, son of Wadhawa Ram through L. Mehr Chand, Mukhtar-i-am
v.
Ghasita Ram and others

Falshaw, J.

or damages on the first part of his claim, and at the same time it was held by the trial Court that if the plaintiff had not been entitled to a decree for possession he would have been entitled to recover Rs. 626/4/- with interest at 6 per cent per annum from the 2nd of April 1943 to the date of the suit from Missar Mulraj.

This decree was challenged in first appeal by the sons of Gharibu and the plaintiff filed cross-objections regarding his claim for Rs 358/13/- as interest by way of damages. The net result was that the plaintiff found himself without any relief at all, as the learned District Judge upheld the case of the sons of Gharibu that the suit against them for possession of the property was barred by time, but although appearance was put in at the hearing of the appeal on behalf of Missar Mulraj, he did not see fit to grant the plaintiff the alternative relief which the trial Court had held the plaintiff would have been entitled to against Missar Mulraj. The plaintiff Sant Ram has therefore come in second appeal contending that the decree for possession ought to be restored or in the alternative he should be given a money decree against Missar Mulraj on whose behalf it may be mentioned no appearance has been entered for contesting the appeal.

I may say at once that in my opinion the learned District Judge was wrong in not granting the plaintiff the relief to which the trial court had held him to be entitled against Missar Mulraj in case it had not been possible to grant him the first of the alternative reliefs claimed by him. It seems to me that where a plaintiff claims alternative reliefs in this manner and the trial Court grants him the first choice and at the same time holds that he would have been entitled to the alternative if the first relief had not been granted, it is not necessary for

the plaintiff to file an appeal in case the appellate Court might find that the second and not the first of the reliefs claimed was the appropriate relief.

The main question in the appeal against the sons of the mortgagor is whether the plaintiff's suit was within time. The appropriate Article of the Limitation Act appears to be Article 135 which fixes the period of limitation for a suit instituted in a Court not established by Royal Charter by a mortgagee for possession of immovable property mortgaged at 12 years from the time when the mortgagor's right to possession determines. The trial Court decided that the starting point was the 24th of June 1936, i.e., the termination of the period for which the second rent deed was executed by the mortgagor in favour of the mortgagee, the suit, which was instituted on the 9th of June, 1948, thus being within time by some 15 days. The learned District Judge, however, held that the execution of this second rent deed was not properly proved and that the starting point of limitation was therefore the end of the year for which the first rent deed was executed simultaneously with the execution of the mortgage deed itself, i.e. the 25th of June, 1929.

Unfortunately the original rent deed was not forthcoming. It has been shown that in the previous suit instituted by Sant Ram in the form of a simple ejectment suit as by a landlord against a tenant he had called on Missar Mulraj to produce the original rent deed and Missar Mulraj, while admitting that such a deed had been executed in his favour, denied that he had it in his possession, and alleged that he had handed it over to Sant Ram, who has denied that he ever received the rent deed. In the present suit Missar Mulraj was called as a witness by the plaintiff, but unfortunately he seems to have been on the side of the

Sant Ram, son of Wadhawa Ram through L. Mehr Chand, Mukhtar-i-am
v.
Ghasita Ram and others

Falshaw, J.

other defendants and he now made an ambiguous statement that such a deed might have been executed and might have been given by him to Sant Ram. In these circumstances in spite of an objection by the defendants the trial Court allowed the execution of the rent deed to be proved by means of an entry in the register of Nand Lal deed-writer in which the full particulars were set out including the description of the property, the period of the lease deed, the names of the parties and attesting witnesses, and on which also the thumb impression of Gharibu was obtained. The deed-writer Nand Lal was said to have died and his register was produced by his widow. From this a copy was taken and placed on the file.

Before the learned District Judge three objections appear to have been taken—firstly, that secondary evidence was not admissible because the loss or destruction of the original document was not proved, secondly, that the entry was not proved to relate to the property in suit and thirdly, that in any case the entry in the deed-writer's register did not amount to secondary evidence within the meaning of section 63 of the Evidence Act. I do not consider that there is any force in any of these objections.

In the first place, I cannot see any reason for doubting that if the document had been in the plaintiff's favour he would most certainly have produced it, and the conduct of Missar Mulraj described above justifies the inference that in fact the document was executed and was in his possession, and that he has suppressed it in order to help himself and the other defendants. Thus in my opinion there was sufficient ground for admitting secondary evidence.

As regards the identity of the property, the boundaries on three sides, the north, south and west, clearly correspond in the entry in the deed-writer's register with the previous description of the property, the only difference being that whereas on the east property of Khushi Ram was shown, the eastern boundary was described in the register as property of Lal Chand. In the absence of any suggestion that there was any other property regarding which Gharibu had dealings with Missar Mulraj, I cannot see any reason for doubting that the lease-deed referred to the property in suit.

As regards the other objection that in any case the entry does not amount to secondary evidence within the meaning of section 63 of the Evidence Act, this section reads—

"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 ; and

(5) oral accounts of the contents of a document given by some person who has himself seen it."

Sant Ram, son of Wadhawa Ram through L. Mehr Chand, Mukhtar-i-am
v.
Ghasita Ram and others

Falshaw, J.

It must be conceded that an entry in a deed-writer's register, even when it includes every essential particular contained in the original document, and bears the signature or thumb-mark of the person executing the document, is not in the strictest sense of the word a copy of the document, but although there must have been thousands of cases in which secondary evidence of this kind has been relied on this is the first time that I have seen the objection raised that such an entry is not covered by the 3rd clause in the section. There does not appear to be much authority on the point. One of the two cases cited on behalf of the respondents, *Hafiz Mohammad Suleman and others* v. *Hari Ram and others* (1), does not appear to be very helpful, since the document which was held in that case not to amount to secondary evidence under section 63 was a so-called abstract translation of a certain document which was found in the printed paper-book prepared for the appeal which was decided as 52 P.R. 1895. This document apparently purported merely to be a summarised translation of a document alleged to have been executed in 1870 and it was sought to be relied on in the suit instituted in 1927. One must unhesitatingly agree with the view of the learned Judges, Tek Chand and Dalip Singh JJ., that such a document was not secondary evidence within the meaning of section 63.

The other case cited *Mst. Gurdevi* v. *Mangal Ram* (2), is more in point as it relates to an entry in a deed-writer's register regarding the execution of a mortgage deed, which, being for Rs. 99 did not require registration. The trial Court had decreed the suit on the strength of this so-called secondary evidence but the Court of first appeal held

(1) A.I.R. 1937 Lah. 370
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that the entry in the register was not admissible in evidence. Bhandari, J., while expressing agreement with the view of the learned senior Sub-Judge on this point nevertheless upheld the finding of the trial Court on the ground that when a document is tendered and no objection is taken to it either as to its being secondary evidence or as to its being tendered in circumstances that would justify its being received as secondary evidence, it is too late in appeal to take the point that it should not have been received. The point whether a detailed abstract in a deed-writer's register can be regarded as amounting to a copy was hardly discussed at all, and the major portion of the judgment was devoted to the consideration of the question whether objection could be taken in appeal to the admissibility of a document received in evidence in the trial Court without objection. The case cannot therefore be regarded as a considered decision on the main point now before me. It is, however, relevant on another point, namely that when objection was taken to the admissibility of the entry in the register in the trial Court the objection raised was only that secondary evidence should not be admitted at all and not that the document did not constitute secondary evidence, it being held by Bhandari, J., that this objection could not be raised for the first time in appeal.

These are the only two cases which have been cited before me, but there must be very numerous cases in which the admission of evidence of this kind has been passed without question and if the objection had been raised in this form in the trial Court the plaintiff could and, no doubt, would have strengthened his case by producing one or both of

Sant Ram, son of Wadhawa Ram through L. Mehr Chand, Mukhtar-i-am
v.
Ghasita Ram and others

Falshaw, J.

the attesting witnesses whose names are mentioned in the entry in the register. It is to be noted that in the case *Hafiz Muhammad Suleman and others* v. *Hari Ram and others* (1), the learned Judges held that counterfoils of the receipts were admissible as secondary evidence, though such counterfoils are not always exact copies of the original receipts. On the whole I am of the opinion that an entry in a deed-writer's register which contains all the essential particulars contained in the document itself and is also signed or thumb-marked by the person executing the document amounts to a copy within the meaning of the 3rd clause in section 63 of the Evidence Act and that therefore the learned District Judge wrongly rejected the entry in this case. I am, therefore, of the opinion that the plaintiff's suit for possession against the sons of Gharibu was within time and was rightly decreed by the trial Court and I accordingly accept the appeal and restore the decree of the trial Court with costs throughout.