

Mandhata Singh & Anr. vs Bans Bahal Singh on 10 March, 2017

Author: Ritu Raj Awasthi

Bench: Ritu Raj Awasthi

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

High Court of Judicature at Allahabad

Lucknow Bench, Lucknow

Reserved

SECOND APPEAL No. 25 of 2017

Mandhata Singh & Anr.

Versus

Bans Bahal Singh

Counsel for Appellants: A.P. Singh

Counsel for Respondent: Hari Om Pandey, Mohd. Aslam Khan,

Mohd. Arif Khan, Sr. Advocate

Hon'ble Ritu Raj Awasthi, J.

1. Heard Mr. A.P. Singh, learned counsel for appellants as well as Mohd. Arif Khan, learned Senior

Advocate assisted by Mr. Hari Om Pandey, learned counsel, who has put in appearance on behalf of respondent and perused the record.

2. This Second Appeal has been filed under Section 100 CPC¹ against the judgment and order dated 27.10.2016 passed in Civil Appeal No. 139 of 2009 (Mandhata Singh & Another vs. Bans Bahal Singh), decree passed in the aforesaid appeal as well as judgment and order dated 11.12.2009 passed in Regular Suit No. 161 of 1982 [Har Dutt Singh (deceased) and Bans Bahal Singh substituted in place of plaintiff vs. Ram Kumar (deceased) Mandhata Singh & Another through legal representative] and decree passed in the aforesaid regular suit.

3. As per the facts of the case, in brief, the respondent-plaintiff filed a suit for cancellation of the sale-deed dated 09.09.1981 (presented for registration on 13.10.1981 and registered in the office of Sub Registrar on 17.12.1981) alleged to have been executed in favour of defendant by putting some impostor. The Suit was contested by the defendant by filing written statement denying the aforesaid allegations. The Trial Court, on the basis of the pleadings of the parties, framed necessary issues and decided issues no. 1 and 2 holding that the sale-deed was obtained by the defendant (Predecessor-in-Interest of present appellants) by putting some impostor in place of Har Dutt Singh (plaintiff), predecessor-in-interest of the present respondent by drawing adverse inference against the defendant, who despite the order passed by the Court for production of the sale-deed, had not filed the same in the Court. Being aggrieved against the said judgment and order passed by the Trial Court, the appellants filed First Appeal before the lower appellate Court wherein the Court after considering the facts and circumstances of the case as well as evidence on record dismissed the appeal vide judgment and order dated 27.10.2016. Being aggrieved the appellants have filed the instant second appeal.

4. Mr. A.P. Singh, learned counsel for appellants submits that the learned Trial Court has grossly erred in allowing the suit for cancellation of sale-deed and decreeing it in favour of respondent-plaintiff. The plaintiff had failed to discharge his burden of proof to establish that the alleged sale-deed was executed by some impostor in favour of Ram Kumar Singh (original defendant). It was incumbent upon the plaintiff to have proved beyond doubt that the said sale-deed was not executed by him and the burden of proof in this regard could not have been transferred to the defendant. In this regard, he has relied on the judgment of this Court in the case of Iqbal Ahmad Vs. Smt. Naimul², particularly paragraphs 7 and 9. He has also relied on the judgment of this Court in the case of Daya Ram Vs. Smt. Lakshmina and others³, particularly paragraph 5.

5. It is submitted by learned counsel for appellants that the allegations made by the plaintiff were required to be proved beyond doubt as has been held by the Apex Court in the case of Union of India vs. M/s Chaturbhai M. Patel and Co.⁴.

6. Submission is that the Trial Court has wrongly drawn the presumption against the appellants-defendants and has decreed the suit in favour of plaintiff. No such presumption could have been drawn by the Trial Court. In this regard, learned counsel for appellants relies on the judgment of the Apex Court in the case of Sheo Pujan Singh vs. Pyare Lal⁵, particularly paragraphs 3, 4, 8 & 9. He has also relied on the judgment of the Apex Court in the case of Ishwar Dass Jain

(Dead) By Lrs. vs. Sohan Lal (Dead) by LRs.6, particularly paragraph 27.

7. Mr. A.P. Singh, learned counsel for appellants contends that the learned Trial Court could not have shifted the burden of proof on the appellants-defendants by issuing direction for production of original sale-deed dated 09.09.1981.

8. It is further submitted by learned counsel for appellants that the first appellate Court has failed to appreciate that the burden of proof was on the respondent-plaintiff to prove the allegations in the suit and it could not have been shifted on the appellants-defendants.

9. It is contended that during pendency of first appeal the criminal case filed by the plaintiff, Har Dutt Singh under Sections 419, 420, 465, 467, 468, 474 and 109 IPC that the sale-deed in question was not executed by him but by some impostor in favour of Ram Kumar Singh was decided, as such, the application under Order XLI Rule 27 CPC was moved by the appellants to bring on record the judgment passed by the criminal Court wherein the criminal court had acquitted the accused, however, the first appellate Court committed gross illegality in rejecting the said application filed under Order XLI Rule 27 CPC.

10. Submission is that the Apex Court in the case of Union of India Vs. Ibrahim Uddin and another⁷ has held that application under Order XLI Rule 27 CPC shall be heard and decided at the time of final hearing and not prior to it. The Apex Court in the case of Malyalam Plantations Ltd. Vs. State of Kerala and another⁸ has held that the application under Order XLI Rule 27 CPC is to be considered at the time of final hearing of the appeal, as such, the order passed by the lower appellate Court rejecting the application moved by the appellants under Order XLI Rule 27 CPC is not sustainable in the eyes of law. The criminal Court has dismissed the case filed by Har Dutt Singh (plaintiff) against Ram Kumar Singh and others and has not found the allegations of fraud established against the said accused, as such, the judgment passed by the Trial Court was necessary for proper adjudication of the first appeal.

11. It is submitted by learned counsel for appellants that the appellants could not bring the said document on record earlier as the judgment in criminal case had come during pendency of the first appeal.

12. Mr. A.P. Singh, learned counsel for appellants also contended that the learned Trial Court has grossly erred in recording in its finding that the defendant had got the said sale-deed executed by playing fraud, by putting an impostor in place of Har Dutt Singh and had tried to destroy the evidence in this regard. The first appellate Court without properly considering the contention raised by the appellants has confirmed the said finding which is not sustainable in the eyes of law.

13. It is submitted by learned counsel for appellants that the learned Trial Court was wrong in considering the contents of the complaint filed by Har Dutt Singh and the statement recorded under Section 200 Cr.P.C.9 because the said statement could not have been relied as Har Dutt Singh was not put to cross examination.

14. It is also contended that the first appellate Court did not discharge the requirement of Order XLI Rule 31 CPC as it did not frame the point of determination while deciding the appeal. In this regard, he has relied on the judgment of this Court in the case of Lakhmi and others vs. Jugendra Lal and Another¹⁰.

15. Mohd. Arif Khan, learned Senior Advocate appearing for respondent, on the other hand submitted that the concurrent findings of fact have been recorded by both the learned Courts below holding that the sale-deed was obtained by the appellants-defendants by putting some impostor in place of Har Dutt Singh and the appellants-defendants could not discharge his burden of proof by filing/producing the original sale-deed. It is submitted that the suit for cancellation of sale-deed was filed by the predecessor-in-interest of the respondent i.e., Har Dutt Singh on the allegations that the alleged sale-deed has been got executed by putting an impostor. On an application moved by the plaintiff, the Trial Court had directed the defendant to produce the original sale-deed, however, despite the order passed by the Court for production of sale-deed, it was not produced before the Court. The appellants-defendants had taken different stands i.e., original sale-deed is with some other Advocate, thereafter it was alleged that original sale-deed was filed in Bank of Baroda in the form of guarantee and later on a case was set up that after taking back the original sale-deed from the bank when he was returning to his residence, the same was lost in the way.

16. It is also submitted that the witness of the appellants-defendants, namely, Ram Pratap in his deposition has stated that the sale-deed bears the signature of four persons while from a bare perusal of the certified copy of the sale-deed it shows that it bears the signature of only scribe and the signature of Har Dutt Singh and Ram Asrey did not find place on the sale-deed.

17. It is further submitted that on an application moved by the respondent-plaintiff, the Court had summoned Register No. 8 from the office of Sub Registrar, Akbarpur so as to get the signature of Har Dutt Singh examined by an expert. Steps in this regard were taken by the respondent-plaintiff, however, when the said register was produced before the Court it was found that the relevant pages of the register were torn off and the handwriting and fingerprint expert, who was present in the Court, could not succeed in getting the photograph of the thumb impression of Har Dutt Singh and verify it. The learned Trial Court as such has drawn adverse inference against the appellants-defendants as appellants-defendants had failed to produce the original sale-deed before the Court and had taken different stand.

18. It is next submitted by learned counsel for respondent that the appellants-defendants had moved an application under Order XLI Rule 27 CPC seeking permission to file certified copy of the judgment passed by the criminal Court instituted by Har Dutt Singh which was rejected vide order dated 03.09.2016 on the ground, inter alia, that the judgment passed in the criminal case and the findings recorded thereon are not binding in the civil proceedings. The said order was not challenged before any Court and has become final and, as such, the appellants-defendants shall not be permitted to raise objection regarding the said order.

19. Mohd. Arif Khan, learned Senior Advocate submits that in the case of Ibrahim Uddin and another (supra), the Apex Court in paragraphs 36, 39, 48 and 49 has observed that the application

through which additional evidence sought to be filed, if at the time of hearing, the Court is of the opinion that certain documentary evidence is required for proper adjudication of the lis, the Court may permit the concerned party to adduce additional evidence but in the present case, the application that was filed for filing additional evidence i.e., certified copy of the judgment passed by the Chief Judicial Magistrate, Akbarpur and the lower appellate court after considering the aforesaid case law rejected the application vide order dated 03.09.2016 and fixed the date as 17.09.2016 for final arguments as the appeal was listed for hearing.

20. It is also submitted that the certified copy of the judgment passed by the Chief Judicial Magistrate was not admissible as it was not binding in civil proceedings in view of the law laid by the Apex Court in the case of Vishnu Dutt Sharma versus Daya Sapra (Smt.)¹¹, particularly paragraphs 23 and 28.

21. It is contended that in another case the Apex Court in the case of Devendra and others vs. State of Uttar Pradesh and another¹², particularly paragraph 13, had held that the civil suit as also a criminal case could be maintainable; they can run simultaneously, however, result in one proceeding would not be binding on the court determining the issue before it in other proceedings.

22. It is submitted that Har Dutt Singh had filed a suit for cancellation of sale-deed. The plaintiff had filed certified copy of the sale-deed and had made an application for direction to the defendant to produce the original sale-deed which was with the defendant. They also moved an application for summoning of relevant record from the office of Sub Registrar in order to demonstrate that the alleged sale-deed was not executed by him; rather it was got executed by putting some impostor. Thus, he had discharged his burden. Despite the orders passed by the Court for production of original sale-deed, the defendant did not produce it on one or other pretext.

23. It is contended that in view of the law laid down by the Apex Court in the case of Gopal Krishnaji Ketkar vs. Mohamed Haji Latif and others¹³, particularly paragraph 5, wherein it has been held that even if the burden of proof does not lie on a party, the court may draw an adverse inference, if the party withhold an important document in his possession which can throw light on the facts at issue. In the case of Srikant Singh Vs. Smt. Ram Kesari Devi¹⁴, particularly paragraphs 12 and 13, this Court has held that the burden of proof lies on the defendant in whose favour the sale-deed was executed.

24. Modh. Arif Khan, learned Senior Advocate submits that the burden of proof in the present case was rightly shifted on the appellants-defendants. It is submitted that in case of an illiterate person the Court has held that the burden of proof would be shifted reference Nar Singh vs. Deputy Director of Consolidation, Basti and others¹⁵.

25. Mohd. Arif Khan, learned Senior Advocate contends that the judgment of the criminal Court has not been relied by the Trial Court or the first appellate Court. The observations made by the Trial Court are on the basis of the statement of Har Dutt Singh made before the criminal Court under Section 200 Cr.P.C. which was on record.

26. It is also contended by Mohd. Arif Khan, learned Senior Advocate that so far as the application under Order XLI Rule 27 CPC is concerned, only judgment of criminal Court was sought to be placed on record, there was no prayer for placing statement of Narendra Bahudur Srivastava, Clerk. Moreover, the matter is still subjudice as appeal against the said judgment by the criminal Court has been admitted, as such, the judgment of the criminal Court has no evidenciary value. In this regard, he relies on the judgment of the Apex Court in the case of Vishnu Dutt Sharma (supra).

27. It is also submitted by Mohd. Arif Khan, learned Senior Advocate that the adverse inference was rightly drawn against the appellants-defendants by the Trial Court as the defendants had failed to produce the original sale-deed which was in his possession. In this regard, he has placed reliance on Section 114 of the Act¹⁶ to submit that in such circumstances adverse inference can be drawn by the Court.

28. Mohd. Arif Khan, learned Senior Advocate submits that after the judgment and decree passed by the learned two Courts below, the alleged sale-deed has been cancelled and the name of respondent has been mutated in the revenue records.

29. I have considered the submissions made by learned counsel for the parties and gone through the record.

30. A suit for cancellation of sale-deed dated 09.09.1981 presented for registration on 13.10.1981 and registered in the office of Sub Registrar on 17.12.1981 was filed in the year 1982. As per averments made in the suit, the alleged sale-deed pertaining to land at Gata No. 707Aa measuring 15 biswa, 9 dhur, Gata No. 707Ba measuring 1 bigha, 15 biswa, 19 dhur, Gata No. 674 measuring 11 biswa, Gata No. 1166 measuring 2 bigha, 13 biswa, 2 dhur, village Bangaon Pargana and Tehsil Akbarpur District Faizabad (now Ambedkar Nagar) was got executed by putting an impostor. When plaintiff applied for khatauni and approached the Lekhpai; then, he came to know about the said misdeed of the defendant and got the relevant record in the Sub Registrar office examined. He came to know that the alleged sale-deed had been got executed by putting some other person in his place which is a false document. The plaintiff has also got the said land sold on 29.3.1975 and there is no question of selling it again. He has not got any such sale-deed executed. The defendant has no right, on the basis of the said sale-deed. It shall be immediately cancelled. The suit was admitted by the Court. During pendency of the suit, the plaintiff died and was substituted by the present respondent, Bans Bahal Singh on the basis of a will-deed.

31. Original defendant, Ram Kumar Singh, had filed written statement denying the allegations in the suit. The sale-deed executed by the plaintiff in the year 1975 was wrong as at that time the concerning village was under consolidation proceedings and plaintiff had not obtained any permission for sale from the Consolidation Officer. No order in favour of seller was passed on the basis of the said sale-deed. He had got the sale-deed executed on 09.09.1981 which has been registered in the office of Sub Registrar, Akbarpur. The revenue records have been corrected on the basis of the said sale-deed and the defendant is in the possession of the land in question.

32. On the basis of the pleadings made by the parties in the suit, the learned Trial Court had framed certain issues, english translation of which on reproduction read as under:

- "1. Whether the sale-deed in question has not been executed by the plaintiff Har Dutt Singh as has been stated in para 5 of the plaint?
2. Whether the sale-deed in question is liable to be cancelled for the reasons stated in the plaint.
3. Whether the suit has been undervalued and the prescribed court fee is insufficient?
4. Whether the suit is beyond the jurisdiction of the Court?
5. What relief plaintiff is entitle to get?"

33. The learned Trial Court has decided issues no. 1 and 2 jointly. It has been recorded by the learned Trial Court that plaintiff, Har Dutt Singh, had died before the stage of evidence. Defendant, Ram Kumar Singh, has also died during pendency of suit. Ram Kumar Singh has been substituted by his legal heirs. The learned Trial Court, on the basis of evidence on record and examining the witnesses, has come to conclusion that stamp papers of the alleged sale-deed were purchased on 05.09.1981. They were not purchased by Har Dutt Singh. The sale-deed was allegedly executed on 09.09.1981, however, it was sent for registration in the office of Sub Registrar, Akbarpur only on 13.10.1981 and it was ultimately registered on 17.12.1981. Ram Pratap Singh son of Khelavan and Ram Asrey son of Sukhai are said to be witnesses in the said sale-deed. One Ram Pratap has been produced as DW-2. DW-2 before the Court has stated his name Ram Pratap (name of DW-2 has not been recorded as Ram Pratap Singh). He has stated his name only Ram Pratap. He has stated on oath that stamp papers were not purchased by Har Dutt Singh; rather they were purchased by defendant, Ram Kumar Singh from the Government Treasury, Faizabad. DW-2 has stated that he had put his thumb impression as well as signature on the sale-deed whereas in the certified copy of the sale-deed only thumb impression has been found. He has also stated that in the sale-deed four other persons had put signatures. Certified copy of the sale-deed indicates that it bear thumb impression of Har Dutt Singh and two witnesses only and no other thumb impression or signature. It contains the signature of only Girish Chandra Srivastava, writer of the sale-deed. DW-2 has stated that on the sale-deed, witness Ram Asrey and plaintiff Har Dutt Singh had put their signatures, however, from certified copy of the sale-deed it is evident that signature of Har Dutt Singh and witness Ram Asrey are not there. As per this witness, he had put the signature in the office of Sub Registrar. The learned Trial Court as such has found the statement of DW-2 as totally unreliable and has not accepted the same.

34. The learned Trial Court has recorded in its finding that the defendant had not given any satisfactory explanation as to why the sale-deed was not placed for registration before Sub Registrar immediately after its execution.

35. The learned Trial Court has also recorded that on an application moved by deceased plaintiff Har Dutt Singh, the Court has ordered for producing original sale-deed but the defendant has failed to produce the same. It has also recorded that in the criminal case filed by the deceased Har Dutt Singh, defendant Ram Kumar Singh, his brother Ram Singh and witnesses of the alleged sale-deed were summoned. The said criminal case is pending. The learned Trial Court has come to conclusion that the plaintiff has tried to get his thumb impression verified from the alleged thumb impression on the sale-deed. In this regard, he had also tried to get the original relevant documents from the office of Sub Registrar, Akbarpur i.e., Register No. 8 and had moved an application in this regard, on which orders were passed and the said register was placed before the Court where it has been found that the places where the signature of deceased Har Dutt Singh were made i.e., page 2 and 4 were torn off, with the help of the expert and the advocates, the torn pages were tried to be put together but as per expert's opinion, he has not been able to give any concurrent finding and opinion about the alleged thumb impression. The learned Trial Court as such has come to conclusion that the evidence in the office of Sub Registrar has also been tried to be destroyed. The learned Trial Court as such has recorded in its finding that in spite of best efforts made by the deceased plaintiff Har Dutt Singh, the defendant, Ram Kumar Singh and his brother Ram Singh has not produced the original sale-deed in the Court. The learned Trial Court as such has come to conclusion that the alleged sale-deed was not executed by the plaintiff Har Dutt Singh. The issues no. 1 and 2 are decided in favour of plaintiff.

36. The first appellate Court has agreed with the finding recorded by the learned Trial Court on issues no. 1 and 2 by giving its own reasons. It has been observed by the first appellate Court that the plaintiff-Har Dutt Singh had no issue, plaintiff and defendant were residents of same village. The plaintiff-Har Dutt Singh had not purchased the stamp paper on which the alleged sale-deed was said to be executed. The stamp paper were purchased on 05.09.1981 from Government Treasury, Faizabad by defendant Ram Kumar Singh. The sale-deed was said to be allegedly executed on 09.09.1981, however, it was presented in the office of Sub Registrar on 13.10.1981 and was finally registered on 17.12.1981. The question as to why the alleged sale-deed was not presented for registration prior to 13.10.1981 and registered only on 17.12.1981, not only creates doubt about the conduct of the defendant but also raises question about the conduct of the employees of office of Sub Registrar, Akbarpur. The first appellate Court has come to conclusion that the plaintiff had filed a criminal case under Sections 419, 420 IPC at PS Akbarpur against defendant, Ram Kumar Singh and witnesses Ram Singh, Ram Kumar and Ram Pratap and tried to get them prosecuted for committing fraud. The first appellate Court has also recorded that in spite of direction issued by the Trial Court to produce the original sale-deed, the defendant had intentionally not produced the same because in case the same was produced before the Trial Court, the alleged thumb impression of plaintiff-Har Dutt Singh on the said sale-deed could have been verified. In this regard, the relevant records from the office of Sub Registrar was summoned but it was found that the relevant pages which bore the alleged thumb impression of plaintiff-Har Dutt Singh were torn off and it was not possible to verify the signature of late Har Dutt Singh. The first appellate Court as such has agreed with the finding recorded by the Trial Court that the adverse inference would be drawn against the defendant as he was in possession of the original sale-deed and had not produced the same before the Trial Court.

37. So far as the contention of learned counsel for appellants that it was the burden on the part of the plaintiff to have proved their case and the same could not have been shifted on the defendant and the Trial Court has committed gross illegality in this regard is concerned, it is to be noted that it was the case of the plaintiff-Har Dutt Singh that the alleged sale-deed was got fraudulently executed by the defendant late Ram Kumar Singh by putting an impostor. The plaintiff Har Dutt Singh was issueless and plaintiff as well as defendant were both resident of the same village and knew each other very well. As per case of the plaintiff, defendant late Ram Kumar Singh had got the revenue records amended by incorporating his name over the land in question on the basis of the alleged sale-deed. The original sale-deed was with defendant late Ram Kumar Singh. The plaintiff had filed certified copy of the sale-deed and had made an application for direction to defendant to produce the original sale-deed which was with the defendant. The Trial Court vide order dated 26.2.2007 had directed the defendant to produce the original sale-deed. It is to be noted that the defendant had not produced the original sale-deed and had taken different stands i.e., original sale-deed is with some other advocate, thereafter it was alleged that original sale-deed was filed in Bank of Baroda in the form of guarantee and later on a case was set up that after taking back the original sale-deed from the bank when he was returning to his residence, the same was lost in the way, as such, it is very much clear that the defendant had no intention to produce the original sale-deed before the Court. It is also to be noted that it was on the request of the plaintiff by moving an application for summoning of relevant records that the relevant register i.e., Register No. 8 was summoned from the office of Sub Registrar. The said document was summoned in order to demonstrate that the alleged sale-deed was not executed by plaintiff; rather it was got executed by putting some impostor. The Trial Court had summoned the relevant record i.e., Register No. 8 from the office of Sub Registrar, Akbarpur, however, in spite of efforts made in this regard no expert opinion could be obtained as the relevant pages were torn off and thumb impression of plaintiff-Har Dutt Singh could not be verified, as such, it is very much clear that the plaintiff had made all possible effort to show before the Court that he had not made any sale-deed in favour of defendant Ram Kumar Singh and in this regard had discharged his burden.

38. In the given facts, the learned Trial Court had rightly directed the defendant to produce the original sale-deed in order to find out as to whether the plaintiff-Har Dutt Singh had executed the said sale-deed or not by getting his thumb impression verified. On an application moved by the plaintiff, the Trial Court had summoned the relevant records from the office of Sub Registrar, however, from the record produced it was found that only that portion of the record was tampered where the thumb impression of the plaintiff were allegedly made. The Trial Court as such had rightly drawn adverse inference against the defendant.

39. In the case of Gopal Krishnaji Ketkar (supra) it has been held that even if the burden of proof does not lie on a party, the court may draw an adverse inference, if the party withhold an important document in his possession which can throw light on the facts at issue. Relevant paragraph 5 of judgment is reproduced below:

"5. On behalf of the appellant reference was made to the Area Book, Ex. 66 of the year 1890. The entry shows the name of Laxmibai widow of Govind Gopal Ketkar under the heading (name of the person). Exhibit 67 is the entry from the Phalani Book for

the year 1897 and shows the land as "Kilyacha Dongar" and under the column is shown the name of Laxmibai widow of Govind Gopal. Exhibit 68 is of the same year from the revision Phalani containing Similar entry with the map attached. In Exhibit 70 the name of Laxmibai is shown as "Khatedar" for the year 1906. In the remarks column there is an entry "one built well, one pakka built masjid, one Dargah, one tomb". Exhibit 71 is an entry for the year 1915 from Akar Phod Patrak and in the column of "Kabjedar" the name of Rukminibai Hari appears with regard to plot 134. Thereafter, in the record of rights for the year 1913, Ex. 76, the name of the predecessor of the appellant is shown. On the basis of these entries it was submitted by Mr. Gokhale that the ownership of the plot was with the appellant and not with the Dargah. But there are important circumstances in this case which indicate that the appellant is not the owner of Survey plot No. 134. Exhibits 64 and 65 are significant in this connection. Exhibit 64 is an entry from the "Sud" in Marathi for the year 1858 in connection with Survey plot No. 134 (Revisional Survey Number). The original Survey number of this plot was 24 and it was known as "Kilyacha Dongar". The total area is shown to be 249 acres and 24 Gunthas. It is shown as 'Khalsa' land. Kharaba is shown as 89 acres 24 Gunthas and the balance of the area is shown as 160 acres. In the last column the name of the cultivator is not mentioned but it is shown as "Khapachi". It is significant that the name of the Ketkar family is absent from this record. No convincing reason was furnished on behalf of the appellant to show why his name was not entered in the "Sud". It is also important to notice that the appellant has furnished no documentary evidence to show how his family acquired title to the land from the earliest time; there is no sanad or grant produced by the appellant to show that he had acquired title to the land. It further appears that the appellant's family did not assert any title to the land at the time of the survey made in 1858; otherwise there is no reason why its name was not entered in the "Sud" of the year 1858. It is true that there are a number of entries subsequent to the year 1890 and 1897 in which the Ketkar family is shown as the "Khatedar" or the occupant but these entries are not of much significance since the Ketkar family was in the fiduciary position of a Manager of the Dargah and was lawfully in possession of Survey plot 134 in that capacity. There is also another important circumstance that the appellant has no lands of his own near plot No. 134 and the nearest lands he owns are in Bandhanwadi which are admittedly 3-1/2 to 4 miles away from the top of the hill. There is also the important admission made by the appellant in the course of his evidence that there are 2 or 3 tombs behind the Musaferkhana. He stated further that "there is no cemetery or burial ground in Survey No. 134". But this evidence is in direct conflict with the statement of the appellant in the previous case that "Round about the Dargah many people die every year..... Anyone that died there, whether Hindu, Muslim or Parsee if he has no heirs is buried there". He also conceded that there is one public tank known as "Chasmyachi Vahir" near the Dargah and there are 5 wells near the Dargah and five boundary 'Aranas' about one mile from the Dargah. Lastly, reference should be made to the important circumstance that the appellant has not produced the account of the Dargah income. In the course of his evidence the appellant admitted that he was enjoying the income of plot No. 134 but he did not

produce any accounts to substantiate his contention. He also admitted that "he had got record of the Dargah income and that account was kept separately." But the appellant has not produced either his own accounts or the account of the Dargah to show as to how the income from plot No. 134 was dealt with. Mr. Gokhale, however, argued that it was no part of the appellant's duty to produce the accounts unless he was called upon to do so and the onus was upon the respondents to prove the case and to show that the Dargah was the owner of plot No. 134. We are unable to accept this argument as correct. Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In *Murugesam Pillai v. Manichavasaka Pandara*(1) Lord Shaw observed as follows:

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to, the, Courts the best material for its decision. With regard to third parties, this may be right enough—they have no responsibility for the conduct of the suit but with regard to the parties to the suit it is, in their Lordships' opinion an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition."

This passage was cited with approval by this Court in a recent decision - *Biltu Ram & Ors. v. Jainandan Prasad*, Civil Appeal No. 941 of 1965, D/ 15-4-1968 (SC). In that case, reliance was placed on behalf of the defendants upon the following passage from the decision of the Judicial Committee in *Mt. Bilas Kunwar v. Desrai Ranjit Singh & Ors.*; AIR 1915 PC 96 "But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents."

40. In the case of *Srikant Singh* (supra), this Court has held that the burden of proof lies on the defendant in whose favour the sale-deed was executed. Relevant paragraphs 12 and 13 of the judgment are reproduced below:

"12. The lower appellate court in the light of the above principles has held that in the circumstances of the case the burden was on the defendant to prove that Dhannu Singh plaintiff had after full comprehension in a state of complete mental health executed the sale deed in favour of Srikant. The lower appellate court came to the conclusion that Srikant has failed to prove that Dhannu Singh executed the sale-deed in his favour after full comprehension. The lower appellate court on the discussion of

evidence has also concluded that defendant Srikant got the sale-deed from Dhannu Singh as a result of perpetration of fraud. The judgment of the lower appellate court is totally in consonance with law and I am fully satisfied in the circumstances of the case that in the suspicious circumstances under which sale-deed has been found to be executed by Dhannu Singh in favour of Srikant are such that found to be executed by Dhannu Singh in favour of Srikant are impact of surrounding suspicious circumstances attending the execution of sale-deed.

13. The ratio, laid down in the above cases fully applied on all fours on the facts of the present appeal. It is clear from the allegations made in the plaint that Dhannu Singh was not explained at the time of execution of the alleged sale deed that he is affixing his thumb mark for execution of the sale deed on the stamp paper of the deed. Defendant Srikant has failed to prove that Dhannu Singh executed the sale-deed consciously after understanding the same. The lower appellate court in this connection has entered into a detailed discussion of the evidence. On the total facts and circumstances of the case, I am firmly of the view that lower appellate court has drawn such conclusion in respect of issue No. 3 that the said finding of fact is not liable to be interfered with in exercise of the jurisdiction conferred in second appeal, regarding finding of fact. "

41. In the case of Nar Singh (supra), the Court has extended the principle of Pardanashin lady to illiterate person and has held that the sale-deed is required to be proved by that person who pleads execution of the sale-deed.

42. Learned counsel for appellants in support of his contention in this regard has relied on the case of Iqbal Ahmad (supra), Daya Ram (supra) and M/s Chaturbhai M. Patel and Co. (supra).

43. In the case of Iqbal Ahmad (supra), the Court has held that the burden of proof would lie on the plaintiff and in case the defendant did not file the original sale-deed, it would not lead to any adverse inference against the defendant as the plaintiff could have proved non-execution of the sale-deed by him by having the necessary records from the Registrar's office summoned for comparison of his thumb impression and by adducing other evidence which he failed to do so. Relevant paragraphs 7 and 9, on which reliance has been placed by the appellants, are reproduced below:

"7. Under Section 101 of the Indian Evidence Act, whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist and the burden of proof lies on that person. Section 102 of the said Act says that the burden of proof in a suit or proceeding lies on that person, who would fail if no evidence at all were given on either side. Section 103 of the said Act shows that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

9. So far as the plaintiff's averment that the sale deed was liable to be cancelled on the ground that it was obtained by putting forward some imposter in place of the plaintiff No. 1, here too burden of proof lay on the plaintiff and not on the defendant. The defendant was not asking for any relief and therefore, he was not under any obligation to prove the execution of the sale deed or to produce the original record before the Court. The plaintiff No. 1 or any of the witness could have been examined to prove that no such sale deed was executed and even necessary record could have been summoned from the sub-registrar's office for comparison of the thumb impression of plaintiff No. 1 with the thumb impression of the executor of the sale deed in question available in the sub-registrar's office. Had any such evidence been led by the plaintiff in support of their case, the burden would have shifted on the defendant. In the absence of any such evidence on record, issue could not be decided in favour of the plaintiff by drawing adverse inference on the ground that the defendant had not produced the original sale deed as desired by the plaintiff in the case."

44. In the present case, the plaintiff late Har Dutt Singh had moved an application for direction to defendant to produce the original sale-deed. In spite of specific order, the defendant had intentionally not produced the original sale-deed. On the application moved by the plaintiff, the relevant record was summoned from the office of Sub Registrar, however, it was found that the relevant portion where the plaintiff had allegedly put his thumb impression were tampered and those pages were torn off, as such, in the given facts and circumstances, the judgment of this Court in the case of Iqbal Ahmad (supra) would not be of much assistance to the appellants.

45. In the case of Daya Ram (supra), the Court has held that in the suit for cancellation the plaintiff has to prove and the burden lies on the plaintiff. The allegation that sale-deed was not executed as a result of fraud and misappropriation. Relevant paragraph 5, on which reliance has been placed by the appellants, is reproduced below:

"5. I have considered the submissions of learned counsel for both the parties.

I do not see any reason to interfere with the order of the first appellate authority which is based on evidence on record. It is settled principle of law that the person who alleges anything burden lies upon such person to prove its case. Since it was the case of the plaintiff that the sale deeds were executed as a result of fraud and misrepresentation, the burden lies upon the plaintiffs-appellant to prove it which they have failed to do so. The defendants-respondents cannot be asked to discharge the negative burden."

46. There is no doubt to the given proposition of law that the plaintiff has to prove his allegations and burden would lie on him in this regard, however, in the present case, as noted above, the plaintiff had discharged his burden and in spite of best efforts it was not possible to verify his thumb impression from the relevant documents available in the office of Sub Registrar. In spite of specific direction, the defendant had deliberately not produced the original sale-deed and had taken

different stands to avoid production of the original sale-deed before the Court. In the given circumstances, the Trial Court had rightly drawn adverse inference against the defendant to come to conclusion that the said sale-deed was not executed by the plaintiff.

47. In the case of M/s Chaturbhai M. Patel and Co. (supra), the Court has held that the allegation of fraud must be established beyond reasonable doubt and suspicion cannot take place of proof. Relevant paragraph is reproduced below:

"The High Court has carefully considered the various circumstances relied upon by the appellant and has held that they are not at all conclusive to prove the case of fraud. It is well settled that fraud like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt; per Lord Atkin in A. L. N. Narayanan Chettyar v. Official Assignee, High Court Rangoon. However suspicious may be the circumstances, however strange the coincidences, and however grave the doubts, suspicion alone can never take the place of proof. In our normal life we are sometimes faced with unexplainable phenomenon and strange coincidences, for, as it is said, truth is stronger than fiction. In these circumstances, therefore, after going through the judgment of the High Court we are satisfied that the appellant has not been able to make out a case of fraud as found by the High Court. As such the High Court was fully justified in negating the plea of fraud and in decreeing the suit of the plaintiff."

48. In the present case, on the basis of evidence on record and the perusal of the relevant record of the Sub Register's office, the learned Courts below have drawn the conclusion that the conduct of the defendant and employees of the Sub Registrar's office was not above board and leads to conclusion that the alleged sale-deed was not executed by the plaintiff late Har Dutt Singh.

49. No cogent explanation has been given by the learned counsel for appellants as to why the original sale-deed could not be produced by the defendant before the Trial Court in spite of positive directions in this regard. The explanation given in this regard, as noted above, was not at all satisfactory. Even the said original sale-deed has not been produced before this court.

50. It is to be noted that the order dated 26.2.2007 passed by the Trial Court for production of original sale-deed was not challenged by the defendant. If there was any such circumstance where the said original sale-deed was impossible to be produced, they could have got the said order modified or set-aside by the higher Forum, however, no such effort was made. As such, I am of the considered opinion that the findings recorded by the learned Trial Court by drawing adverse inference against the defendant and upheld by the first appellate Court do not suffer from any infirmity or illegality.

51. In this view of the matter, the judgments of the Apex Court in the case of Sheo Pujan Singh (supra) as well as Ishwar Dass Jain (Dead) By Lrs. (supra) on which reliance has been placed by the appellants are also not of much assistance to them.

52. Section 114 of the Act clearly stipulates that the Court may presume existence of certain facts. Section 114 of the Act is reproduced below:

"114. Court may presume existence of certain acts.-The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations The Court may presume--

(a)

(b)

(c)

(d)

(e)

(f)

(g) That evidence which could be and is not produced would, if produced, be unfavorable to the person withholds it.

(h)

(i)

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:-

As to illustration (a) -.....

As to illustration (b)-.....

As to illustration (b)-.....

As to illustration (b)-.....

As to illustration (c) -

As to illustration (d) -

As to illustration (e) -

As to illustration (f) -

As to illustration (g) - A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feeling and reputation of his family;

As to illustration (h) -

As to illustration (i) -"

53. As such, in the given facts, the learned Courts below have rightly presumed that the defendant has intentionally not produced the alleged original sale-deed and doubted about the conduct of the defendant as well as employees of the Sub Registrar's office after noting the tampering of relevant portion of the records from where thumb impression of the plaintiff could have been verified to ascertain the facts.

54. So far as the contention of learned counsel for appellants that the learned first appellate Court has committed gross illegality in rejecting the application filed under Order XLI Rule 27 CPC to produce the additional evidence in his support is concerned, it is to be noted that the application under Order XLI Rule 27 CPC was moved by the appellants to produce the judgment of the criminal court. In fact, the criminal case was lodged by the plaintiff against the defendant, his brother Ram Singh and alleged witnesses to the said sale-deed. The criminal Court had acquitted the defendant and other persons. The said judgment was sought to be placed on record by the appellants, however, the first appellate Court by a detailed order dated 03.09.2016 had rejected the application. It is to be noted that the appellants had not challenged that order before any higher Forum and has now raises the question of validity of the said order by saying that in view of the law laid by the Apex Court in the case of Ibrahim Uddin and another (supra), the application under Order XLI Rule 27 CPC shall be heard and decided at the time of final hearing and not prior to it, as such, the order rejecting the application was not correct.

55. In the case of Ibrahim Uddin and another (supra), the Apex Court has held that the application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevance/bearing in the issues involved. Relevant paragraphs 38 and 41 are reproduced below:

"38. An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment

or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh & Ors., AIR 1951 SC 193; and Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors., AIR 1976 SC 1053).

41. Thus, from the above, it is crystal clear that application for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/ inexecutable and is liable to be ignored.

In the instant case, the application under Order XLI Rule 27 CPC was filed on 6.4.1998 and it was allowed on 28.4.1999 though the first appeal was heard and disposed of on 15.10.1999. In view of law referred to hereinabove, the order dated 28.4.1999 is just to be ignored."

56. In the case of Malyalama Plantations Ltd. (supra), the same proposition of law has been held that it is incumbent on the part of the appellate Court to consider at the time of hearing the appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevant/bearing in the issues involved. Relevant paragraph 11 is reproduced below:

"11) If any petition is filed under Order 41 Rule 27 in an appeal, it is incumbent on the part of the appellate Court to consider at the time of hearing the appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevance/bearing in the issues involved. It is trite to observe that under Order 41, Rule 27, additional evidence could be adduced in one of the three situations, namely, (a) whether the trial Court has illegally refused the evidence although it ought to have been permitted; (b) whether the evidence sought to be adduced by the party was not available to it despite the exercise of due diligence; (c) whether additional evidence was necessary in order to enable the Appellate Court to pronounce the judgment or any other substantial cause of similar nature. It is equally well-settled that additional evidence cannot be permitted to be adduced so as to fill in the lacunae or to patch up the weak points in the case."

57. In the case of Ibrahim Uddin and another (supra), the Apex Court in paragraphs 36, 39, 48 and 49 has also observed that the application through which additional evidence sought to be filed, if at

the time of hearing, the Court is of the opinion that certain documentary evidence is required for proper adjudication of the lis, at the time of final hearing, the Court may permit the concerned party to adduce additional evidence. There is no dispute to the legal proposition as laid down by the Apex Court.

58. In the present case, the application that was filed for filing additional evidence i.e., certified copy of the judgment passed by the Chief Judicial Magistrate, Akbarpur was rejected by the lower appellate Court vide order dated 03.09.2016 and had fixed the date as 17.9.2016 for final arguments, as such, it is very much clear that the appeal was at the stage of hearing and the first appellate Court after rejecting the application filed under Order XLI Rule 27 CPC had fixed the appeal for final arguments. As such, I do not find any infirmity of illegality in the order passed by the first appellate Court rejecting the application of the appellants moved under Order XLI Rule 27 CPC.

59. Moreover, by the application under Order XLI Rule 27 CPC, the appellants had asked for only placing the judgment of the criminal court on record, there was no prayer for placing statement of Narendra Bahudur Srivastava, Clerk. Moreover, the matter is still subjudice as appeal against the said judgment by the criminal Court has been admitted, as informed by the learned counsel for respondent and not denied by the appellants.

60. In the case of Vishnu Deo Sharma (supra), it has been laid down by the Apex Court that the judgment passed in the different proceedings would not be binding. Distinguishing standard of proof required in civil proceedings from that in criminal proceedings, it was held that acquittal in the criminal proceedings would not make continuation of the civil proceedings abuse of process of court. Relevant paragraphs 23 and 28 are reproduced below:

"23. It brings us to the question as to whether previous judgment of a criminal proceeding would be relevant in a suit. Section 40 of the Evidence Act reads as under:

"40. Previous judgments relevant to bar a second suit or trial.-The existence of any judgment, order or decree which by law prevents any Courts from taking Cognizance of a suit or holding a trial is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial."

This principle would, therefore, be applicable, inter alia, if the suit is found to be barred by the principle of res judicata or by reason of the provisions of any other statute. It does not lay down that a judgment of the criminal court would be admissible in the civil court for its relevance is limited. {See Seth Ramdayal Jat v. Laxmi Prasad [2009 (5) SCALE 527]}. The judgment of a criminal court in a civil proceeding will only have limited application, viz., inter alia, for the purpose as to who was the accused and what was the result of the criminal proceedings. Any finding in a criminal proceeding by no stretch of imagination would be binding in a civil proceeding.

28. If judgment of a civil court is not binding on a criminal court, it is incomprehensible that a judgment of a criminal court will be binding on a civil court. We have noticed hereinbefore that Section 43 of the Evidence Act categorically states that judgments, orders or decrees, other than

those mentioned in sections 40, 41 and 42 are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant in some other provisions of the Act, no other provisions of the Evidence Act or for that matter any other statute had been brought to our notice."

61. In the case of Devendra and others (supra), it has been held that the civil suit as also a criminal case could be maintainable; they can run simultaneously, however, result in one proceeding would not be binding on the court determining the issue before it in other proceedings. Relevant paragraph 13 is reproduced below:

"20. There cannot, however, be any doubt or dispute whatsoever that in a given case a civil suit as also a criminal proceeding would be maintainable. They can run simultaneously. Result in one proceeding would not be binding on the court determining the issue before it in another proceeding. In P. Swaroopa Rani v. M. Hari Narayana @ Hari Babu [AIR 2008 SC 1884 : (2008) 5 SCC 765], the law was stated, thus :

"13. It is, however, well-settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case.[See also Seth Ramdayal Jat v. Laxmi Prasad, 2009 (5) SCALE 527]"

62. As such, the judgment of the criminal Court had no evidenciary value in the given facts of the present case. The application under Order XLI Rule 27 was rightly rejected by the lower appellate Court.

63. The last contention of learned counsel for appellants is that the first appellate Court has failed to discharge the requirement of Order XLI Rule 31 CPC as no points of determination were framed while deciding the first appeal. The first appellate Court has discussed in detail the issues framed by the Trial Court and has recorded its own conclusions and findings while agreeing with the findings recorded by the Trial Court. It has discussed in detail the lis between the parties and the evidence on record and has agreed with the conclusions drawn by the Trial Court. As per the first appellate Court, the Trial Court has committed no infirmity or illegality in drawing its conclusion and, as such, has rejected the first appeal. I do not find any infirmity of illegality in the manner in which the first appeal has been decided by the first appellate Court.

64. There are concurrent findings of fact recorded by both the learned Courts below holding that the sale-deed was obtained by the defendant by putting some impostor in place of plaintiff late Har Dutt Singh. There are no reasons to interfere with the findings so recorded by the two courts below. The proposed substantial questions of law framed by the appellants in the appeal do not involve any legal issue. The appeal is devoid of merit, hence liable to be dismissed at the admission stage. It is accordingly dismissed.

[Ritu Raj Awasthi, J.] Dated: 10th March, 2017 Santosh/-

