

316

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

XOBS No.6-C of 1989 in/and
RSA No.1415 of 1988 (O&M)
Date of Decision: 07.01.2015
.....Appellant.

Sis Ram

Versus

Pehlad (through LRs) & others

.....Respondents

CORAM:HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. R.S. Sihota, Senior Advocate with
Mr. Ashok. K. Sharma, Advocate &
Mr. B.R. Rana, Advocate
for the appellant.

Mr. Ashok Kumar Jindal, Advocate for
Mr. Sanjay Mittal, Advocate
for respondent No.1.

Mr. H.S. Bhatia, Advocate
for respondent No.2-Bank/cross-objector.

1. ***Whether Reporters of local papers may be allowed to see the judgment ?***
2. ***To be referred to the Reporters or not ?***
3. ***Whether the judgment should be reported in the Digest?***

RAJ MOHAN SINGH, J.

This appeal is directed against the judgment and decree dated 10.10.1987 passed by Addl. District Judge, Narnaul, vide which judgment and decree dated 29.07.1985 passed by learned Sub-Judge IIIrd Class, Rewari, was upheld. Cross-objection No.6-C of 1989 have also been filed by respondent No.2-Bank against the impugned judgment and decree. It is relevant to note that no such cross-objections were filed before the lower appellate Court against the judgment and decree of trial Court.

2. Facts are briefly noted as under:-

Respondent No.1 filed a suit for declaration that he is owner in

possession of agricultural land measuring 62 Kanal 19 Marla as shown in the plaint. He challenged general power of attorney (hereinafter referred to as the “attorney”) allegedly executed in favour of appellant-Sis Ram in connivance with respondents No.3 & 4 to be forged and fictitious document and resultant mortgage deed executed on the basis of said attorney was the result of fraud as the same was neither executed by the plaintiff/respondent No.1, nor he thumb marked the same. The execution of impugned attorney was the result of fraud and conspiracy. On the basis of said attorney the land of plaintiff/respondent No.1 was mortgaged with respondent No.2-Bank and loan was secured to the tune of ₹44,500/- in his name and others for the purchase of tractor. Appellant got registered the mortgage deed in favour of respondent No.2 without any authority of law as he was never appointed as general power of attorney on behalf of plaintiff.

3. The suit was contested by the appellant on the ground that the plaintiff/respondent No.1 himself appeared before the Sub-Registrar and executed the impugned attorney in his favour and the plaintiff himself authorised the defendant No.1 to mortgage the land in question in favour of respondent No.2-Bank and to purchase the tractor in the name of plaintiff, defendant No.1 and brothers and sisters of defendant No.1. After taking all the customary defences, it was prayed that suit be dismissed.

4. The stand of defendant No.2-Bank was that the plaintiff himself appeared before the Sub-Registrar and executed the impugned attorney in favour of defendant No.1. Mortgage deed in question was claimed to be legal and operative qua the rights of the plaintiff.

5. The defendants No.3 & 4 took the plea that they are not necessary parties to the litigation as nothing was claimed against them. Though they

pleaded that they never appeared before the Sub-Registrar in the aforesaid context.

6. On the basis of pleadings of the parties the trial Court framed the following issues:-

- “1. Whether the plaintiff did not appoint No.1 as general attorney and defendant No.1 falsely and fraudulently fabricated the general power of attorney?
2. Whether defendant No.1 had no right or authority to mortgage the property of the plaintiff and to obtain loan from defendant No.2 in the name of plaintiff? OPP
3. Whether the mortgage deed dated 27.10.1980 is a void transaction? OPP
4. Whether the suit property mentioned in para No.1 of the plaint is free from all encumbrances.
5. Whether the suit for declaration is maintainable.
6. Whether the suit is not properly valued for the purposes of Court fee and jurisdiction? OPD
7. Whether the suit is liable to be dismissed with special costs under Section 35 A? OPD
8. Whether the plaintiff is estopped from filing the present suit by his own act and conduct? OPD
9. Whether the suit is bad for misjoinder of necessary parties as alleged in preliminary objection No.2 of the written statement for the defendant No.1.
10. Relief.”

7. Trial Court dealt with the evidence of the parties. The contention

of the plaintiff vis-a-vis alleged execution of attorney was appreciated in the light of report Ex.PW2/10 submitted by Sh. S.N. Aggarwal, handwriting and finger print expert who appeared as PW-2. The report of the expert revealed that the thumb impression of the plaintiff on the disputed attorney did not match with the thumb impression taken in the Court. Since the science of identifying thumb impressions is a perfect science, therefore, the plaintiff successfully discharged the initial onus and thereafter the same shifted to the defendant No.1 to show that the transaction in question was lawfully executed. No expert was examined by the defendant No.1 to prove that the thumb impressions appearing on the impugned attorney were that of the plaintiff. The stand of the defendant No.1 was that the plaintiff himself appeared before the Sub-Registrar and executed the impugned attorney in favour of defendant No.1 and since the document being registered document, therefore, the same was having presumption of its genuineness. The trial Court based its conclusion on the basis of issue No.1 to hold that the plaintiff did not appoint the defendant No.1 to be his general power of attorney and the same was fabricated and the mortgage deed dated 27.10.1980 on the basis of said general power of attorney was also held to be not binding upon the plaintiff. Being a void transaction resultantly the suit was decreed.

8. Under issue No.2 it was held that the defendant No.1 had no authority to mortgage the land for obtaining loan from defendant No.2-Bank. Under issue No.3 the mortgage deed dated 27.10.1980 was held to be a void transaction and the property of the plaintiff was held to be free from encumbrance under issue No.4. Suit was held maintainable under issue No.5. Under issue No.8 the trial Court held that the plaintiff was not

estopped from filing the suit because tractor in question was never used by the plaintiff for cultivation of his land nor the impugned attorney was ever executed in favour of defendant No.1. On the basis of evidence of PW-3 Suraja it was held that the plaintiff cultivated his land by bullocks and, therefore, the stand of defendant No.1 was negated to show that the tractor in question was never used by the plaintiff in cultivation of his land. Issue No.9 was also decided against the defendant and ultimately the suit of the plaintiff was decreed thereby declaring the attorney dated 30.09.1980 as well as the mortgage deed dated 27.10.1980 to be illegal, void and not binding upon the rights of the plaintiff.

9. Against the judgment and decree dated 29.07.1985 passed by the trial Court, defendant No.1 filed appeal before the Additional District Judge, Narnaul. The stand of the defendant No.1 in appeal was that the witnesses of the document were not examined and there was presumption of truth attached to the execution of the attorney being a registered document. The opinion evidence of the expert was claimed to be a weak type of evidence and should not have been relied upon by the trial Court in deciding the issues against the defendant No.1. Estoppel was pleaded against the plaintiff on the ground that the plaintiff was also one of the beneficiary of the loan along with others who were not even impleaded in the suit as party. Therefore, the suit itself was claimed to be bad on non-joinder of the necessary parties.

10. Defendant No.2-Bank also supported the cause of the appellant in projecting that the loan transaction was lawful and was rightly granted on the basis of attorney. The Bank took another ground that it was not provided adequate opportunity to lead evidence before the trial Court.

11. The lower appellate Court after appreciating all the pleas and evidence on record held that the plaintiff was successful in discharging its onus to show that the attorney was without his consent and the transaction of mortgage based thereon was void.

12. The plea of the Bank was met by observing that the counsel for the Bank pleaded no instructions before the lower appellate Court and, therefore, it was decided against the Bank. Counsel for defendants No.3 & 4 also pleaded no instructions nor they led any evidence, rather their stand in the written statement was that they had no role to play in the execution of attorney nor they appeared before the Sub-Registrar in the context thereof. The lower appellate Court dismissed the appeal. The respondent No.2-Bank did not file any cross-objection before the lower appellate Court but in regular secondary appeal before this Court, respondent No.2 has preferred cross-objection No.6-C of 1989 to contend that in the event of pleading no instruction by its counsel, the notice should have been given to the Bank personally.

13. Prior to amendment of Section 100 CPC, a second appeal could have been filed before this Court on the grounds set out in clauses (a) to (c) of Section 100 (1) CPC i.e. (a) the decision being contrary to law or to some usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law and (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

Now the interference in the second appeal could only be made if substantial question of law arises in the case. Therefore, the interference

cannot be only because the order is contrary to law, but when the disputed issues raised a substantial question of law. Limiting such a power in the Appellate Authority is based on public policy having roots in the maxim '*interest reipublicae ut sit finis litium*'. The underlined purpose was to bring finality to the issues/litigation at some point of time.

In the appeal, the appellant had filed CM No.14915-C of 2014 formulating substantial questions of law that arise for consideration in the present appeal are as under:-

- “i) *Whether the registered general power of attorney dated 30.09.1980 executed by plaintiff/respondent No.1 authorising applicant/defendant No.1, brothers and sisters of appellant/defendant No.1 has been rightly held to be fictitious by both the learned courts below or can be said to be result of mis-reading and mis-appreciation of the evidence on record?*
- ii) *Whether the finding with respect to mortgage deed dated 27.10.1980 being a void transaction is according to law and in conformity with the evidence on record?*
- iii) *Whether the official acts performed in normal course of business can be held to be illegal when the same are treated in itself as relevant facts under Section 35 of the Evidence Act 1872?*
- iv) *Whether the deposition of expert witness PW-2 Shri SN Aggarwal inspires confidence and in itself sufficient to record a finding that the general power of attorney is*

falsely and fraudulently fabricated document?

- v) *Whether the conduct of respondent-plaintiff No.1 and the nature of general power of attorney show that the respondent is party to all proceedings for purchase of the tractor and mortgaging his land?"*

14. This Court has considered the arguments of the parties at length. The entire controversy hinges upon the factum of attorney dated 30.09.1980 whether the same was executed by the plaintiff himself or not? The non-execution of the same would entail in making transaction of mortgage to be void and thereafter other consequences would definitely follow. Questions No.1 to 3 are the composite questions of law and can be answered jointly. The question No.4 is based upon the evidentiary value of the opinion evidence given by the expert Sh. S.N. Aggarwal, who appeared in the case as PW-2. The question No.5 is not strictly a question of law rather it involves factual matrix.

15. The alleged attorney was executed in favour of defendant No.1- Sis Ram and thereafter Sis Ram mortgaged the land of plaintiff in order to secure loan for tractor in the name of plaintiff himself, defendant No.1 and his two brothers and sisters. The thumb impressions on the attorney were claimed to be forged. The defendants No.3 and 4 namely Ram Chander and Ghisa were shown the attesting witnesses of the attorney who filed their written statement and denied their role in the context of execution of attorney and their appearance before the Sub-Registrar. During the course of proceedings also their counsel pleaded no instructions. The plaintiff adduced opinion evidence in the form of expert Sh. S.N. Aggarwal-PW-2 who after necessary comparison of thumb impressions opined that the

thumb impressions appeared on the attorney are different that of thumb impressions of the plaintiff taken in the Court.

16. The aforesaid opinion evidence was not countered by the defendant No.1 by any expert on his behalf. Since the attorney was claimed to be fraudulent, therefore, onus was lawfully discharged by the plaintiff to show that the attorney was the result of fraud. Thereafter it was legally incumbent upon the defendant No.1 to counter the said fact by way of proving that attorney was lawful and was not result of any fraud or fabrication. Since the defendant No.1 did not adduce any evidence to counter the expert opinion, therefore, the attorney was held fraudulent and could not have validated the sanctioning of loan on the basis thereof.

17. The attesting witnesses namely Ram Chander and Ghisa also did not support the factum of execution of attorney in their pleadings as well as in the evidence when their counsel pleaded no instructions.

18. The evidence of PW-1 plaintiff could not be shattered by the defendant No.1. The statement of PW-2 Sh. S.N. Aggarwal, is based upon exact science of comparing thumb impressions. The cross-examination of PW-2 reads as under:-

“I have not compared the thumb impression which is now mark as X1 on the general power attorney dated 30.09.1980 as the same is crossed and cancelled. In the whorl type thumb impression, some of the ridges at centre will either coiled around each other or will make circle, there will be one or two core and two deltas in whorl type thumb impression. While in the loop type thumb impression, some of the ridges

at the centre point core will re-curve and make exist on the same side, there will be one core and one delta. I have compared the disputed thumb impression inter-see and they correspond each other, I have not mentioned this in my report, as I did not feel any necessity of it, being different in type from the sample thumb impressions. It is incorrect to suggest that the left hand portion of the thumb impression mark P2 is not printed. The core and delta in P2 are clearly visible and printed. It is incorrect to suggest that I am deposing wrongly in favour of the party engaging me.”

19. Perusal of the aforesaid cross-examination shows that the testimony of expert was never shattered in pith and substance. The plaintiff got examined PW-3 Suraja in rebuttal to show that the plaintiff never used any tractor in cultivation of his land. The said witness also denied the factum of land of plaintiff ever cultivated by the defendant No.1-Sis Ram with the help of tractor. The half-hearted plea during the course of arguments was raised by the defendant No.1-appellant to allege that Sis Ram was cultivating the land of plaintiff and that necessitated in obtaining tractor in the name of plaintiff and defendant No.1 jointly. Perusal of statements of DW-1 to DW-3 negated the theory of tenancy by any stretch of imagination, nor there is any document on record to substantiate the plea of tenancy of the appellant with the plaintiff-respondent No.1. There is no revenue record to show the alleged factum of relationship of tenant and landlord between the parties. In the light of aforesaid facts the plea raised by the appellant is totally ill-founded.

20. Learned counsel for the respondent No.2 contended that in the event of pleading no instruction by the counsel in the trial Court, the trial Court was legally obligated to issue notice to the Bank in person. On a pointed question it was admitted by the learned counsel for the respondent No.2 that no cross-objection was filed before the lower appellate Court at the first instance and the present cross-objection No.6-C of 1989 have been filed in regular second appeal only. The argument of the counsel is to be tested in the light of material available on record.

21. The evidence of defendant No.2 started w.e.f. 22.11.1984. The order passed by the trial Court on 22.11.1984 is reproduced as under:-

“Present: As above

No evidence of defendant No.2 present. Date is sought.

Adjournment is granted. Now to come upon 20.02.1985 for evidence of defendant No.2 at his own responsibility.”

*Sd/-
SJIC, Rewari
22.11.1984”*

On 20.02.1985, the trial Court observed in the following manner:-

“Present:Counsel for the parties.

Evidence of defendant No.2 not present. Adjournment is requested. In the interest of justice case is adjourned to 23.02.1985 for evidence of defendant No.2 at own responsibility.

*Sd/-
SJIC
20.02.1985”*

On 23.02.1985 also no evidence was present and the trial Court passed the following order:-

“Present:Counsel for the parties.

Evidence of defendant No.2 not present. Date is sought.

Adjournment is granted on subject to payment of Rs.25/- as to costs. Now to come upon 19.03.1985 for DWs at his own responsibility. Last opportunity granted.

*Sd/-
SJIC
23.02.1985”*

On the adjourned date trial Court passed the following order:-

Present: Counsel for the parties.

Sh. P.K. Sharma counsel for the defendant No.2 pleaded no instruction on behalf of defendant No.2. Cost Rs.25/- is also not paid. Hence the defence of defendant No.2 is hereby struck off under Section 35-B C.P.C. Now to come upon 08.04.1985 for rebuttal evidence.

*Sd/-
SJIC
19.04.1985”*

22. If the argument of learned counsel for the respondent No.2-Bank is appreciated in the light of aforesaid interlocutory orders, it will be seen that it is not a case of simpliciter pleading no instructions, rather opportunities were given to respondent No.2 to adduce its evidence on numerous dates and finding no evidence available with it, learned counsel on 19.04.1985 pleaded no instructions and even did not pay the cost imposed on earlier occasion and resultantly the defence of defendant No.2 was struck off. Apparently it is not a case of ex parte rather it is a case of striking down the defence for want of evidence and for want of payment of cost. Moreover no such cross-objections were filed before First Appellate Court. Consequently, the cross-objections are without any force and are

dismissed as such.

23. In the aforesaid interlocutory orders, the plea of defendant No.2 does not stand to reason. Questions No.1 to 3 are answered in the aforesaid manner. Once the very execution of attorney is found to have no legs, all transactions based thereon become void and, therefore, question of a document having proper source or performed in normal course of business do not arise at all. In question No.4 it is found that once the attorney is proved to be fraudulent, the same vitiates all solemn acts and the mortgage deed in question becomes not binding upon the plaintiff. Question No.5 is a mixed question of fact and the same does not arise for consideration. No interference is called for in the concurrent findings of facts by both the Courts below.

24. After considering the aforesaid contentious issues between the parties this Court finds that the appeal is totally bereft of merit and the same is accordingly dismissed, leaving the parties to bear their own costs.

07.01.2015

Atik

(RAJ MOHAN SINGH)
JUDGE