

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Date of Decision: 18.09.2015

1. RSA No.33 of 2011

Ishwar and others

Appellants

Vs.

Premwati and another

Respondents

2. RSA No.506 of 2011

Ishwar and others

Appellants

Vs.

Premwati and another

Respondents

CORAM: Hon'ble Mr. Justice Raj Mohan Singh

Present: Mr. Rakesh Nehra, Advocate,
for the appellants.

Mr. Sunil Chadha, Advocate with
Ms. Pallavi Singh, Advocate,
for the respondents.

RAJ MOHAN SINGH, J. (ORAL)

1. By this common judgment, aforesaid two appeals are being decided as both these appeals have arisen out of the same judgment and decree dated 22.12.2009 passed by Additional District Judge Rohtak, vide which both the appeals alongwith cross objections were dismissed. For convenience, facts are being taken from RSA No.33 of 2011.

2. Two suits were filed i.e Civil Suit No. 148 of 1995, 'Dhanpal (deceased) through LRs vs. Ishwar and others' and civil suit No.148A of

1995, 'Ishwar and others vs. Dhanpal and another'. Both these suits were consolidated and were taken for disposal jointly.

3. Dhanpal, s/o Mahiya, plaintiff filed the first suit for declaration that judgment and decree dated 21.11.1992 passed in civil suit No.960/92 titled 'Ishwar and others vs. Dhanpal' by the Civil Court at Rohtak and Will dated 01.03.1995 allegedly executed by Dhanpal in favour of his daughter is null and void and not binding on the rights of the plaintiff. Consequential relief of permanent injunction, restraining the defendants Ishwar and others from alienating the suit land and from dispossessing the plaintiff was also claimed. After the death of Dhanpal, he has been represented by his daughter Premwati and widow Smt. Rajan. In the suit, Dhanpal plaintiff has pleaded that he is the owner of the land measuring 29 Kanals 11 Marlas and also 1/5th share of 1 Kanal 18 Marlas in equal share, situated in the revenue state of Village Sundana, District Rohtak. It has been alleged that the defendants, namely, 'Ishwar and others' pressurised the plaintiff because he was not having son. Defendants pressurised the plaintiff and was not allowed to enjoy his share. Khewat of the plaintiff was got partitioned by the plaintiff by filing a partition suit before the revenue authorities at Rohtak which was decided on 24.02.1992. Separate portion was earmarked to the plaintiff Dhanpal and was allotted to him accordingly. The plaintiff being an old person fell in the trap of the defendants and they managed to get passed false and fictitious decree dated 21.11.1992 from the Civil Court at Rohtak. Dhanpal plaintiff came to know regarding the decree dated 21.11.1992 about 15 days prior to filing of this suit. The decree in question has been assailed on the ground that the plaintiff never engaged any

counsel, nor signed or thumb marked any power of attorney. The written statement filed in said suit and the statement in Court are also false. The defendants were never the members of Hindu joint family as they got separated about 30 years ago and were residing separately. There was no necessity for the plaintiff to execute the alleged false and frivolous decree. The decree is result of fraud and is not binding. Even in the absence of registration, decree has no evidentiary value. The decree in question has been managed by the defendants with all deliberate intentions just to deprive the plaintiff from his valuable rights. The physical possession over the property always remained with the plaintiff throughout and the decree is null and void. No family settlement has ever taken place between the parties. The alleged family settlement is a concocted affair. Defendants have no pre-existing rights in the suit land. The amendment in suit was allowed by the High Court and Will dated 01.03.1995 has also been assailed to be null and void and not binding on the rights of the plaintiff. It has been asserted that no Will was ever executed by the plaintiff in favour of his daughter. Thumb impressions on the Will have also been denied by the plaintiff Dhanpal.

4. The suit was contested by the defendants and counter claim was filed. It was also allowed to be amended as a consequence of the amendment of the plaint. Defendants claimed that the plaintiff was neither owner nor in possession of the property and the suit was not maintainable.

5. On merits, it has been admitted that initially the plaintiff was owner in possession of the suit land, however, decree dated 21.11.1992 has been claimed to be legal and binding on the rights of the plaintiff. Mutation

in pursuance to decree has already been sanctioned. Plaintiff Dhanpal himself has appeared in the Court and made a statement to the effect that he has no objection for the transfer of land in favour of defendants 'Ishwar and others'. Plaintiff also engaged a counsel at his own and thumb marked on the power of attorney as well as the written statement. Plaintiff had no son. Defendants being nephew were serving the members of joint hindu family. It has been denied that the plaintiff was residing separately about 30 years ago. On the basis of pleadings of the parties, Trial Court framed issues in suit No.148 of 1995 to the following effect:-

“i) Whether the plaintiff is owner in possession of the suit land? OPP

ii) Whether the defendants are owners in possession of the suit land? OPD

iii) Whether the suit is not maintainable? OPD

iv) Relief.”

6. In Civil Suit No.148A of 1995, 'Ishwar and others vs. Dhanpal and others', Trial Court framed the following issues:-

i) Whether the plaintiff is owner in possession of the suit land? OPP

ii) Whether the suit is not maintainable? OPD

iii). Relief.

7. Aforesaid issues were framed before consolidation of suits, thereafter in both the suits following common issues were framed:-

“i) Whether the plaintiff is owner in possession of the suit land? OPP of civil suit bearing no.148 of 1995.

ii) Whether the defendants are owner in possession of the suit land? OPD of 1st civil suit bearing no.148 of 1995.

iii) **Whether the 1st suit bearing no.148 of 1995 is not maintainable in the present form? OPD of 1st civil suit bearing no.148 of 1995.**

iv) **Whether the 2nd suit bearing no.148A of 1995 is not maintainable in the present form? OPD of 2st civil suit bearing no.148A of 1995.**

v) **Relief.”**

8. After amendment, one additional issue i.e. 1A was also framed which is to the following effect:-

**1-A) Whether the Will dated 01.03.1995 allegedly executed by plaintiff in favour of his daughter is void, illegal, forged and bogus document and does not bear the thumb impression of plaintiff Dhanpal, if so as to what effect ?
OPP**

9. Both the parties led their respective evidence on the aforesaid issues. Trial Court after appraisal of evidence on record, decreed the suit No.148 of 1995, declaring the daughter of Dhanpal, Premwati and widow Rajan to be owners of the suit property and defendants were permanently restrained from alienating or creating any charge on the suit property. Suit No.148-A of 1995 titled 'Ishwar and others vs. Dhanpal' was partly dismissed and partly decreed. Title to the property was dismissed while claim regarding possession of the suit property was decreed in favour of Ishwar and others. Defendants of civil suit No.148A of 1995 were restrained from dispossessing the plaintiff therein, except in due course of law. In this way, possession of Ishwar and others was held and legal heirs of Dhanpal were left to avail remedy in law to seek possession. Both the parties went in appeal. Three appeals and one cross objection were filed. Appellate Court dismissed the appeals as well as cross objection. Now two appeals have arisen and both have been filed by Ishwar and others.

10. I have considered the submissions made by the learned counsel for both sides.

11. Learned counsel for the appellants has argued that admitted specimen sheet of thumb impressions of Dhanpal which was allegedly obtained in Court, is not available on record and was never produced before the expert when he was cross examined. In the absence of admitted specimen sheet from where the expert took the specimen thumb impression of Dhanpal for comparison, an adverse inference can be drawn. Therefore incriminating material vis-a-vis the expert opinion cannot be read in evidence. In the context of remaining evidence in the form of comparison of specimen thumb impressions with disputed thumb impressions existing on Vakalatnama and written statement in civil suit No.960 of 1992, the expert PW4 has opined that specimen thumb impression and disputed thumb impression are not of the same person. In view of examination of expert, the report can be relied upon because he has thoroughly compared the disputed thumb impressions alongwith specimen thumb impression.

12. The presumption that the disputed thumb impressions over Vakalatnama and written statement of civil suit No.960 of 1992 do not relate to plaintiff Dhanpal can be co-related from the circumstances which the defendants themselves have created on record. Dhanpal remained alive till 2002. Defendants never asked the plaintiff to give his thumb impressions for the purpose of comparison with the disputed thumb impressions over Vakalatnama and written statement. The defendants have also examined expert DW8 during the life time of Dhanpal, but even then the defendants never asked Dhanpal to give his specimen thumb impressions for the

purpose of comparison, rather defendants relied upon the thumb impressions on Will which is also under challenge and cannot be treated to be an admitted document.

13. Both the Courts below have recorded concurrent findings of fact, after appreciation of evidence. Non availability of thumb impression sheet may be a relevant factor in the context of evidentiary value attached to the report, but at the same time, failure on the part of the defendants in not obtaining thumb impressions of Dhanpal during his life time who remained alive till 2002 is also an instance, disentitling the claim of the defendant on the basis of civil court decree. Effort to get the thumb impressions compared with Will further goes in a way to highlight the effort made by the defendant for not obtaining specimen thumb impressions of the Dhanpal during his life time. Further by agreeing to get the comparison done with a Will which is an admitted document, also adds to the disqualification of defendant. The facts pleaded and evidence brought on record in reference thereto are not to be re-appreciated by this Court in second appeal.

14. Even otherwise also for dislodging lawful heirs of Dhanpal, there is no explanation forth coming on record. In family settlement also, the right of legal heirs of Dhanpal has to be squarely met. In the absence of such settlement, it is impossible for Dhanpal to give whole of the property to his nephew in exclusion of her daughter and widow. Such family settlement cannot be held to be bonafide settlement in view of '**Smt. Badani (Deceased) by her LR vs. Bhali 2012 AIR (SC) 2858**' wherein such type of family settlement was held not to be bonafide, rather it cannot be held to be voluntary and is induced by fraud and coercion and undue influence.

Fraud vitiates all solemn acts. Judgment based on fraud is a nullity and nonest in the eyes of law. It can be challenged at any stage and even in collateral proceedings. The decree based on fraud which is not based on any bonafide settlement can be ignored outrightly as it does not recognise any pre-existing right of the defendants in any manner, nor the defendants had any semblance of interest during life time of Dhanpal and even thereafter.

15. The appellant has formulated substantial question of law in para No. 10 of the ground of appeal in the following manner:-

“i) Whether the courts should have framed the proper issue regarding the validity of the judgment and decree dated 21.11.1992 passed in favour of the Appellants/Defendants?

ii) Whether the court should have given the finding regarding the validity of the judgment and decree dated 21.11.1992 passed in favour of the Appellants/Defendants?

iii) Whether the Decree dated 21.11.1992 in favour of appellants requires registration?

iv) Whether there has been grave misreading of the evidence by the courts below?

v) Whether the courts below is justified in framing the issue with regard to the Will dated 01.03.1995 allegedly executed by the Respondent/Plaintiff?

16. The question No.1 formulated vis-a-vis decree dated 21.11.1992 is based on factual plea. Subject question is covered under the issue no. (i) and (ii). The discussions made under these issues are suffice to meet the requirement of this alleged question of law, therefore, no such question arises.

17. Question No.2 is based upon the findings of the courts below. The validity of judgment and decree dated 21.11.1992 cannot be presumed in view of fraudulent family settlement. The decree in question is stated to

be based on family settlement in which no provision has been made in favour of heirs of Dhanpal. The family settlement is proved to be fraudulent. Fraud vitiates all solemn acts and can be ignored at any stage of litigation.

18. Question No.3 framed by the appellant is a question of law. The decree dated 21.11.1992 in the absence of any lawful concept of family settlement is not a memo, recognizing any pre-existing right of the defendants in the suit land. Therefore, transfer of property more than value of Rs.100/- requires compulsory registration. Defendants have no such pre-existing right in the presence of heirs of Dhanpal. Therefore, the decree dated 21.11.1992 does not create any lawful entitlement in favour of defendant for want of registration thereof.

19. Question No.4 does not arise, as there is no misreading of evidence on record, rather re-appreciation cannot be done at the stage of regular second appeal.

20. As regards question No.5, no issue arises on the basis of pleadings of the parties, therefore, framing of issue on question of Will does not arise in the present lis.

21. On due consideration, this Court finds that no indulgence is required in these appeals. Consequently, these appeals are dismissed.

(RAJ MOHAN SINGH)
JUDGE

18.09.2015
Dinesh