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

RSA No.3968 of 2011 (O&M)
Date of Decision:07.01.2016

Ramphal .....Appellant
vs
Punjab National Bank and others .....Respondents

CORAM: ***HON'BLE MR. JUSTICE RAJ MOHAN SINGH***

Present: Mr. Anurag Jain, Advocate
for the appellant.

Mr. Ashish Rawal, Advocate
for respondent No.8.

Mr. Santlal Barwala, Advocate
for respondent No.10.

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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.

[1]. Defendant No.9-Ramphal is in second appeal against concurrent judgments and decrees passed by the Courts below decreeing the suit of the plaintiff-Bank and to the extent of his involvement in the loan transaction.

[2]. Plaintiff-Bank filed suit for recovery on the ground that the plaintiff-Bank received a loan application duly forwarded by letter bearing serial No.775 dated 12.07.2005 from District Fishery Officer-cum-Chief Executive Officer, Fishery Farmer Development Agency, Hisar vide which plaintiff-Bank was

instructed to grant a loan to defendant No.1-Suresh Kumar son of Hawa Singh. Proceeding on that premise, the plaintiff-Bank proceeded to grant loan of Rs.4,30,000/- to the alleged Suresh Kumar.

[3]. The person who approached the plaintiff-Bank for the loan was the same person whose photographs and signatures were present on the loan application which was duly sponsored by Fishery Department through its Officer. The loan application was signed by the defendant No.5-Sadhu Ram Boora and was also supported by the project report bearing signature of afroesaid Sadhu Ram Boora and Suresh Kumar-defendant No.1. The loan application was also supported by an affidavit of defendant No.1 in Hindi and English which was duly attested by the Oath Commissioner, Hisar. The loan application was followed by a plan duly signed by Jai Gopal Verma-defendant No.4 and Sadhu Ram Boora-defendant No.5.

[4]. The agreement dated 24.06.2005 was also attached with the said application which was executed between Fish Farmer and Fish Farmer Development Agency. The Fish Farmer was alleged Suresh Kumar and the agreement carried the signatures of Suresh Kumar-defendant No.1, Jai Gopal Verma-defendant No.4 and Sadhu Ram Boora-defendant No.5. Therefore, loan of Rs.4,30,000/- was sponsored to be given to

Suresh Kumar-defendant No.1 for fishery development in village Gurana.

[5]. Plaintiff-Bank alleged that defendant No.1 submitted an application for loan on 21.07.2005 and account opening form before the plaintiff-Bank which was also carrying his signatures and photographs. In this background, plaintiff-Bank sanctioned a loan of Rs.4,30,000/- in favour of alleged Suresh Kumar on interest @ 11.25% per annum with half yearly rests and it was also agreed between the alleged Suresh Kumar and the plaintiff-Bank that Suresh Kumar shall mortgage the land measuring 40 *Kanals* 1 *Marla* situated in village Gurana in favour of plaintiff-Bank by way of registered mortgage deed.

[6]. The needful was also done by way of registered mortgage deed registered in the office of Sub-Registrar, Hansi. At the time of registration of mortgage deed defendants No.8, 9 and 10 signed the same as witnesses on the mortgage deed. The mortgage deed also carried the photographs and signatures of alleged Suresh Kumar. Defendant No.3 stood as guarantor and executed deed of guarantee on 17.08.2015 admitting his joint and several liability to pay the aforesaid loan amount along with interest with alleged Suresh Kumar.

[7]. The alleged Suresh Kumar started availing the loan facility from the Bank. On 10.10.2005, defendant No.7 submitted

a certificate before the plaintiff-Bank stating that Suresh Kumar son of Hawa Singh has utilised the second installment of the loan and also recommended the release of third installment in favour of Suresh Kumar. The utilisation certificate was forwarded to the Bank by Dharambir Singh Budania, District Fishery Officer-cum-Chief Executive Officer, Fishery Farmer Development Agency (defendant No.6). The said certificate bears serial No.1190 dated 13.10.2005.

[8]. It was further alleged by the plaintiff-Bank that infact defendant No.2 Rajesh Kumar entered into conspiracy with defendant No.1 and with other defendants in order to cheat the plaintiff-Bank. Suresh Kumar was minor who could not avail the loan, therefore, from the very inception a conspiracy was made by defendant No.2. Photographs of defendant No.2 were affixed on the loan document projecting him to be Suresh Kumar. Rajesh Kumar signed the documents as Suresh Kumar and story was developed by common conspiracy of the above stated defendants. Defendant No.2 was introduced on various documents showing him to be defendant No.1. The original documents including mortgage deed, account opening form, documents sent by Fishery Department and another documents on which defendant No.2 signed as Suresh Kumar have been attached with the plaint. After serving notice, the suit came to be

filed.

[9]. In order to avoid unnecessary details, this Court proceeds to note the complicity of the present appellant in the entire process of cheating or bungling with the record. The role ascribed to defendant No.9 is that in the written statement filed by defendant No.8, preliminary objection has been taken that Hawa Singh used to meet him with his two sons namely Rajesh and Suresh. In conspiracy with each other Hawa Singh used to call Rajesh as Suresh and vice versa. One day Hawa Singh came with Rajesh impersonating him as Suresh and purchased a buffalo from defendant No.8 on credit. Later on Hawa Singh and his two sons manipulated to obtain the signature of defendant No.8 on mortgage deed under the pretext that his son Suresh impersonated by Rajesh had to obtain a loan and that would facilitate them to pay the price of the buffalo. Defendant No.8 further alleged that at that time defendants No.9 and 10 were also present who put their signatures as witnesses on the mortgage deed.

[10]. Defendant No.9 also filed his written statement pleading that plaintiff-Bank is bound to follow the guidelines of the Reserve Bank of India, where loans are to be advanced under the Schemes sponsored by the State Government or the Central Government. The identification of the person by the

Bank and verification of the property of the loanee before executing the mortgage deed by the Bank officers and verification of the guarantor before executing guarantee deed by the Bank are sine qua non for such advancement of loan under the Policy of the State Government or the Central Government.

[11]. Defendant No.9 alleged that the Bank totally ignored to follow the guidelines of the Reserve Bank of India. Had the plaintiff-Bank followed the guidelines of the Reserve Bank of India, the fraud must have come to the light at the initial stage. It appears that the Bank officials also had joined hands with the wrong-doers. Plaintiff-Bank was duty bound to verify the contents of the application sponsored by the Department. Defendant No.9/appellant denied his being present before the Sub-Registrar at the time of registration of mortgage deed in the capacity of witness.

[12]. Parties went to the trial on the following issues:-

"1. Whether the plaintiff bank is entitled to recover an amount of Rs.4,73,479/- along with interest, costs etc. from the defendants on the grounds so mentioned in the plaint?OPP.

2. Whether the plaintiff has no locus standi and cause of action to file the present suit? OPD

3. Whether the suit is barred by limitation? OPD

4. Whether the suit is not maintainable in the present form? OPD

5. Relief."

[13]. Both the parties led their respective evidence on the aforesaid issues to prove their case.

[14]. The complicity of the appellant is to the extent that he signed the mortgage deed as witness, whereas the appellant has denied his signing in the capacity of witness before the Sub-Registrar.

[15]. Defendant No.8 has alleged that his signatures were obtained on the mortgage deed by playing fraud by defendants No.1 and 2 through their father Hawa Singh who used to call Suresh as Rajesh and vice versa.

[16]. Defendants No.9 and 10 have contented that they were not present at the time of registration of the mortgage deed Ex.P-12.

[17]. Both the Courts below have concurrently concluded that the appellant has signed the mortgage deed in the capacity of attesting witness and his absence before the Sub-Registrar at the time of registration of mortgage deed is wholly inconsequential.

[18]. I have considered the controversy with the assistance

provided by both the learned counsel for the parties.

[19]. Appellant has formulated following substantial questions of law in para No.9 of the grounds of appeal:-

> *"i) Whether any evidence beyond pleadings can be looked into while adjudicating a controversy?*
>
> *ii) Whether in the presence of loanee and a guarantor, any liability to pay their debt can be fastened on the alleged attesting witnesses of the mortgage deed?*
>
> *iii) Whether the judgment and decree passed by the courts below are perverse?"*

[20]. After perusing the record, I find that defendant No.9/appellant and defendant No.10 are shown to have signed the mortgage deed at the relevant place, however they have denied their presence at the time of registration of mortgage deed Ex.P-12.

[21]. According to me, they cannot be absolved of their participation in due execution of the mortgage deed because they have identified the fake person/executant of the mortgage deed. Appellant had also put his signatures as a witness on the mortgage deed Ex.P-12 at the time of its execution and he was party to the mis-representation committed by the defendant No.2. It hardly matters whether defendant No.9 was present

before the Sub-Registrar at the time of registration of the document or not because he signed the document in the capacity of witness.

[22]. The expressions '*onus probandi'* and '*animo attestandi'* are the basic features in testamentary depositions. '*Onus probandi'* lies in every case upon the party propounding a Will, whereas '*animo attestandi'* means and implies animus to attest. In common parlance it means intent to attest. The attesting witness must subscribe with the intent that the subscription of the signature made stands by way of a complete attestation of a testamentary deposition and the evidence is admissible to show whether such was the intention or not? The persons who had identified the testator at the time of registration of testamentary deposition and had appended their signatures at the foot of the endorsement by the Sub-Registrar, were not attesting witness as their signatures were not put '*animo attestandi'*. A person who had put his name under the word scribe was not an attesting witness as he had put his signature only for the purpose of authenticating that he was a scribe.

[23]. Similarly legatee who had put his signature on the Will in token of his consent to its execution was not attesting witness. The word attested occurs as part of the definition itself. To attest is to bear witness to a fact. The essential conditions of

valid attestation are that (i) two or more witnesses have seen the executant signed the instrument or have received from him a personal acknowledgment of his signature, (ii) With a view to attest or to bear witness to this fact each of them has signed the instrument in presence of the executant. It is essential that the witness should have put his signature '*animus attestandi*' i.e., for the purpose of attesting that he has seen the executant signing or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for any other purpose i.e. to certify that he is a scribe or an identifier or a registering officer, he cannot be treated to be an attesting witness.

[24]. The reference can be made to the aforesaid proposition in the light of observations made by the Hon'ble Apex Court in ***N. Kamalam (dead) and another vs. Ayyaswamy and Another, AIR 2001 Supreme Court 2802***.

[25]. Learned counsel for the appellant contends that the appellant is not signatory to the alleged mortgage deed in the capacity of attesting witness as he has not signed the document before the Sub-Registrar.

[26]. Fraud vitiates all solemn acts. It started with the preparation of the fraudulent application. Candidature of the loanee was got fraudulently sponsored from the Fishery

Department by preparing necessary documents. Even if, no loan was got released by the plaintiff-Bank, the appellant could not escape his involvement being the attesting witness to the transaction as mentioned above. The appellant became the attesting witness once he identified the executant of the document in the presence of other witnesses. Signing of document at the time of registration of the document/instrument does not bring the appellant in the category of attesting witness in the light of observations made in the aforesaid precedent.

[27]. Perusal of mortgage deed dated 12.08.2005 reveals that the signature by Ramphal is appearing in the first column, along with his father's name as Jai Dev Parshad with address of village Gurana. Appellant signed in the capacity of first witness and, therefore, this deed was presented before the Sub-Registrar for registration. Even if, the presence of appellant is not proved from the endorsement of the Sub-Registrar at the time of its registration, the appellant cannot be presumed to be not an attesting witness because attesting witness is the person who attested the document by specifying the maxim '*animo attestandi*' as discussed above.

[28]. In the light of aforesaid situation, the signature of the appellant has to be treated in the capacity of attesting witness and his mere absence from the office of Sub-Registrar and have

not signed the endorsement before the Sub-Registrar does not absolve him from his conduct being an attesting witness to the mortgage deed.

[29]. Both the Courts below have concluded that the appellant has necessary complicity in the entire episode. While issuing notice in the civil misc. application bearing No.1176-C of 2012 filed under Order 41 Rule 27 CPC for leading additional evidence, this Court on 09.02.2012 passed the following order:-

> "*This is an application Order 41 Rule 27 CPC for leading additional evidence. Learned counsel for the applicant/appellant places reliance on document Annexure A-1 to contend that even though the impugned judgment and decree of the lower appellate Court has been passed on 15.06.2011, the testimony of Suresh Kumar recorded on 12.01.2012 would be crucial in as much as such statement would clearly show that the defendant/appellant was neither present nor he has scribed his signatures on the mortgage deed Ex.PW4/A. Such subsequent event is the subject matter of the instant application.*
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> *Notice of the application for 05.03.2012.*"

[30]. Perusal of Annexure A-1, the document which is sought to be adduced as additional evidence is statement of PW-6 Suresh Kumar, who appeared in the trial arising out of FIR No.344 dated 15.12.2005. The statement of PW-6 is sought to be relied to extract the inference that at the time of writing

and registration of the document i.e. mortgage deed, appellant was neither present, nor scribed his signature.

[31]. Firstly this is a statement of defendant No.1 on attaining majority against whom *mala fide* is being projected. In the civil suit, even though he was a minor at the relevant time. Secondly the perusal of the mortgage deed itself produced in the civil Court Ex.P-12 shows presence of signature of the appellant at the concluding page of the mortgage deed in the capacity of witness No.1. Signature of appellant satisfies the concept of '*animo attestandi*' and, therefore cannot be allowed to wriggle out the complicity on the strength of statement of Suresh Kumar being made during trial of the criminal case. Moreover the evidence of criminal case cannot be relied in the present case as no such proceedings have been exhibited on record of this case.

[32]. As discussed above in the light of observation made in ***N. Kamalam (dead) and another***'s case (supra) no cognizance can be taken solely because the appellant was not present at the time of registration of the instrument whereas his signature is very much present in the capacity of attesting witness No.1 at the relevant page. His presence is not necessary to be recorded at the time of registration of the instrument being '*animo attestandi*'. Therefore, in considered

opinion of this Court the application under Order 41 Rule 27 CPC for leading additional evidence is wholly inconsequential. Similarly another application No.CM-12047-C of 2015 for securing presence of respondents No.2 and 4 through coercive steps is also not consequential as the main case is being decided. Natural consequences would follow in due course.

[33]. In view of aforesaid, the questions of law as formulated in the appeal do not involve. Question No.(i) cannot be looked into as the findings recorded by the Courts below are not based on the evidence beyond pleadings of the case. Question No.(ii) has to be considered on the basis of evidence as to who has derived benefit of the loan. Even, if, said liability to pay the loan primarily rested upon loanee and on the guarantor in the event of default by the loanee, but in the entire episode conduct of the defendants has been highlighted. Appellant was also found one of the person who has actively participated in the entire episode.

[34]. In view of above, the findings recorded by the Courts below cannot be held to be perverse, Consequently, there is no scope for interference in the present appeal and the same is accordingly dismissed.

January 07, 2016 **(RAJ MOHAN SINGH)**
Atik **JUDGE**