

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

RSA No.784 of 2011 (O&M)

Date of decision : 30.09.2016

Mahinder Kumar

...Appellant

Versus

Mani Devi and others

..Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL.

Present: Mr. Ramesh Sharma, Advocate for the appellant.

Mr. Rakesh Nehra, Advocate for the respondents.

AMIT RAWAL, J. (Oral)

CM No.2158-C of 2011

For the reasons stated in the application, which is supported by an affidavit, LR's of plaintiff-Bhim Sain as mentioned in the application, are ordered to be brought on record for the purpose of prosecuting the present appeal.

Application stands disposed of.

Main Case

The appellant-defendant No.2 is aggrieved of the judgment and decree rendered by the lower Appellate Court, whereby suit of the respondent(s)-plaintiff(s) though dismissed by the trial Court, has been decreed.

Mr. Ramesh Sharma, learned counsel appearing on behalf of appellant-defendant No.2 submits that Tikku Ram was the father of Chhabil Dass and Bhim Sain. During his lifetime, he suffered a decree dated 18.04.1972 vide which 10 kanals of land had fallen to Bhim Sain and 10 kanals to Raj Kumar son of Chhabil Dass. He was owner of 48 acres of land. Again in the year 1988, three persons i.e. two sons of Chhabil Dass (plaintiff Nos.1 and 2) and one Bhim Sain i.e. plaintiff No.3, filed the civil suit No.604-C of 1988 against Tikku Ram which resulted into passing of judgment and decree dated 08.09.1988 and as per the aforementioned judgment and decree, 10 acres of land had fallen to Bhim Sain and 18 acres of land to plaintiff Nos.1 and 2. The plaintiff-Bhim Sain had challenged the aforementioned judgment and decree by filing suit on 11.05.2007 on following grounds:-

- i) Tikku Ram had died in the year 1971.
- ii) Plaintiff never filed the plaint nor engaged services of an advocate in order to suffer statement in the Court.

Even an FIR was registered, though it resulted into acquittal. In fact, suit was ex facie barred by law of limitation, much less, act of greed as has been filed after almost 10 years. No explanation has come forth in challenging the aforementioned decree during all these years. In fact, the respondent(s)-plaintiff(s) failed to discharge the onus as enshrined under Section 101 of the Indian Evidence Act. No documentary evidence, much less, any statement i.e. direct or cogent, or corroborative has been brought on record to prove the factum of death in the year 1971. All these factor weighed in the mind of Courts below resulted into dismissal of

the suit by the trial Court but the lower Appellate Court relied upon the statement suffered by other litigants i.e. between Chhabil Dass, Raj Kumar and his sons. Even if the aforementioned statements have to be looked into, then as per statement of heirs, Tikku Ram died in the year 1974 but heir's statement cannot be looked into. The FSL report Ex.A1 cannot be looked into for it had compared the thumb impression of Bhim Sain on the plaint and on the power of attorney filed in Civil Suit No.604-C of 1988 with specimen thumb impression given on 28.12.2000. There is variation in the thumb impression after 10 years and as all of the pressure, the respondent-plaintiff has also not examined the thumb impression of Tikku Ram. All these factors escaped the notice of the Court and thus urges this Court for setting aside of the judgment and decree under challenge.

Per contra, Mr. Rakesh Nehra, learned counsel appearing on behalf of respondent(s)-plaintiff(s) submits that when PW1 examined and cross-examined stated that Tikku Ram had died in the year 1982, 20 years back. FSL Report is of Government agency and cannot be discarded. There is admission of the defendants qua death of Tikku Ram in the year 1974. Tikku Ram was not alive when the decree of 1988 came to be passed. No doubt, the appellant was acquitted on technical grounds as the FSL report had not been proved in accordance with law. He submits that it was a total collusive suit which was not in consonance with the provision of Order 4, Order 5, Order 14 as it had been decreed without framing of issues. First date of hearing of the suit is only when issues were framed. In support of his contention, he has relied upon judgment rendered by Hon'ble Supreme Court in *Badami (deceased) by LRs Vs. Bhali*, 2012 (11) SCC 574, and

urges this Court for affirming of the findings under challenge.

I have heard learned counsel for the parties and appraised the paper book and of the view that respondent-plaintiff has miserably failed to discharge the onus vis-a-vis the death of Tikku Ram who alleged to have been died in the year 1971. Even in the statement of PW1, there is no single iota of averments or whisper qua death of Tikku Ram. No documentary evidence qua his death has been brought on record. Chowkidar PW2 had also not deposed in terms of averments made in the plaint. Statement that Tikku Ram was unheard for the 10 years is an hearsay. There is no decree qua death of Tikku Ram.

In my view, respondent-plaintiff has failed to discharge the onus. FSL Report cannot be treated as sermon, for, it had compared the thumb impression on the power of attorney and plaint of the year 1988 with the specimen thumb impression given on 28.12.2000. There is stark differences in the line of thumb which change over a period of time as persons grouse ages. No effort has been made for taking thumb impression on the plaint and statement suffered. Until and unless something startling element of fraud is brought to the notice of this Court. Filing of the suit after 10 years, in my view is an act of aggrandizement as deemed owner had got lesser area from the son of Chhabil Dass than other brother had got. If at all, it has to be believed that Tikku Ram had died in the year 1971, then decree dated 18.04.1972 suffered by the Tikku Ram would also go, which is not under challenge.

For the reasons aforementioned, I am of the view that respondent-plaintiff has failed to discharge the onus, much less, ingredients

of Order 6 Rule 4 of the Code of Civil Procedure with regard to the fraud and misrepresentation, much less, forgery or impersonation.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in ***Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213***, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure, so there is need to frame the substantial questions of law or not. The Constitutional Bench of Hon'ble Supreme Court held that the decision in ***Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262*** on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)] cannot be sustained and is thus overruled.” [at paras 27 – 29] ”

“27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned. For the reasons aforementioned, the findings rendered by the Lower Appellate Court are set aside. The suit of appellant-plaintiff succeeds. The judgment and decree of

the trial Court is restored.

Resultantly, the Regular Second Appeal stands allowed.

30.09.2016

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**(AMIT RAWAL)
JUDGE**

Whether speaking/reasoned:-

Yes/No

Whether reportable:-

Yes/No