

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

Regular Second Appeal No.3115 of 2013 (O&M)

Date of decision: 31.3.2016

Balwinder Kaur

... Petitioner

Versus

Amarjit Singh

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr.K.S.Dadwal, Advocate,
for the petitioner.

Mr.Mohd. Yousaf, Advocate,
for the respondent.

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

AMIT RAWAL, J. (Oral)

The appellant-plaintiff is aggrieved against the judgment and decree of both the courts below whereby the suit for declaration challenging the decree dated 30.6.2006 has been dismissed.

Mr.Krishan Singh Dadwal, learned counsel appearing on behalf of the appellant-plaintiff submits that the respondent obtained the aforesaid decree by playing a fraud upon the appellant by giving a wrong address as village Ucha Pind, District Kapurthala instead of Jalandhar before the Court below. The docket of the judgment and decree was placed on the record but the Court did not take it into consideration for want of proof on record. It was, in these circumstances that the suit was dismissed. However, during the appellate stage, an application under Order 41 Rule 27 CPC was moved for

placing on record a copy of the judgment and decree but the lower court has declined the same by holding that expression “despite exercise of due diligence” has not been complied with in the essence appellant had knowledge of the same and, therefore, it tantamounts to filling up a lacuna and erroneously dismissed the appeal.

Mr.Mohd. Yousaf learned counsel appearing on behalf of the respondent-defendant submits that rightly so, the suit has been dismissed for want of admissible evidence. Photocopy of the document/only simple letter cannot prove the case of alleged fraud. It was incumbent upon the plaintiff to discharge the onus by leading evidence, vis-a-vis the ex parte decree. Having failed to do so, adverse inference has rightly been drawn.

In rebuttal, Mr.Dadwal submits that on going through the record, it transpired that in para. 2 of the written statement, the defendant admitted the existence of ex parte judgment and decree dated 30.6.2006. In view of such admission and as well as the provisions of Section 58 of the Indian Evidence act, the appellant was not required to prove the same. This fact escaped the notice of the Court being the last Court of fact and law, thus urges this Court to formulate the following substantial question of law : -

“Whether the judgment and decree of the lower appellate court suffers from illegality and perversity muchless misreading of the pleadings and documentary evidence on record?”

I have heard learned counsel for the parties and appraised the paper book.

In view of the shorn of the facts noticed above, I am of the view

that both the courts below have failed to advert/refer to the categorical pleading in the plaint vis-a-vis existence of the judgment and decree.

It is a settled law that admitted facts are not to be proved and only those documents and facts are required to be proved where parties are at variance. Since the appellant has not been deprived consideration of the fact and law before the first appellate court, I deem it appropriate to remand the case by setting aside the impugned judgment and decree of the learned appellate court who, shall after considering the aforesaid facts, decide the same in a most pragmatic manner. Accordingly, the question of law noticed above is answered in favour of the plaintiff and against the respondent. The judgment and decree of the learned appellate court is set aside. The matter is remanded back to the learned lower court for deciding the appeal afresh in accordance with law within a period of 6 months from the date of receipt of a certified copy of this order.

Parties are directed to appear before the lower appellate court on 2.5.2016.

Regular Second Appeal stands disposed of.

(AMIT RAWAL)
JUDGE

March 31, 2016
Paritosh Kumar