In the High Court of Punjab and Haryana, at Chandigarh

Regular Second Appeal No. 981 of 2014 (O&M)

Date of Decision: 27.05.2016

Ramesh Rani

... Appellant(s)

Versus

Punjab Financial Corporation and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Shekher Dhawan.

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

Present: Mr. Baldev Raj Mahajan, Senior Advocate
with Mr. Prateek Mahajan, Advocate
for the appellant(s).

Mr. Ramandeep Singh, Advocate
for Mr. Vikas Sharma, Advocate
for respondents No.1 & 2.

Shekher Dhawan, J.

Present regular second appeal, filed by the plaintiff, against concurrent findings of facts having been recorded by the Courts below in a suit for declaration and permanent injunction, which was dismissed by the Court of first instance and first appeal having been dismissed by the first Appellate Court.

For the sake of convenience, parties are being referred to as per their status before the Court of first instance.

Relevant facts of the case that plaintiff filed suit for declaration and permanent injunction on the ground that she is owner in possession of the house, which was constructed by her after purchasing the land underneath the house from Baljit Kaur wife of Kashmira Singh vide sale deed dated 6.6.1972 and registered on 7.6.1972. Roshan Lal, who was on visiting terms to the house of the plaintiff, had committed theft of original sale deed, which came to the knowledge of the plaintiff/owner when she received the notice on 16.10.2001 from defendant No.2. However, plaintiff had never executed any sort of document in favour of defendants No.1 & 2, nor she had mortgaged the house in dispute in their favour. She never stood guarantor or surety of defendant No.3 to defendants No.1 & 2. The alleged mortgage deed must be a result of fraud and impersonation. Even the photo, if any, appearing in the alleged mortgage deed does not relate to the plaintiff and the same was brought to the notice of defendants No.1 & 2 but they did not care. As such, necessity of the suit.

Defendants No.1 & 2 contested the suit *inter alia* taking the plea that suit property stands mortgaged as collateral security in favour of Roshan Industries. However, in order to avoid legal liability of mortgagor, in the account of Roshan Industries, the plaintiff has taken wrong plea that original sale deed standing in her name had been taken away by Roshan Lal. She had not created any mortgage deed in favour of defendants No.1 & 2. The legal action was rightly initiated. The liability of the plaintiff is co-extensive as principal borrower and mortgagor failed to clear their accounts as per the financial discipline of defendant-corporation and prayed that suit be dismissed.

Defendant No.3 did not file the written statement.

On these facts, issues were settled by the Court of first instance and parties were put to trial. After recording the evidence and appreciating thereof, the Court of first instance recorded the findings that defendants have been able to discharge the onus of execution of mortgage deed by the plaintiff and resultantly, suit of the plaintiff was dismissed. First appeal preferred by the plaintiff was dismissed by the first Appellate Court and as such present regular second appeal before this Court.

After hearing learned counsel for the appellants and perusal of the record, this Court is of the view that following substantial question of law is involved in the present case:

> ***"Whether the mortgage deed was duly executed by the plaintiff and the same was duly registered in favour of defendants No. 1 & 2?"***

Learned counsel for the appellant, at the time of arguments, took the plea that the Courts below have not considered the legal aspects of the matter at all. Issue No.5A was most relevant issue for the purpose of decision of the case and the same reads as under:-

> *"5A. Whether plaintiff has executed and registered any mortgage deed in favour of defendant No.1 as alleged? OPD"*

As per the provisions of Section 59 of the Transfer of Property Act, 1882, mortgage deed, other than mortgage by deposit of title deeds can be effected only by registered instrument signed by the mortgagor and attested by at least two witnesses. Relevant Section 59 *ibid* reads as under:-

*"59. **Mortgage when to be by assurance***

Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property."

The only point to be seen was whether mortgage deed was duly executed and registered as per the provisions of Sections 67 & 68 of the Indian Evidence Act, 1872. For ready reference, Sections 67 & 68 *ibid* read as under:-

"67. Proof of signature and handwriting of person alleged to have signed or written document produced.

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

68. Proof of execution of document required by law to be attested.

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court *and capable of giving evidence:*

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

As per Section 67 ibid, the mortgage deed was required to be proved that the same was in the handwriting of the person, who allegedly executed the sale deed. As per Section 68 *ibid*, the said mortgage deed was required to be attested and the same was not to be used as evidence unless one attesting witness is examined to prove the same. The onus was lawfully upon the defendants, but defendants failed to discharge the onus.

Plaintiff proved that FIR No. 26 dated 17.3.2003 was registered under Sections 420, 467, 468, 471 & 120-B IPC at Police Station City Batala against Roshan Lal (defendant No.3) and his wife Sarita and both of them were arrested in the said case and remained behind the bars for more than four months. After investigation, challan was presented against them. All these facts established the version of plaintiff to be correct. To the contrary, the onus to prove issue No.5A was upon the defendants but they failed to discharge the onus as required under Section 59 of the Transfer of Property Act and Section 68 of the Indian Evidence Act and the Courts below have completely ignored these legal propositions, which resulted into erroneous findings.

So, in view of above, the substantial question of law is answered in favour of the plaintiff and against the defendant. Consequently, findings, recorded by both the Courts below on issues No.5A and the remaining issues, are set aside and the same are decided in favour of the plaintiff and against the defendants. Present appeal is hereby accepted and suit of the plaintiff stands decreed.

(Shekher Dhawan)
Judge

May 27, 2016
"DK"