

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

101

RSA No.984 of 2006 (O&M)

Date of decision: 23.08.2017

Chatra

..... Appellant

Versus

Khazani and another

..... Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. G.S. Nagra, Advocate
for the appellant.

Mr. V.K. Jindal, Sr. Advocate with
Ms. Janya Sarohi, Advocate
for the respondents.

ANIL KSHETARPAL, J. (ORAL)

Plaintiff is in Regular Second Appeal against the judgment passed by Additional District Judge, Kaithal reversing the judgment of the trial Court.

While admitting the appeal on March 20, 2006, this Court passed the following order:-

“Counsel for the appellant contends that in this case the trial Court has decreed the suit of the plaintiff while holding that the collusive decree dated 8.6.1982 is null and void, and the said finding was recorded on the basis of the expert's report, who had compared the admitted thumb impressions of the plaintiff (Ex.P1), which were taken in presence of the Presiding Officer in the Court, and further recorded a finding that the defendants have failed to prove the family settlement. However, the first Appellate Court has reversed the judgment and decree of the trial Court on the ground that the specimen thumb impressions

of the appellant were not in terms of Section 73 of the Indian Evidence Act and further it has been found that the plaintiff has failed to prove his possession over the suit land, therefore, his simple suit for declaration is not maintainable. Counsel contends that both the findings recorded by the first Appellate Court are contrary to the evidence of the parties. He submits that the first Appellate Court has totally ignored the specimen thumb impressions of the plaintiff (Ex.P1), which were taken in presence of the Presiding Officer and those were compared by the Handwriting Expert, who found that the same were not tallying with the thumb impressions of the plaintiff on the written statement, power of attorney etc. in the previous suit. The first Appellate Court has also not taken into consideration that the plaintiff was a co-sharer and the land was joint. In view of these submissions, the following substantial questions of law are involved in this appeal:-

- (i) Whether the signatures taken by the Handwriting and Finger Print Expert of the plaintiff-appellant before the Presiding Officer for comparison were as per requirement of Section 73 of the Evidence Act?*
- (ii) Whether the decree dated 8.6.1982 was compulsorily registrable when there was no family settlement proved by the defendant-respondent No.1?*
- (iii) Whether the suit of the plaintiff-appellant can be dismissed on the ground that he has not sought possession of the suit land even though he is a co-sharer with the defendant-respondent No.1?*

Admitted.

Status -quo regarding alienation be maintained by the parties during the pendency of the appeal.”

Plaintiff had filed a suit for declaration and permanent injunction. Plaintiff had claimed that he is owner of the land mentioned in the plaint. He challenged the decree passed by Civil Court in Civil Suit

No.491 of 1982 titled Smt. Khazani Vs. Chatra etc. It was stated that the

aforesaid decree is result of fraud. The decree was challenged on various grounds.

Defendant No.1 contested the suit and claimed that the suit was not maintainable. The suit was also claimed to be barred by time. It was pleaded that Chatra himself had suffered the impugned decree. Defendant denied the allegation of fraud. Defendant further reiterated that a family settlement was arrived at and pursuant to the aforesaid family settlement, the plaintiff suffered a decree.

Learned trial Court after appreciating the evidence available on the file decreed the suit filed by the plaintiff to the extent of declaration that the aforesaid decree is result of fraud. Learned trial Court relied upon the opinion of the expert who opined that the thumb impressions of Chatra available on the written statement and the statement before the Court in the previous suit which resulted in decree dated 08.06.1982 do not match with the standard thumb impressions of Chatra taken in the Court in the present suit.

Defendant No.1 filed an appeal. The First Appellate Court has reversed the judgment and decree of the trial Court by assigning two reasons:-

- (i) Plaintiff is not proved to be in possession. Plaintiff has not made a prayer for delivery of possession. In view of Section 34 of the Specific Relief Act, plaintiff was entitled to seek further relief of possession which he has failed to do so. Therefore, the suit is not maintainable.
- (ii) The thumb impressions taken before the Civil Court cannot be considered as standard thumb impressions as per Section 73 of the Evidence Act, 1872.

I have heard the learned counsel for the parties at length and with their able assistance gone through the judgments passed by the Courts below as well as records.

As noticed above, while admitting the Regular Second Appeal, Court had framed three questions of law.

Question No.1

- (i) *Whether the signatures taken by the Handwriting and Finger Print Expert of the plaintiff-appellant before the Presiding Officer for comparison were as per requirement of Section 73 of the Evidence Act?*

In this case, the standard thumb impressions of plaintiff were taken in the presence of counsel for the parties and the Presiding Judge in the Court. Six standard thumb impressions of left hand and six thumb impressions of right hand were taken. It is not in dispute that the thumb impressions of plaintiff were taken when counsel for defendant was also present.

Section 73 of the Evidence Act, 1872 is extracted as under:-

“Comparison of signature, writing or seal with others admitted or proved.- *In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.*

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

[This section applies also, with any necessary modifications, to finger impressions.]”

It is clear from the reading of Section 73 that the Court can direct any person present in the Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person. This provision also applies with necessary modification to finger impressions also.

Therefore, learned First Appellate Court clearly erred in refusing to accept the standard thumb impressions of Chatra-appellant taken before the Presiding Judge to be standard thumb impressions. Learned Court has totally misinterpreted the provisions of Section 73 of the Evidence Act.

Still further, appellant in order to prove that he did not appear and make any statement in civil suit decreed on 08.06.1986, examined the handwriting and finger print expert. The handwriting and finger print expert after examining the thumb impressions gave his opinion vide report Exhibit P-2 available on the file. The aforesaid handwriting and finger print expert also appeared in the witness box as PW-1. As per the opinion of the handwriting and finger print expert, the basic pattern of left standard thumb impressions and the thumb impressions appearing in the written statement and the statement suffered in the Court during the suit No.491 of 1982 do not match/tally with the standard thumb impressions taken in the Court. It was concluded that the earlier thumb impressions have not been affixed by the plaintiff.

In view of what has been noticed above, learned First Appellate Court committed the material irregularity while refusing to accept the thumb impressions taken before the Judge in the presence of the counsel for the parties to be standard thumb impressions. Hence, first question of law is answered in favour of the plaintiff.

Question No.2

- (ii) *Whether the decree dated 8.6.1982 was compulsorily registrable when there was no family settlement proved by the defendant-respondent No.1?*

Since it has been found that Chatra did not suffer the decree, therefore, second question as framed need not be answered because the decree itself has been found to be result of impersonation.

Question No.3

- (iii) *Whether the suit of the plaintiff-appellant can be dismissed on the ground that he has not sought possession of the suit land even though he is a co-sharer with the defendant-respondent No.1?*

With respect to question No.3, it is significant to mention here that Chatra was a co-owner. Chatra, after the Civil Court decree which has been found to be result of impersonation, would again be co-owner. He could not have filed a suit for possession of his share. He can get the possession of the property only after seeking partition which would only be possible before the revenue Court. Every co-owner is deemed to be in possession of every part of the land. In these circumstances, learned First Appellate Court fell in error in holding that since Chatra is not in possession and had not sought possession, hence, his suit is liable to be dismissed.

Learned counsel for the respondents has submitted that learned trial Court has recorded a finding that Chatra is not in possession. Such finding has not been challenged and therefore, it has become final.

Section 34 of the Specific Relief Act, 1963 provides that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. In this case as discussed above, Chatra could not have filed a suit for possession as he is

co-owner in the property and only remedy available to the plaintiff is to file proceedings for partition of the property in accordance with the provisions of Punjab Land Revenue Act, 1887.

In view of the above, question No.3 is also answered in favour of the plaintiff.

Learned counsel for the respondents has further submitted that the suit filed by the plaintiff was barred by time as the decree was passed in 1986 and the suit was filed in 1996. It will be noticed that before the Courts below, defendant did not raise the issue of limitation as well as the lower Court also has not framed such issue of limitation.

Plaintiff in his plaint had pleaded that decree was not incorporated in the revenue record. Defendant failed to prove that the plaintiff had a knowledge of the aforesaid decree. Plaintiff had asserted that he came to know about the decree in May, 1996. In case of fraud, the limitations start from the date of knowlege. Defendants have not led any evidence to prove that the plaintiff had knowledge of the decree prior thereto.

In these circumstances, there is no force in the submissions of learned counsel for the respondents.

In view of the discussion made above, the judgment passed by the learned First Appellate Court is set aside and that of the trial Court is restored.

Regular Second Appeal is allowed.

23.08.2017
Dinesh Bansal

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned Yes / No

Whether Reportable Yes / No