

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

RSA No.2761 of 2005 (O&M)
Date of Decision:29.01.2019

Rambir

...Appellant(s)

Versus

Lekha

...Respondent(s)

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.J.K.Sharma, Advocate for
Mr.Shailender Sharma, Advocate for the appellant.

Mr.Adarsh Jain, Advocate for the respondent.

ANIL KSHETARPAL, J.

The defendant-appellant is in the regular second appeal against the judgment passed by the learned first appellate court reversing the judgment of the learned trial court resulting in decreeing the suit filed by the plaintiff-respondent.

The questions which require consideration are as under:-

- (i) Whether in absence of any cogent evidence, the court can infer/assume fraud in the conduct of the proceedings in the previous suit and on that basis set aside the judgment and decree passed by the court in the previous suit with the consent of the parties?
- (ii) Whether non-disclosure of pending suit between the parties is fatal to the result of the suit under Order 7 Rule 1(j) of the Code of Civil Procedure (`for short `CPC) as applicable to

the States of Punjab, Haryana and UT Chandigarh?

Some facts are required to be noticed. Paras Ram, a common ancestor of the parties, was having five sons namely Lekha, Har Narain, Nand Ram, Jal Singh and Bohri Lal. Lekha was a childless bachelor. Jal Singh has a son namely Rambir. Rambir initially filed a Civil Suit No.701 of 1998 on 09.11.1998, pleading that in a family settlement which took place one year back, Lekha had admitted claim of Rambir in the suit resulting in declaration that he is owner in possession. Now this fact is being disputed. During the pendency of the aforesaid suit, Rambir filed another suit on 13.05.1999 bearing Civil Suit No.220 of 13.05.1999 pleading that in a family settlement which took place on 01.01.1999, Lekha-defendant/appellant had admitted that Rambir-plaintiff to be owner in possession. In the aforesaid second suit i.e. Civil Suit No.220 of 13.05.1999, Lekha appeared through counsel on 21.05.1999 and filed a written statement through counsel admitting the assertion made in the plaint. Shri Lekha appeared before the court and suffered a statement admitting the contents of the plaint. Rambir also suffered a statement on the same day and the court passed a judgment and decree under Order 12 Rule 6 CPC. The decree, which has been passed, was first challenged by brother of Lekha, Har Narain and the aforesaid suit as per the pleadings is pending. Lekha also filed a suit on 19.07.1999, challenging judgment and decree dated 25.05.1999 on the ground that the aforesaid judgment and decree is result of fraud. At this stage, it may be noticed that Lekha in his plaint stated that Rambir had brought to the civil court at Palwal and got his signatures on some papers on the excuse that the plaintiff had to defend a

suit filed against him by his other nephews. Lekha also stated in the plaint that he appeared before the court but the Presiding Judge did not ask him as to how and for what purpose the plaintiff has come to the court. With these assertions, the suit was filed which was contested by Rambir-appellant herein. Assertions with regard to fraud were disputed and it was reiterated that this suit has been filed by the plaintiff in collusion with Har Narain, his brother, who has also filed a similar suit which is pending.

Learned trial court dismissed the suit, whereas the learned first appellate court has reversed the judgment and decree. Learned first appellate court has recorded following reasons:-

- (i) Second suit i.e. Civil Suit No.220 of 1999 was not maintainable once first suit i.e. Civil Suit No.701 of 1998 was pending.
- (ii) Second suit is hit by the principles of *resjudicata*.
- (iii) Plaintiff Rambir when appeared in evidence has stated that he has not signed the plaint Ex.PY i.e. in a Civil Suit No.220 of 1999 and therefore, there was no suit filed by Rambir.
- (iv) Since pendency of Civil Suit No.701 of 1998 was not disclosed while filing the second suit 220 of 1999, therefore, the non-disclosure is fatal to the suit. Hence, judgment and decree is liable to be set aside.

It may be noted that Civil Suit No.701 of 1998, i.e. the first suit, was dismissed for non-prosecution on 29.05.1999. In support of his evidence, Lekha has appeared as PW-1. He, while deposing in his testimony, has denied that he had appeared in the court on the day decree was passed. He even goes to the extent of refusing to recognise his photograph affixed on the written statement filed in Civil Suit No.220 of

1999 i.e. the second suit. He has reiterated the assertions made in the plaint. He has stated that his thumb impressions were taken by the counsel for the plaintiff-Rambir. He has also examined Ganga Ram son of Tulsi, who is a resident of the village and has stated that the land is in possession of Lekha, who resides with Har Narain. Similarly, one Yad Ballabh has also been examined, who has also deposed on the similar line.

Setting aside of a judgment and decree passed by the court of competent jurisdiction is a serious matter. The courts should not set aside the decree on mere asking. As per Order 6 Rule 4 CPC, the plaintiff is required to specifically plead particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence. Such pleadings of fraud have to be proved. The standard of proof required for proving fraud is extremely high and equivalent to the duty of the prosecution to prove the case beyond any reasonable doubt. Inference of fraud, should not be ordinarily drawn by the court unless there is unimpeachable evidence in support thereof.

Now let us examine the reasons given by the learned first appellate court to set aside the decree.

Learned first appellate court has held that the second suit was not maintainable when first suit is pending as it would be hit by the principle of *resjudicata*. The reason given by the learned first appellate court is clearly erroneous. The principle of *resjudicata* can be invoked only if a previous suit has been decided between the same parties on merits and the issue was directly or substantially in issue in the previous suit which has been decided on merits. In the present case, admittedly the first suit was

dismissed for non-prosecution and that also after the decree has been passed in the second suit as the first suit was dismissed for non prosecution on 29.05.1999, whereas second suit was decided on 25.05.1999. Hence, the second suit was not barred on account of *resjudicata*. Section 11 of the CPC deals with *resjudicata*. In the present case, Section 11 CPC would have no application, because neither the first suit was decided first of all nor it was decided on merits.

Learned first appellate has further erred in recording a finding that since Rambir while appearing in evidence has stated that he had not signed plaint Ex.PY of Civil Suit No.220 of 1999, therefore, there was no suit filed by him. No doubt, Rambir in the cross-examination has fumbled. But such statement in one line cannot be read in isolation of the entire statement. In examination-in-chief, he has specifically stated that he had filed the suit on the basis of family settlement in which he and Lekha had appeared and their statements were recorded. During the cross-examination when he was confronted with the plaint of Civil Suit No.220 of 1999, he stated that it does not bear his signatures. Ex.PY is on record on which signatures of Rambir exists. In these circumstances, the learned first appellate court has erred in picking up one line in the cross-examination to treat it as an admission of Rambir that he never filed the suit. Once document i.e. plaint was available for perusal of the court, learned the first appellate court erred in overlooking the fact.

Still further the learned first appellate court did not choose to read the entire statement of Rambir who has appeared in Court in this suit as DW-3. It is well settled that one line in the cross-examination cannot be

read in isolation of the entire statement. It is the entire statement which has to be read and understood rather than reading only one line. Therefore, the learned first appellate court has erred in recording a finding that there was no suit instituted by Rambir.

Next reason assigned by the learned first appellate court is based upon interpretation of Order 7 Rule 1(j) CPC as applicable to States of Punjab, Haryana and U.T. Chandigarh. Order 7 Rule 1(j) CPC provides that in the plaint a statement to the effect that no suit between the same parties or between the parties under whom they or any of them claim, litigating on the same grounds has been previously instituted or finally decided by a court of competent jurisdiction or limited jurisdiction, as if so, with what results. No doubt, a plaint filed in the court, the plaintiff is required to disclose a previously instituted suit pending between the same parties or if decided what results. However, attention of this Court has not been drawn on any provision which leads the Court to a conclusion that such non disclosure would be fatal to the result of the suit. No doubt, it is expected that previously instituted suit should be disclosed. However, in absence of any such provision in the Code of Civil Procedure or in the High Court Rules and Orders, it would not be safe to hold that such non-disclosure which amounts to non compliance of Order 7 Rule 1(j) as such is fatal to the suit itself and the court must reject the plaint.

Still further the second suit has already resulted into a decree. Question is “whether a decree which has already been passed can be set aside on this ground”. In the considered view of this Court, the answer would be no. Once there is no provision that the Code of Civil Procedure

which lays down the consequences of non disclosure of the particulars as required under Order 7 Rule 1(j) CPC shall have to be rejected, setting aside of the decree on that ground would not be correct.

Learned counsel appearing for the respondents has relied upon a judgment passed by the Hon'ble Supreme Court in the case of ***Santosh Vs. Jagat Ram and another, 2010 (3) SCC 251*** in support of his submission that such decrees are liable to be set aside on the ground of fraud.

This Court has carefully read the judgment passed by Hon'ble the Supreme Court in the case of ***Santosh*** (supra). In the aforesaid case, Hon'ble the Supreme Court was faced with a situation when plaint, written statement, statement in court and the decree was passed on the same day against a helpless widow. Still further, the Court found that her statement recorded after passing of the decree in pursuant to a caveat filed was clearly act of fraud. Hence, the aforesaid judgment is a judgment in the facts of the case and it does not lay down as a *ratio decidendi* that wherever a consent decree has been passed it must be set aside.

In the present case, Civil Suit No.220 of 1999 was filed on 13.05.1999, whereas Lekha appeared in Court on 21.5.1999, filed his written statement as well as appeared in court and suffered a statement duly identified by his counsel. The court still adjourned the case for four days and the judgment and decree was passed on 25.05.1999. Hence, the aforesaid judgment would not have any application on the facts of the present case. Still further, learned counsel for the respondent has relied upon a statement of Megh Shyam Sharma, Advocate, who represented Lekha in Civil Suit No.220 of 1999. He submitted that the counsel has

admitted that Lekha was referred to him by Shri K.P.Sharma, Advocate, who was representing Rambir. In the considered view of this court, once there was no contest between Lekha and Rambir, then merely because Lekha was referred by the counsel for the plaintiff in the aforesaid suit, Megh Shyam Sharma cannot be made basis to return a finding of fraud. It is well settled that finding of fraud cannot be arrived at merely on the ground that there is grave suspicion. The finding of fraud can only be given on the basis of cogent and reliable evidence proving the fraud to the hilt. In the present case, neither necessary particulars of the fraud have been pleaded nor proved.

Accordingly, the questions of law framed are answered against the respondent and in favour of the appellant.

Resultantly, the Regular Second Appeal is allowed. The judgment and decree passed by the learned first appellate court are set aside and that of the learned trial court is restored.

29.01.2019
mks

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No