

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

RSA No.4593 of 2018 (O&M)

Date of Decision: 11.09.2019

Parkash Chand and Anr.

.....appellants

Vs.

Ajay Kumar and Others

.....Respondents

CORAM: HON'BLE MR.JUSTICE DR. RAVI RANJAN

Present:- Mr.Vijay Lath, Advocate, for the appellants.

DR. RAVI RANJAN, J. (Oral Judgment)

CM No.12234-C of 2018 and
CM No.12235-C of 2018

These applications have been filed for placing on record the copy of Affidavit dated 30.07.2012 as Annexure A-1 and for granting leave to the appellants to lead additional evidence by allowing them to produce the original of Mark-A and for taking it on record as evidence.

It appears from the record that a General Power of Attorney, purported to have been executed by Avtar Singh in favour of defendant No.1-appellant, has been brought on record as DW4/A. Along with it, an affidavit purported to have been executed by Avtar Singh stating therein that he is executing a power of attorney in view of consideration of Rs.7 Lacs which he had received from the defendant No.1 and also stating that he was executing the Power of Attorney for the reason that his son was not looking after him rather his brother, v.i.z., Parkash Chand was looking after him, was also attached.

These applications have been filed under Order XLI Rule 27

CPC. First of all, it has to be seen as to whether such application should be

allowed by this Court or not. On a plain reading of Order XLI Rule 27 CPC, it appears that in exceptional circumstances, the appellate Court can allow one of the parties to lead additional evidence. Those circumstances stand carved out in the statute itself. First and foremost is that the Court, from whose decree the appeal is preferred, had refused to admit such evidence. The appellants' case cannot be covered under this provision as it has categorically been stated that no such application was filed before the first appellate Court. The second is the under Order XLI Rule 27(aa) lays down that the party seeking to produce additional evidence, has to establish that such evidence was not within his knowledge or could not, even after exercise of due diligence, be produced by him at the time when the decree appealed against has been passed. In my considered opinion, the case of the appellants is not covered under this provision also for the reason that it was well within their knowledge that such affidavit existing as Xerox copy thereof was filed showing passing of Rs.7 Lacs to Avtar Singh. He has not stated anywhere that he did not have knowledge of such affidavit. He cannot say so also because he had produced Xerox copy of the document before the Trial Court. That apart, admittedly, he never filed any application before the trial Court so that an order could have been passed to procure the original from the office of sub-Registrar so that he could have proved his case. That having not been done, since no reason has been given as to why that could not be done, it would be very difficult for this Court to allow such prayer at the second appellate stage. It has been stated by him in the cross-examination that the plaintiff has admitted that he has seen the affidavit in the office of sub-Registrar but it was not a case that Xerox copy of such

proved. In such a situation also there would not be any reason to adduce additional evidence. Apart from above, it appears that when the issue of non-availability of the original affidavit was being raised before the First Appellate Court and was being considered it, no effort was made by the defendants to bring it on record. Now he wants to fill up the lacuna in order to get decision in their favour. In my considered view, this is not the aim and object of the said provision.

In my considered view, since the First Appellate Court has already noticed as above and even there is no proper identification of the deponent in the said affidavit, allowing it to be placed on record would be a futile exercise. It is not the duty of the Court to fill up the lacuna in favour of one party which would be detrimental to the other side. In such a situation, I am left with no option than to reject the prayer. Accordingly, these applications are dismissed.

RSA No.4593 of 2018

This appeal is directed against the judgment and decree dated 17.04.2018 passed by District Judge, Rupnagar, in Civil Appeal No.260/2017 by virtue of which, the findings recorded and decision taken by the Additional Civil Judge (Sr.Divn.), Sri Anandpur Sahib, District Rupnagar, Punjab, vide judgment and decree dated 25.07.2017 has been reversed and the appeal filed by the plaintiffs has been allowed.

Brief facts of the case which would be necessary for consideration of *lis* enumerated as under:

The plaintiffs/respondents filed a suit for declaration against the defendants/appellants with respect to the suit property fully described in the

Preeto are joint owners in possession of land of 1/9th share of deceased Avtar Singh in equal share being his Class-I legal heirs. According to the plaintiffs, land stands reflected in the *jamabandi* for the year 2007-08 of village Kalitran, H.B.No.351, Tehsil Nangal, District Rupnagar. The case of the plaintiffs is that Avtar Singh being father of plaintiffs and son of defendant No.3 owned aforesaid land. He died intestate on 07.09.2012. It is further case of the plaintiffs that on the death of their mother and wife of Avtar Singh, v.i.z., Kanta Devi in the year 1992, caused a grave mental shock to Avtar Singh, due to which he lost his mental balance. He shifted back to his native Village Daroli. He used to visit a Mandir at Beli in routine. He was suffering from many diseases such as diabetes, T.B., hypertension etc. The plaintiffs got treated their father but due to the aforesaid ailments, he lost his eye sight since January 2010 and died on 07.09.2012 at Village Daroli. The plaintiffs performed all the ritual ceremonies. They wanted to get the land of their father mutated in their names but came to know that Mutation No.2552 dated 05.09.2012 has already been entered in favour of defendant No.2, i.e., the wife of the defendant No.1 on the basis of sale deed dated 04.09.2012 executed by defendant No.1 qua the share of their father Avtar Singh on the basis of alleged power of attorney dated 18.07.2012 registered on 30.07.2012. The defendant No.1 happened to be brother of Avtar Singh. The plaintiffs claimed that Avtar Singh was having no need to execute such power of attorney which is an illegal document and result of misrepresentation and fraud and the sale deed has also been executed by alleged general power of attorney holder of Avtar Singh i.e., defendant No.1 in the name of his wife i.e., defendant No.2, which is illegal, null and void

relief for permanent injunction restraining defendants No.1 and 2 from further alienating the suit property and in alternative, recovery of Rs.7,00,000/- i.e., the sale consideration of the sale deed dated 04.09.2012 along with interest was sought by the plaintiffs.

The defendant No.1 contested the suit by filing written statement. He admitted that Avtar Singh was joint owner in possession to the extent of 1/9th share in the suit land who died on 07.09.2012. The genealogical table also stands admitted by the parties. The defendants No.1 and 2 took stand that, after the death of wife of Avtar Singh, v.i.z., Kanta Devi, the answering defendant started looking after Avtar Singh as plaintiffs never cared for their father. The factum that Avtar Singh had lost his mental balance after the death of his wife was also denied rather a stand was taken that Avtar Singh was a person of sound disposing mind. They also took a stand that Avtar Singh used to reside with answering defendant who used to look after him and provided him medical treatment whenever he fell ill. Avtar Singh also took money from answering defendant to build house of his son Ajay Kumar and furnished an affidavit dated 30.07.2012 in this regard (Marked A for identification). The Power of Attorney dated 18.07.2012 which was registered on 30.07.2012, according to the defendants, is legal and a genuine document and sale deed dated 04.09.2012 has rightly been executed by the answering defendants/appellants.

The defendant No.2 i.e., the wife of defendant No.1, also filed a separate written statement almost taking same line which has been taken by her husband i.e., defendant No.1 that Avtar Singh, through Power of Attorney, has sold the land to her vide registered sale deed dated 04.09.2012

sound disposing mind when he executed the general power of attorney.

On the basis of rival pleadings, the trial Court framed the following issues:-

1. Whether the power of attorney dated 18.07.2012 executed by Avtar Singh in favour of defendant No.1 is illegal, null ad void? OPP
2. Whether the sale deed dated 04.09.2012 executed by defendant No.1 in favour of defendant of is illegal, null and void? OPP.
3. Whether the plaintiff and defendant No.3 are joint owners in possession of the suit land to the extent of 1/9th share?OPP.
4. Whether plaintiffs are entitled to get relief of declaration, as prayed for? OPP.
5. Whether plaintiffs are entitled to get consequential relief of permanent injunction, as prayed for? OPP.
6. Whether this suit is not maintainable? OPD.
7. Whether plaintiffs have concealed material facts from the Court?OPD.
8. Relief.

The trial Court returned to the findings with regard to issues No.1 and 2 which were considered together by it, in favour of defendants No.1 and 2 holding that power of attorney dated 18.07.2012 registered on 30.07.2012 is a legal and valid documents. The sale deed dated 04.09.2012 executed by the defendant No.1 on the basis of said power of attorney in favour of defendant No.2 was also held to be legal and valid document. As a sequel there of issues No.3, 4, 5,6 and 7 were also decided in favour of defendants.

The plaintiffs preferred an appeal before the first appellate Court. The first appellate Court noticed that, though the plaintiffs have challenged the authenticity and genuineness of power of attorney on the ground that it was a result of fraud, misrepresentation because Avtar Singh was incapable of understanding his good and bad and he was blind person, not in sound disposing mind at the time of execution of power of attorney, no specific

finding has been recorded by the trial Court on that rather the trial Court has upheld the authenticity and genuineness of such power of attorney simply on the basis of inadmissible documentary evidence in the form of photostate copy of affidavit, 'Mark-A', shown to have been executed by Avtar Singh admitting that he owed money to defendant No.1 which he had received from him for construction of house of his son and further that it was defendant No.1 who was serving Avtar Singh being real brother. However, the first appellate Court has reversed such findings of the learned trial Court being perverse and erroneous. It has been observed that original affidavit has not been brought on record. Apart from that, the name and address of the person who allegedly identified the deponent before the Executive Magistrate has not been mentioned in the affidavit. In the absence of aforesaid, no reliance could be made on Xerox copy of such affidavit of Avtar Singh. Aforesaid lacuna raises serious doubt on the genuineness or execution of the document and the photo copy of the affidavit, in such a situation, would not be admissible.

The first appellate Court has also observed and opined that once the plaintiffs have challenged the execution of power of attorney on the ground of fraud and misrepresentation and also that the executant was not in sound disposing mind, the trial Court was required to scrutinize the evidence in order to ascertain as to whether the plaintiffs have been able to prove such fact or not, but the trial Court has based its findings only on the aforesaid inadmissible document, i.e. Affidavit- "Mark-A".

Apart from the evidence which had been led by the plaintiffs on the point that Avtar Singh was suffering from several ailments like dubieties,

sight, the plaintiffs have tried to prove that the agony and stress which Avtar Singh faced after the death of his wife, i.e., mother of the plaintiffs, led to such ailments. In such a situation, one cannot be held to be of such sound and fit state of mind to ascertain the things properly. The defendant No.1 was in a dominant position and could have easily procured the general power of attorney from the deceased in his favour. The first appellate Court has also noticed that DW-1 Parkash Chand (defendant No.1) has admitted during his cross-examination that Avtar Singh was blind. DW-2 Amar Nath is shown to be the attesting witness to such power of attorney. During the cross-examination, he deposed that Avtar Singh had permanently shifted to a place Longowala Thann about 30/35 years before his death as he became *Saint* and thus, the contents of affidavit Mark-A that he was permanently residing with the defendant No.1 who was serving him are also not proved. It has been noticed in the impugned judgment that DW-2 has further stated in his deposition that Avtar Singh occasionally used to visit the village and stayed in the house of defendant No.1. He also accepted that Avtar Singh was suffering from Diabetes, T.B., Blood Pressure, for the last 5-10 years before his death. He has further deposed that, due to such ailments, he was unable to see properly. According to him, the ailment was to such an extent that Avtar Singh was unable to independently go for easing out also. He needed help of at least one person. He has further deposed that memory of Avtar Singh had faded. The First appellate Court has opined that the testimony of witness of defendant Nos.1 and 2 has established the case of the plaintiffs that at the time of execution of such document Avtar Singh was not in a sound disposing state of mind and he was suffering from many ailments also.

It has further been noticed by the first appellate Court that apart from (Mark-A) i.e. affidavit, there is no evidence which is admissible in evidence to show that consideration of Rs.7 Lacs has passed to Avtar Singh. There is no such receipt or acknowledgment which was issued by Avtar Singh after receiving Rs.7 Lacs. The registered power of attorney is totally silent on the point that it was being executed after receiving any consideration amount.

On the other hand, it has been noticed by the first appellate Court that PW-1 Ajay Kumar has deposed that he was having very good relationship with his father. He had been visiting his father after every 15 to 20 days and from cross-examination of plaintiff-Ajay Kumar, it would be sufficient to conclude that execution of such document from the side of Avtar Singh was not voluntary but it was under the dominance of defendant No.1 by taking benefit of physical and mental illness of Avtar Singh as he was unable to understand his good and bad. Eventually, it has been held by the First Appellate Court that power of attorney was not executed by Avtar Singh in his sound disposing mind and, thus, it was not a voluntary and valid document. As a sequel, it has been held that sale deed executed by the defendant No.1 (husband) in favour of his wife defendant No.2 would also be illegal and null and void because the power of attorney itself was a sham document.

In the background of aforementioned factual matrix and I have heard learned counsel for the appellant and perused the records of this case. It has vehemently argued on behalf of appellants that once the power of attorney, which is a registered document, which was executed and affidavit

Executing Magistrate, the document cannot be held to be a sham transaction and as a result of that the sale deed would also have to be accepted as a valid document.

Having given anxious consideration to the materials on record and submissions raised on behalf of the appellants, I find no force in such submissions for the following reasons:-

Before taking up the issues which were taken by the Courts below, there are certain questions to be answered. A prudent person may ask in such circumstances that in case Rs.7 Lacs was given to Avtar Singh by his brother defendant No.1-Parkash Chand as consideration amount then a sale deed itself could have been executed by Avtar Singh in his favour. Why a person will take a long route to receive the consideration amount and then would get a General Power of Attorney executed and, thereafter, he will execute the sale deed in favour of his wife? Secondly, if the aforesaid Avtar Singh wanted to give his property to defendant No.1 in lieu of services rendered by him as he was suffering from ailments and he was not being looked after, as per defendant No.1, by his son (plaintiff), then a gift deed or Will could easily have been executed. The pleading of defendant No.1 that plaintiff was not looking after his ailing father and that defendant No.1 was looking after him, still he wanted some consideration amount for executing general power of attorney so that the land could be transferred by the defendant No.1 in favour of his wife, both would be antithesis to each other. If the plaintiff was not looking after the father then the father could have ousted him by gifting his property to his brother-defendant No.1 who was looking after him. In such a situation why he will demand Rs.7 Lacs, so that it could be given to his son, who was allegedly not looking after him,

for construction of his house? Another question which would arise in the case would be as to whether the sale deed was a sham or showee transaction or actually some consideration passed on from the wife to the husband (being GPA holder) or to Avtar Singh? For proving this, since the case of defendant Nos. 1 and 2 is that it is a legal and valid transaction, duty would be cast upon the defendant No.2 to show that such consideration actually had passed. However, this has not been proved at all by the appellants/defendants No.1 and 2. Apart from the aforesaid, whether the wife had sufficient fund to purchase the property would be another question. There is no evidence on record to show as what was she doing for earning so that she could have procured the amount and gave it either to the General Power of Attorney holder or to the real owner of the property. If nothing is there then whether, in such circumstance, the said transaction by General Power of Attorney holder, who is husband of defendant No.2, would have to be termed to be showee and sham transaction? In my considered view, if the aforesaid two facts are not proved by the defendants then the sale deed is not proved properly and that appears to be a showee and sham transaction.

Having regards to the aforesaid facts and circumstances, I am of the considered view that the First Appellate Court has rightly held that the trial Court did not touch the issue as to whether the General Power of Attorney and the sale deed are showee and sham documents or not. The overwhelming evidence and circumstance are contraindicative. Even the testimony of defendants' witnesses, as discussed above, do not prove the things which the defendants were required to establish rather they support plaintiffs' claim. Had it been a case that Avtar Singh was annoyed with his

because he was looking after or taking care of him, then there was no requirement of accepting the consideration amount and execute a power of attorney so that a sale deed could have been executed by the husband in favour of his wife and that too for the purpose that consideration amount could be given to the son for construction of his house who was not at all looking after him. He could have well executed a sale deed or gift deed himself. All these things, if considered along with further fact that the original affidavit could not be brought on record by the plaintiff and merely a photo copy has been produced which has been marked as “Mark-A” for identification, definitely gives an impression that the execution of the documents is surrounded by strong suspicion which are not worth reliance.

Having held so, in my considered view, no good ground or substantial question of law could be set-forth by the appellant warranting interference of this Court in the judgment and decree passed by the appellate Court. In the result this appeal is dismissed.

(DR. RAVI RANJAN)
JUDGE

11.09.2019
anil

Whether speaking/reasoned Yes/No

Whether reportable Yes/No