

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.12347 of 2018 (O&M)

Date of Decision: 15.01.2019

Urmila Kinnar Chela Tara Moti KinnarAppellant

Vs.

Phoolpati Kinnar Chela Shakuntla Gyano Kinnar and others
.....Respondents

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

Present:- Mr.Deepak Girotra, Advocate, for the appellant.

DR. RAVI RANJAN, J.

The challenge has been made in this appeal the judgment and decree dated 01.10.2018 passed in Civil Appeal No.87 of 2018 by Additional District Judge, Rohtak, by which he has affirmed the judgment and decree passed by Civil Judge (Jr.Divn.), Rohtak in Civil Suit No.137 of 2015. The aforesaid judgment of the trial Court has also been assailed in this appeal.

The facts in brief, which are necessary for consideration of *lis* and which emanate out of the pleadings, stand enumerated as under:

Both the parties claim that they are *Kinner* by birth and used to collect gifts and Badhai on happy occasions in the locality as per custom prevailing in their society. The plaintiff has claimed that there was an agreement between the plaintiff and the defendant No.1 regarding the distribution of area for the purpose of collecting gifts/Badhai and it was agreed that they will never encroach the area of one and others. The plaintiff

was reduced into writing. The plaintiff, however, claimed that area of plaintiff was being encroached by *chelas* of defendant No.1 who stood as witness to the agreement. Hence, filing of suit was found necessary due to action of defendant No.1 who illegally started collecting gift/Badhai from the area of plaintiff as per agreement.

The defendant No.1 appeared and filed written statement controverting and denying that any agreement was effected between defendant No.1 and the plaintiff regarding the distribution of area of collecting the badhai. It was alleged that the thumb impression of defendant No.1 on the alleged agreement was fake, bogus, false and fictitious. Defendant No.2 and 3 filed their joint written statement accepting that the agreement/compromise was effected and they signed on the same as witness.

The trial Court, considering the rival pleadings, framed following issues :-

1. Whether the plaintiff is entitled to a decree for permanent injunction on the grounds as prayed for? OPP.
2. Whether the suit of the plaintiff is not maintainable in the present form ? OPD.
3. Whether the plaintiff has not come to the Court with clean hands and suppressed the material facts from the Court ? OPD.
4. Whether the plaintiff has no cause of action to file the present suit? OPD.
5. Whether the plaintiff has no locus standi to file the present suit? OPD.
6. Relief.

Upon appreciation of the evidence led in the suit, trial Court has

recorded findings in favour of defendant No.1 and has dismissed the suit.

The appellate Court has also taken the similar view.

Learned counsel appearing for the appellant has vehemently argued that once the written agreement is there between the parties, which has been brought on record as Ex.PW-1/A and once the witnesses who have put their signature on the agreement and filed their written statement accepting the same, both the Courts erred in dismissing the suit. The plaintiff-appellant, in view of the fact that the execution of the agreement stands proved, would be entitled for grant decree of permanent injunction.

The trial Court has dismissed the suit on the ground that in the deed of agreement only the thumb impression of defendant No.1 was there but the same has not been identified by any of the witnesses. Thus, the identity of the person who had made thumb impression cannot be held to be admitted one. Of course, the defendant No.2 and 3 have stated about the execution of the deed in his presence and also that they have put their signatures as witnesses there upon but they have been failed to examine themselves as a witness before the Court. Therefore, merely on the basis of the pleading, it cannot be held that agreement was actually executed by the parties.

Secondly, to overcome the same, the plaintiff had an opportunity to examine any expert who could have compared the thumb impression of the defendant No.1-Phoolpati with the same put on any other document but that was never done. In such a situation, since none of the alleged attesting witnesses i.e. defendants No.2 and 3 approved as witnesses to prove the alleged agreement and furthermore, the Notary Public who has been examined as PW-1 has stated that neither money transaction has taken

becomes doubtful. He has further stated that on the agreement Ex.PW1/A, the thumb impression of defendant No.1 Phoolpati was not identified by anybody in his presence. A question would arise whether the transaction of such huge amount of Rs.18,50,000/- has been made or not ? The plaintiff herself admittedly, in her cross-examination, has accepted that no money was paid before the Notary Public and no witness has been examined to prove that there was in fact such huge amount of cash transaction. The sources have also not been available from where and which bank account, the plaintiff has taken out the money to be paid to the defendant No.1. The trial Court has held that in such circumstances it could be very difficult to believe that the plaintiff withdrew the money from any bank and any transaction had taken place between plaintiff and respondent No.1.

The appellate Court has also affirmed the findings recorded by the trial Court and dismissed the appeal.

In the aforesaid background of the matter and upon consideration of the submission made on behalf of appellant, this Court does not find force in the submission made on behalf of appellant. First question would arise in this case as to why and under what circumstances, the *chelas* of defendant No.1, who are attesting witness to the deed of agreement in question (Ex.PW1/A) have been impleaded as party to the suit? No cause of action has been shown against them. If they wanted to stand in support of the plaintiff, they could well have examined themselves as plaintiff-witnesses. In any case, if they have been impleaded in a suit as defendants No.2 and 3 and had appeared and filed written statement supporting the plaintiff's case though being *chelas* of defendant No.1, then defendant No.1 had a right to

Therefore, mere their pleading would not be a decisive material for proving the case of the plaintiff. Whether, the defendant No.1 has put his signature on the deed or such huge amount of money has passed in favour of defendant No.1 were the questions which were required to be established by such witness and defendant No.1 had a right to cross-examination them. After standing the test of cross-examination only, the same could have been considered to be a piece of cogent evidence.

Secondly, PW-1 Notary Public, in his cross-examination, as noted by the appellate Court in paragraph 16 of the judgment, has stated that he was not personally knowing the party nor had anyone identified the thumb impression of defendant No.1 over the agreement. The sum of Rs.18,50,000/- as mentioned in the agreement was also not delivered in the presence of this witness. Once this is the case of the Notary Public, onus would be upon the plaintiff to prove it by leading cogent evidence. None except the plaintiff has come up in support of her claim regarding respondent Phoolpati having put thumb impression on the deed of agreement or passing of such huge amount of consideration. It has rightly been observed by first appellate Court that the attesting witnesses of the agreement have unnecessarily been impleaded as performa respondents and though they have filed their written statement by accepting that they were present at the time of execution of the disputed agreement but none could turn up to be examined as a witness. The amount of consideration mentioned in the Ex.PW-1/A is huge one but no source has been disclosed from where such amount was withdrawn or arranged by the plaintiff/appellant and paid to respondent-Phoolpati. The appellate Court has further observed that the

time of execution but appellant, who has examined himself as PW-2, has stated that the same was paid at the residence. Thus, it has rightly been recorded that payment of disputed amount also does not stand proved.

In the background of aforesaid discussion, I am of the considered view that no good ground or question of law could be raised by the learned counsel for the appellant warranting interference in the judgments and decrees of the Courts below.

In the result, this appeal fails and is, accordingly, dismissed. However, there would be no order as to costs.

(DR. RAVI RANJAN)
JUDGE

15.01.2019
anil

Whether speaking/reasoned Yes/No

Whether reportable Yes/No