

ITEM NO.103

COURT NO.4

SECTION IV

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Civil Appeal No(s). 4650/2007

SITA RAM

Appellant(s)

VERSUS

PRABHU LAL & ORS

Respondent(s)

Date : 10/12/2014 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE SUDHANSU JYOTI MUKHOPADHAYA
HON'BLE MR. JUSTICE N.V. RAMANA

For Appellant(s)

Petitioner-in-person

For Respondent(s)

Mr. A. D. Sikri, Adv.
Mr. K. L. Janjani, Adv.
Mr. Surya Kant, Adv.

UPON hearing the counsel the Court made the following
O R D E R

The appeal is allowed in terms of signed order.

(Neeta)
Sr. P.A.

(Signed order is placed on the file)

(Suman Jain)
COURT MASTER

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4650 OF 2007

SITA RAM

Appellant(s)

VERSUS

PRABHU LAL & ORS

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O R D E R

This appeal has been preferred by appellant against judgment and decree dated 2nd August, 2006 passed by High Court of Punjab and Haryana at Chandigarh in Regular Second Appeal No.4642 of 2000. By the impugned judgment, the second appellate court disagreed with the concurrent findings of the lower courts, set aside the judgment and decree passed by the lower courts and dismissed the suit for declaration filed by the plaintiffs including the appellant herein.

The factual matrix of the case is as follows:

One Nirmal Dass was the owner of the suit property comprising of agricultural land, house etc. After his death, his estate was inherited by his wife Bhirwan Bai (Widow), his sons, namely, Ram Kishan, Radha Krishan, Hari Narain, Sita Ram (appellant herein), Prabhu Lal (contesting respondent-defendant) and his daughters, namely, Smt. Jamuna Devi and Radha Rani.

As per respondent-defendant a Power of Attorney (allegedly) was executed by Sita Ram (appellant herein) and Radha Krishan on 7th December, 1981 in the case titled "Prabhu Lal Vs. Bhirawa Bai". According to the appellant (who was 5th defendant in the said

case), the said Power of Attorney was not executed by him and it does not say admit the Suit. The entries in the deed book of document writer shows recording of the Power of Attorney in two suits "Hari Narain Vs. Sita Ram" and Radha Krishan's Power of Attorney in favour of Hari Narain to prosecute the suit in "Prabhu Lal vs. Ram Kishan". The said suit preferred by contesting respondent-Prabhu Lal against Bhirwan Bai was amended to include the house and plot as well in addition to the 4/5th share in the land as previously claimed and was subsequently decided on the basis of alleged admission by the appellant by decree dated 15th December, 1981.

The case of the appellant is that the said Power of Attorney was not executed by him and he had no knowledge about the suit or decree dated 15th December, 1981. On knowing the same, Radha Kishan (Plaintiff No. 1) and Sita Ram (Plaintiff No. 2) initiated Suit No.1438 of 1987 seeking declaration that decree dated 15th December, 1981 in the case of "Prabhu Lal vs. Bhirwan Bai" is illegal and was obtained by fraud. In the said Suit, the plaintiffs pleaded that they came to know that Prabhu Lal in collusion with Hari Narain-defendant no.2 have obtained a collusive decree. The plaintiffs further stated that they never consented for the transfer of their share in favour of Prabhu Lal and no document to such effect was ever executed. It was contended that no transfer is permissible without a registered deed since the value of the property is more than 4 lakhs. It was further averred that in the Power of Attorney, it is shown that Radha

Kishan was away, though he is present in his permanent residence at Gurgaon.

It was further pleaded that despite the decree of 1981 no mutation has been sanctioned in the records and the fact that the plaint was filed on 8th December, 1981 and amended on 9th December, 1981 to include the plot, land and the house, shows fraud pleaded by Prabhu Lal. It was also pleaded that the plaintiffs are still in joint possession of the property and Power of Attorney was granted for recovery of the proceedings of the Bank.

To prove their case both plaintiffs and defence produced witnesses.

PW-6 (Ram Kishan) stated that no Power of Attorney was executed by Sita Ram.

DW-6 (Lal Chan), Court Reader in his evidence stated that it was not written in the statement that it was recorded on direction of the Judge.

DW-4 (Kailash Chand) deposed that Sl. No. 1496 dated 7th December, 1981 was a Power of Attorney in "Prabhu Lal Vs. Birwan Bai" case and further stated that there is a compromise recorded regarding case of "Hari Narain vs. Sita Ram" with the other defence witnesses who tried to support the case of the defence.

In Trial Court, issues and additional issues were framed which are as follows:

- (i) Whether the plaintiff and defendant are co-share/
owner in possession of the suit land?

- (ii) Whether the judgment and decree dated 15.12.1981 is illegal, void and not binding on the interest of plaintiffs?
- (iii) Whether the suit is time barred?
- (iv) Whether the suit is not maintainable in the present form?
- (v) Whether the plaintiffs are estopped from filing the suit by their own act and conduct?
- (vi) Whether the suit is barred by principle of resjudicata?
- (vii) Whether the plaintiffs have got no locus standi to file the present suit?
- (viii) Whether the plaintiff is estopped from filing the present suit by their own act and conduct?
- (ix) Whether the present suit is not maintainable against answering defendant i.e. defendant no. 2?
- (x) Relief"

On appreciation of the evidence, the Trial Court by judgment dated 14th September, 1998 held as follows:

"I have perused the special power of attorney dated 7th December, 1981 which is ex. D.2 on record. It is not mentioned in the said special power of attorney as to the court in which it is presented nor it is specified that said special power of attorney if filed in which case. The title of the suit in which the said special power of attorney is filed is stated to be "Prabhu Dayal vs. Ram Krishan" and thereafter the name of Smt. Brava Bai has been added to the Original with a different ink to change the title of the suit to "Prabhu Dayal Vs. Brava Bai" From the special power of attorney it is not clear at all that the said power of

attorney was executed for the case titled as "Prabhu Dayal Vs. Smt. Brava Bai" on 7th December, 1981 and amended on 8th December, 1981 by the defendant no. 1 got the entire suit land through decree of the court in his favour. Neither the name of the court nor the suit no. is written in the special power of attorney. Further more the special power of attorney only empowered defendant no. 2 to defend the suit pending against the plaintiff no. 1 and 2 and to move applications to engage counsel, to make statements, to compromise and file appeals but the special power of attorney had not empowered defendant no. 2 to "admit" any claim. Further more it is admitted by the parties and their witnesses that there were several litigations pending between the parties therefore not satisfied that special power of attorney dated 7th December, 1981 was in fact executed by plaintiff no. 1 and 2 in favour of defendant no. 2 for the civil suit by which defendant no. 1 got the entire suit property in his favour. Even over writing in title in the special power of attorney creates doubt in the mind regarding the genuiness of the said document. Further more a perusal of plaint in said suit clearly shows that plaintiff no. 1 and 2 were imp leaded in their individual capacity and not through any power of attorney. Since the plaintiff no. 1 and 2 were imp leaded in their individual capacity it was imperative on the court to issue a notice to them which was not done. This fact has been admitted by the defendant no. 1 in the present case in the application u/s rule 17 CPC moved by him dated 8th December, 1981 in the first suit. That after an amendment was allowed and the parties appeared except plaintiff no. 1 and 2 to make their statement. Even the written statement was filed by the remaining defendants and not by plaintiff no. 1 and 2 but the title of the case even in the written statement continued to show plaintiff no. 1 and 2 as defendants in their individual capacity. It is no doubt correct that plaintiff no. 1 and 2 have not stepped into the witness box to depose about their contention but the very basis of the impugned decree is the special power of attorney dated 7th December, 1981 which is defective."

The Trial Court further held:

"It is established beyond doubt that special power of attorney in favour of defendant no. 2 was not executed by plaintiff no. 1 and 2. It is also admitted by the parties that the remaining defendants in the earlier suit which is under challenge were uneducated since the remaining defendants were uneducated. It can be safely concluded that they could be easily influenced by another member of the family who was more educated, as it is a common practice in families to place trust and reliance upon the elder member of the family. It has been further laid down in 1996 (2) SCC 660 that a collusive decree obtained by playing fraud on court does not confer any right on the party who obtained it. Further more consent decree is nothing but a contract between the parties with seal of court super-imposed thereon, which can be avoided on any ground which a contract be avoided under provision of contract Act has also been pointed that from the year 1982 till 1987 plaintiff no. 2 did not remain in India and defendant no. 1 cultivated the suit land on his own. This fact is not of much importance as the special power of attorney by which the plaintiff no. 1 and 2 allegedly relinquished their share in favour of defendant no. 1 is itself defective and not maintainable. Further more it has been laid down in 1991 PLJ 325 by the Hon'ble Punjab and Haryana High Court where in it is held that: "Co-sharer in possession becomes constructive trustees on behalf of co sharer not in possession right of co share apart from being in the nature of constructive trustee would be in law possession of co sharer not in possession."

Further more the earlier suit which was decided on 15.12.81 was not contested between the parties and was not decided on merits therefore the later suit is not even bar u/o 2, rule 2 CPC, Ex.D.16 to D.18 on record show that in year 1965-66 the suit property was in the name of Sh. Nirmal Das father of the parties who was recorded as owner of the same. There after up till 1991 the plaintiff and defendants were shown in cultivating possession of the suit property which is evident from Ex.D24 which is Khasra Girdwari

for the period 21.9.87 to 16.3.91. From the document are evidence it is clear that plaintiff are co sharer in possession of the suit.

Presumption of correctness attached to entities in jambandies made in course of law of course this presumption is rebuttable but in present case it has not been rebutted. In vew of my discussion above Issue no. 1 and 2 are decided in favour of the plaintiffs."

The other issues were also decided in favour of the plaintiffs. The suit was decreed and claim of the decree, i.e. declaration to the effect that judgment and decree dated 15th December, 1981 in the case "Prabhu Lal vs. Bhirawa Bai" is illegal, without jurisdiction and is based on fraud and mis-representation led by defendant no. 1 in collusion with defendant nos.2 and 3 and same are not in any way binding on the plaintiffs and are liable to be set aside was allowed. The suit was accordingly, decreed in favour of the plaintiffs.

The aforesaid judgment and decree passed by the Trial Court on challenge was upheld by appellate court on 4th November, 2000 in Suit No. 62 of 15th December, 1998. The appellate court also re-appreciated the evidence and affirmed the judgment and decree passed by the Trial Court.

The defendant respondent-Prabhu Lal being unsatisfied moved against the judgment and decree as affirmed by the Appellate Court by filing second appeal before High Court. The learned Single Judge of the High Court noticed the substantial question of law as was raised by appellant, as is clear from the observation as quoted below:

"The appellant has raised the following substantial questions of law in the present appeal:-

- 1. Whether the suit of plaintiff Nos. 3 and 4 could be decreed even though, there is sufficient evidence on record to return a finding that plaintiff Nos. 3 and 4 have suffered decree on 15.12.1981?*
- 2. Whether the suit of plaintiff Nos. 1 and 2 can be decreed on the basis of non-execution of Power of Attorney when plaintiff Nos. 1 and 2 have not appeared as a witness?*
- 3. Whether the findings recorded by the Courts below are based upon misreading of evidence and by ignoring the material evidence led by defendant-appellant?*
- 4. Whether the defendant-appellant has any pre-existing rights in the property in respect of which the plaintiffs could have suffered decree?*

On re-appreciation of evidence the second appellate court reversed the concurrent findings of fact given by the Trial Court as upheld by appellate court and dismissed the suit.

The appeal from appellate decree can be preferred under Section 100 of CPC deals with second appeals. It states that second appeal shall lie to High Court from any decree passed in appeal by any subordinate Court, if the case involves a substantial question of law. In *Govindaraju v. Mariamman* AIR 2005 SC 1008 this Court held as follows:

"12. Section 100 provides that the second appeal would lie to the High Court from a decree passed in appeal by any court subordinate to the High Court if the High Court is satisfied that the case "involves a substantial question of law". It further provides that the memorandum of appeal shall precisely state the substantial question of law involved in the appeal and the High Court on being satisfied that the substantial question of law is involved in a case formulate the said question. Sub-section (5) provides that the "appeal shall be heard on the question so

formulated". It reserves the liberty with the respondent against whom the appeal was admitted ex-parte and the questions of law had been framed in his absence to argue that the case did not involve the questions of law framed. Proviso to sub-section (5) states that the questions of law framed at the time of admission would not take away or abridge the power of the court to frame any other substantial question of law which was not formulated earlier, if the court is satisfied that the case involved such additional questions after recording reasons for doing so. It is abundantly clear from the analysis of Section 100 that if the appeal is entertained without framing the substantial questions of law, then it would be illegal and would amount to failure or abdication of the duty cast on the court. The existence of substantial questions of law is the sine qua non for the exercise of jurisdiction under Section 100 of the Code. {Refer to Kshitish Chandra Purkait v. Santosh Kumar Purkait & Ors. [(1997) 5 SCC 438], Panchugopal Barua v. Umesh Chandra Goswami [(1997) 4 SCC 413], Kondiba Dagadu Kadam v. Savitribai Sopan Gujar [(1999) 3 SCC 722]}

"16. As per settled law, the scope of exercise of the jurisdiction by the High Court in Second Appeal under Section 100 is limited to the substantial questions of law framed at the time of admission of the appeal or additional substantial questions of law framed at a later date after recording reasons for the same. It was observed in Santosh Hazari's case (supra) that a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be a 'substantial' question of law must be debatable, not previously settled by law of the land or a binding precedent and answer to the same will have a material bearing as to the rights of the parties before the Court. As to what would be the question of law "involving in the case", it was observed that to be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by the court of facts and it must be necessary to decide that question of law for a just and proper decision between the parties."

From the impugned judgment, we find that the appellant raised so-called substantial question of law and the High Court on satisfaction has not formulated any substantial question of law, as required under sub-section (4) of Section 100 CPC which reads as follows:

"Sub-section (4) of Section 100 of CPC - framing of substantial question of law at stage and decide the matter with out giving an opportunity to other side to hear - is the judgement of High court is liable to be set aside - Apex court held that we are of the opinion that substantial question of law can be formulated at the initial stage and in some exceptional cases, at a later point of time, even at the time of argument stage such substantial question of law can be formulated provided the opposite party should be put on notice thereon and should be given a fair or proper opportunity to meet out the point. Furthermore, the judgment of the High Court should only be set aside on the ground of non-compliance with sub-section (4) of Section 100 of CPC, if some prejudice has been caused to the appellants before us by not formulating such a substantial question of law."

On the other hand, the High Court on re-appreciation of evidence reversed the concurrent finding of facts which is not permissible in a second appeal. This is apparent from finding as quoted below:

"After going through the record, I find that PW 6 Ram Kishan has admitted the outstanding loan in respect of purchase of tractor and that signatures of his mother and sisters were obtained in Gurgaon in one room, where one person was sitting but he does not remember that how many papers were signed by him. He admits signatures of his sifers Radha Rani, Jamuna Devi and that of his mother Bharwan Bai as such signatures/thumb impressions were obtained at the same time. He admits his

signatures on the Vakalatnama. He further states that such signatures / thumb impressions were for the purpose of the recovery suit. He states that there was a settlement amongst the family members that Prabhu Lal (the appellant) should defend the recovery proceedings initiated by the Bank. The case of the plaintiff is simple denial in the pleadings whereas in evidence, the plaintiffs have admitted their signatures/thumb impressions on the Power of Attorney and settlement. It has also come in evidence that their signatures were obtained in a room where one person was sitting is in fact, refers to the Court. Such was not the stand of the plaintiffs in the plaint. Apart from Ram Kishan PW-6, the plaintiffs have produced Ram Kishan Gera son of Devi Dass, husband of Radha Rani as PW-7. He also admits that in execution of recovery suit of the Bank, the land was attached and through settlement amongst the members of the family it was agreed that execution will be defended by defendant no. 1. However, the said witness was not appointed as attorney of Radha Rani. The plaintiffs have examined Radha As PW-8, who has deposed that she has signed the papers for the purpose of loan repayment. The papers were signed to enable Prabhu Lal to satisfy the decree alone. She has admitted her signatures on Vakalatnama, written statement and the statement given in the Court. She deposed that she has gone inside alone but she cannot tell that it was a Court room or not. She has deposed that Jamuna Devi, Ram Kishan, Bharwan Bai, Hari Narain were standing outside the Court. Even her husband appearing as PW-7 had admitted signatures of his wife on Vakalatnama, written statement and the statement in Court dated 12.12.1981. On the other hand, the defendant-appellant has examined Lal Chand Reader of the Court, who recorded compromise as DW-1. He has deposed that statements were written by him at the directions of the Court and the parties signed/thumb marked after accepting the same including their lawyer / Advocates. The finding recorded by the Courts below that the settlement is made by illiterate simpleton ladies and, therefore, not binding, is again not based upon any rationale. The statements are proved to be made in the Court. The Court official appeared has deposed that the same were read over and accepted to be correct. The Court proceedings carry presumption of correctness. Merely on the basis of illiteracy, such statements cannot be put

to naught. Such course is, in fact, fraught with danger. Illiteracy cannot override the presumption of correctness to the Court proceedings. If it is allowed then the Court proceedings can be disputed on change of mind subsequently. Thus, the said finding is wholly unsustainable."

At this stage, learned counsel appearing for the plaintiffs referred to the facts and submitted that the plaintiffs have not proved their case but such question of fact cannot be looked into in a second appeal where High Court is required to frame and decide the substantial question of law, if any involved. This Court has held:

"19. Even if the High Court was of the view that the findings of fact recorded by the courts below were wrong, in our opinion, these findings of fact could not be disturbed without coming to the conclusion that the findings recorded were perverse i.e. based on misreading of evidence or based on no evidence. The High Court did not come to such a conclusion. The learned Singh Judge also did not come to the conclusion that the appeal involved other substantial questions of law or formulate the same."

Learned counsel for the respondent submitted that case be remitted back to the High Court for afresh decision. However, we are not inclined to do so as, in our opinion, no substantial question of law arises in the appeal for decision by the High Court.

For the reasons aforesaid, we have no option but to set aside the judgment and decree dated 2nd August, 2006 passed by High Court of Punjab and Haryana at Chandigarh in Regular Second Appeal No. 4642 of 2000 and upheld the judgment and decree passed by Trial Court as upheld by appellate court.

The appeal is allowed.

We appreciate the assistance given by Mr. Dushyant Dave, learned senior counsel who appeared on behalf of the appellant on the request of the Court.

.....J.
(SUDHANSU JYOTI MUKHOPADHAYA)

.....J.
(N.V. RAMANA)

NEW DELHI;
DECEMBER 10, 2014