

**(2003) 08 P&H CK 0025**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** Regular Second Appeal No. 1629 of 2003

Channo Devi and Others

APPELLANT

Vs

Ami Lal and Others

RESPONDENT

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**Date of Decision:** Aug. 29, 2003

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 100

**Citation:** AIR 2004 P&H 130 : (2004) 1 CivCC 101 : (2004) 136 PLR 401 : (2003) 4 RCR(Civil) 674

**Hon'ble Judges:** M.M. Kumar, J

**Bench:** Single Bench

**Advocate:** Akshey Kumar Goel, for the Appellant;

**Final Decision:** Dismissed

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### **Judgement**

M.M. Kumar, J.

This defendant's appeal filed u/s 100 of the Code of Civil Procedure, 1908 (for brevity "the Code") challenging the judgment and decree dated 25.3.2003, of the learned Additional District Judge, Bhiwani reversing the findings recorded by the Civil Judge (Junior Division), Bhiwani. The Civil Judge in her judgment and decree dated 13.3.2002 had dismissed the suit of the plaintiff-respondent while in appeal his suit has been decreed by the learned Addition District Judge.

2. The plaintiff-respondent in his Civil Suit No. 627 of 9.2.1995, has sought a declaration to the effect that he was owner in possession of his share of suit land and the judgment and decree dated 28.1.1995 alleged to have been suffered by him is null and void and not binding on his rights. Therefore, it was claimed that the same was liable to be set aside. A further prayer was made to the effect that the defendant-appellant be restrained from interfering in his possession over the suit property or alienating the same. The plaintiff-respondent further claimed that he has been owner in possession of the suit land and he had never entered into any

kind of family settlement nor he suffered any decree like judgment and decree dated 28.1.1995. It has been alleged that the aforementioned judgment and decree has been obtained by the defendant-appellant by playing fraud and mis-representation upon him. It is further alleged that an agreement to sell with regard to sale of tractor was executed on 13.1.1995 but under the garb of execution of the afore-mentioned instrument, some other papers were got signed from him. The plaintiff-respondent also averred that he was brought to Tehsil Siwani where defendant-appellant purchased the stamp paper worth Rs. 3/-, on which an agreement to sell the tractor was got typed. The defendant-appellant also got his thumb impression affixed on some paper and he was asked to sit outside room. He was never produced before any officer but the defendant-appellant procured the judgment and decree dated 28.1.1995 by producing one Chunni Lal and impersonating the plaintiff-respondent before the Civil Judge. It has further been claimed that the plaintiff-respondent was residing with his real nephew Rajinder Singh and his family and there was no reason or occasion to transfer his land to the defendant-appellant. The fraud committed upon the plaintiff-respondent came to his notice on 1.2.1995 because the defendant-appellant proclaimed himself to be the owner of the land in the presence of Rajinder Singh and Balbir. Therefore, the suit has been filed.

3. The stand taken by the defendant-appellant is that the suit was not maintainable. There was no cause of action or locus standi etc. to file the suit. On merits, it was claimed that he is owner in possession of the suit land while denying the allegations of fraud or mis-representation in procuring the impugned judgment and decree. The defendant-appellant further claimed that the decree has been suffered by the plaintiff-respondent by making a statement before the Court. It was denied that the plaintiff-respondent is residing with Rajinder Singh who is his real nephew claiming that he has been living with the defendant-appellant and in lieu of the services rendered by him plaintiff-respondent had suffered a decree in his favour.

4. On the basis of the pleadings of the parties, the trial Court framed the following issues:-

"1. Whether the plaintiff is owner in possession of 1/2 share as fully described in the head note of the plaint? OPD.

2. Whether the civil suit decree dated 28.1.1995 is result of fraud and misrepresentation played upon the plaintiff? If so its effect? OPD.

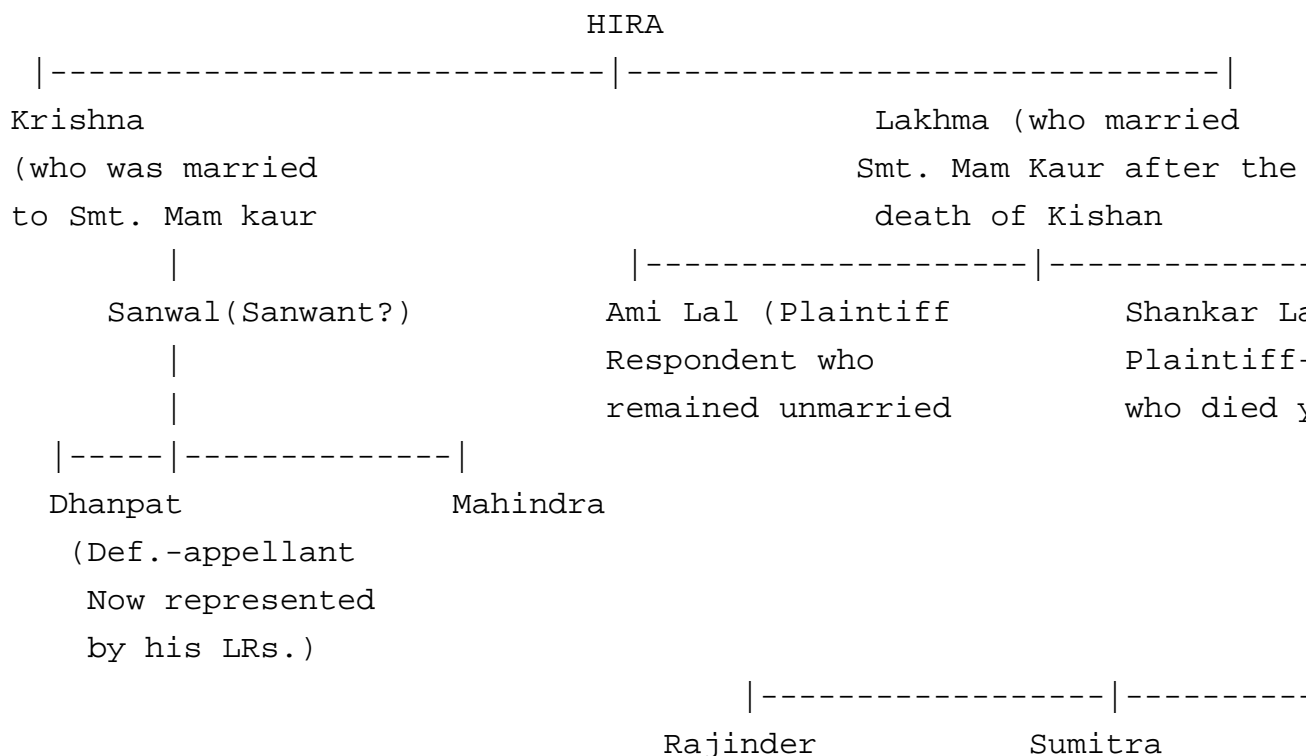
3. Whether the suit is not maintainable in the present form? OPD

4. Whether the plaintiff has no locus standi and cause of action to file the present suit? OPD.

5. Relief."

5. On issues No. 1 and 2, the trial Court held that the plaintiff-respondent had failed to prove that the judgment and decree dated 28.1.1995 was the result of fraud or misrepresentation played upon him by defendant-appellant and, therefore, the judgment and decree was upheld. Consequently, the defendant-appellant was held to be the owner in possession of the property in dispute. Issues No. 3 and 4 were not pressed nor argued. Therefore, no finding was recorded. As a consequence, the suit of the plaintiff-respondent was dismissed.

6. On appeal, the learned Additional District Judge critically examined the evidence on record and reached the conclusion that plaintiff-respondent is an illiterate person and only knew how to sign, which he has learnt while serving in the army. It has further been found that the plaintiff-respondent was 80 years old at the time of passing of the decree. He was hard of hearing with the very weak eye sight. The Additional District Judge also recorded the finding that the plaintiff-respondent has been residing with the children of his brother named Shankar, who died at young age and plaintiff-respondent brought up the children from their young age 5-7 years. His ration card is common with his nephew Rajinder Singh and his family members and his name also figured in the voter list. Before proceeding further, it would be appropriate to refer to the following pedigree table which would make the facts more evident:-



A perusal of the pedigree table shows that Ami Lal was a grand son of Hira through his son Lakhma whereas Sanwal was another grand son of Hira through his other son Kishna. By virtue of succession Ami Lal and Shankar both the brothers were entitled to inherit jointly 1/2 share from the property of Hira and so was his other grand son Sanwal (Sanwant?). However, Dhanpat son of Sanwal took advantage of the presence of plaintiff-respondent in the Tehsil premises, who had come there to

execute an agreement to sell in respect of a tractor on 13.1.1995. On that date, he got his thumb impression affixed on some paper, which the plaintiff-respondent had appended in the belief and on the representation that he was authenticating an agreement to sell in respect of a tractor. The defendant-appellant used those papers for suffering a decree and one Chunni Lal was produced impersonating the plaintiff-respondent. The findings recorded by the learned Additional District Judge in this regard read as under:-

"23. Now let us see what are the surrounding circumstances showing the fraudulent motive and design of the parties. In order to prove these circumstances, it is necessary to discuss the statement of the plaintiff at the first instance. Plaintiff Ami Lal appeared in the witness box as PW4 and deposed that name of his grandfather was Hira, who had two sons, namely Kishna and Lakhma. Lakhma had two sons, namely Ami Lal himself and Shankar Lal. Similarly, Sanwal had two sons, namely Dhanpat and Mahender. Mam Kaur had married earlier with Kishna and with Lakhma lateron. Thus, the mother of Sanwal and Lakhma was one lady. Shankar's wife died while leaving her three children, namely Rajinder, Sumitra and Savitri about 35 years ago. Rajinder was three years young at that time. Thus, he did not contract any marriage, rather brought up the children of his brother. He is residing with Rajinder and having a common ration card. He is having his separate account from Sanwal and he is cultivating the land of his share with the help by Rajinder. He has admitted that he was having good relationship with Dhanpat but after this transaction, their relationship did not remain cordial. He has used a word that Dhanpat trusted a sail (a dagger) in his heart. He has further deposed that Dhanpat, had snatched his land by playing fraud upon him. He had gone to transfer his tractor to Dhanpat, but latter snatched his land. He had never intended to give away his land to Dhanpat nor will he even give to Rajinder during his life time because he is taking the land just like his mother. He was taken to Siwani by Dhanpat when he was having good relationship with him. It was the day of Sankranti He got the matter typed and wherein he mentioned the value of the tractor to the tune of Rs. 1,50,000/-. Nothing was to be paid because the instalments of the tractors were to be given. He has also deposed that no agriculture implements like harrow was to be given alongwith the tractor. He has also stated that he brought the paper for typing when he was having affection (haige) with Dhanpat. He did not enter into court nor did he engage any counsel. He is having one blind eye, whereas he can see an object only upto two yards from second eye. He has further stated that Dhanpat etc. came after 10/12 and disclosed about the decree. He asked him either to cut and remove the crop or he would remove the same. At that time, Rajinder and his brother-in-law were also present in the field and whereupon, he reported the matter to the police, which arrested Dhanpat. He has also stated that he married off the daughters of Shankar, who were two years elder to Rajinder. Respondent has put a suggestion to this witness that Shankar was alive at the time of marriage of Sumitra, but has not produced any evidence to prove the same. He has also stated that

Dhanpat and Sanwal were residing together. But he has also claimed that he was cultivating the land of plaintiff prior to the family settlement. But the Khasra girdawari, Ex.P22 to Ex.P26, show that it is Ami Lal, who has been in cultivating possession of the suit land from 1989 to 1999.

24. From this testimony of Ami Lal, it is proved that Ami Lal was an illiterate person. But he was knowing how to put his signature because he has learnt his signing while remaining in military for some time. He was admittedly 80 years old at the time of impugned decree. He was hard of hearing, having very weak eye sight. He has proved his residence with the children of his brother, named Shankar, who died about 40 years ago. Ami Lal brought up his children when they were just five to seven years young. He was having his ration card and voters list with his nephew Rajinder and his family members.

25. Now coming to the document of alleged agreement to sell Ex.D1, it is quite evident that Ami Lal had agreed to sell his tractor No. HR-17/0427 to the defendant for a consideration of Rs. 1,50,000/- on the condition that all the instalments of loan, after the sale, would be paid by Dhanpat and in case, even a single default, in making the payment of instalments, was made, then he (plaintiff) would become the owner of the tractor. In the foot note of the document, a note was given that "he had not sold anything alongwith the tractor."

30. In view of my above discussion, it is prayed that defendant has failed to prove as to why Ami Lal put his thumb impression on the written statement and power of attorney in black ink. It shows that all these documents were prepared by Dhanpat when the document for sale of tractors prepared. He never intended to give away his land to the defendant. There is a weight in the argument of learned counsel for the appellant that when a person was so specific that he had given a note in the agreement to sell Ex.D1 that he is not selling anything other excepting the tractor, then he would have certainly mentioned this fact that he had already transferred or is going to transfer his entire land measuring 16 kanals to Dhanpat and, therefore, he is not in need of tractor now. Another circumstance showing (that the ) transaction is fraudulent is that no witness from the same village was brought by the parties from their own village. Chunni Lal son of Sardara Ram is not a resident of village Bhera, to which, the parties belong, but he is from village Jhajjda Sheoran and another witness is Sh. Risal Singh, Advocate, who has been alleged to be in league with Dhanpat for committing of the fraud. Whereas Sh. D.S. Pilania, Advocate does not know Ami Lal.

31. From all these circumstances, plaintiff has proved that no such family settlement took place about six months before the impugned decree. Rather a fraud was committed by defendant upon the plaintiff."

7. Mr. Akshay Kumar Goel, learned counsel for the defendant-appellant has argued that fraud or misrepresentation has not been proved and there was heavy onus

placed on the plaintiff-respondent to discharge. According to learned counsel, the trial Court has rightly dismissed the suit holding that the plaintiff-respondent has failed to prove the fraud and misrepresentation. The learned counsel has also referred to provisions of Order VI Rule 10 of the "Code" to argue that allegations with regard to fraud and misrepresentation were not sufficiently set out in the plaint filed by the plaintiff-respondent warranting recording of findings of fraud of misrepresentation by the defendant-appellant.

8. I have thoughtfully considered the submissions made by the learned counsel for the defendant-appellant and have also perused the judgments of both the Courts below. I find that the instant appeal is ill advised and is liable to fail. The principle of non est factum would be attracted to the facts of the present case because the plaintiff-respondent was 80 years, illiterate and was having only one eye with very weak eye sight. It has also been found as a fact that the plaintiff-respondent lost his brother Shankar Lal at the young age and he brought up his three children with whom he has common kitchen. His ration card also proves that fact alongwith the voter list. It was further been proved that there was an agreement to sell a tractor between the plaintiff-respondent and defendant-appellant Dhanpat executed in the same day. Therefore, a person of such a weak position has to be accorded some protection by law. This Court in the case of Hamelo (deceased) v. Jang Sher Singh (2002)131 PLR 101, had discussed in detail the English Common Law principle of non est factum by referring to various judgments namely *Thoroughgood v. Cale* 1582(2) CR. 9A, *Foster v. Mckinnon* 1869 4 C.P. 704, *Sannibibi v. Siddik Hussain* AIR 1919 Cal. 728, [Ningawwa Vs. Byrappa and Others](#), , *Lewis v. Clay* 1897(67) L.J.Q.B. 224, *Muskham Finance Ltd. v. Howard* 1963(1) Q.B. 904, *Saundeers v. Anglia Building Society* 1970(3) All.E.R. 961, *Gaallie v. Lee* 1969(2) Ch.17, *Smt. Bismillah v. Janeshwar Prasad* AIR 1990 S.C. 540. The conclusion recorded is that when an old illiterate person of weak eye sight and mental capacity is tricked to sign a document than the one he actually intended to sign, then he can claim that the documents signed by him is not actually his own document. The mind of the signer did not accompany the document and, therefore, such a person can make claim that the document is non est factum. In the instant case, the afore-mentioned principle would fully apply and once the allegations have been proved, the onus to show valid consideration like love and affection with the defendant-respondent Dhanpat was on him. The defendant-appellant has miserably failed to substantiate any of the valid defences or his bona fides. Therefore, the common law principle of non est factum as adopted by our Courts in *Bingawa's* case (supra) and *Smt. Dismillah's* case (supra) and other judgments referred above would be fully applicable on the facts of the instant case.

9. I am further of the opinion that the facts with regard to fraud and misrepresentation cannot be reopened in an appeal u/s 100 of the Code because the findings are based on cogent evidence and cannot be claimed that the findings are without any evidence. The First Appellate Court has critically analysed the

evidence and has rightly recorded those findings. Therefore, the appeal is without merit and is, thus, liable to be dismissed.

For the reasons recorded above, this appeal fails and the same is dismissed. Appeal dismissed.