
(2007) 08 P&H CK 0204

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 5463 of 2003

Jagdish

APPELLANT

Vs

Shiv Kumar

RESPONDENT

Date of Decision: Aug. 9, 2007

Citation: (2007) 4 PLR 773

Hon'ble Judges: Permod Kohli, J

Bench: Single Bench

Advocate: Rishi Pal Rana, for the Appellant;

Judgement

Permod Kohli, J.

This Regular Second Appeal arises out of the judgment, and decree dated 5.12.2002 passed by the Additional District Judge, allowing the appeal of Respondent No. 1 Defendant thereby setting aside 342 All India Criminal Law Reporter 2008(1) the judgment and decree dated 22.9.2001 passed by Civil Judge (Jr. Division), Karnal.

2. After hearing the counsel for the parties, I am of the opinion that following substantial question of law is involved in the present appeal:

I. Whether the First Appellate Court, after holding inadmissibility of the evidence recorded by the trial Court can return any finding of fact on the basis of the same evidence.

3. The present appeal is preferred by the Plaintiff who filed a suit for declaration challenging will dated 1.12.1994 and consequential mutations entered in favour of Defendants No. 1 to 3. Defendants were set ex-parte in the trial Court. Subsequently, on an application made by Defendants No. 1 to 3, ex-parte proceedings were set aside. The Trial Court proceeded to decide the suit on the basis of the evidence recorded by it when the Defendants were ex-parte. It is admitted case of the parties that even after the ex-parte proceedings were set aside, no written statement of defence was filed which appears to have persuaded the trial Court to proceed further in the matter. The trial Court decreed the suit vide its

judgment and decree dated 27.9.2001 and set aside the will as also the mutations.

4. In appeal preferred by Respondent No. 1 Shiv Kumar, the First Appellate Court set aside the judgment and decree of the trial Court and dismissed the suit. The First Appellate Court set aside the judgment of the trial Court, firstly on the ground that the will which was assailed in the suit, has not been produced and secondly on the ground that the trial Court has recorded findings of fact on the basis of statements of witnesses recorded ex-parte and in absence of the Defendants were relied upon without subjecting them to cross-examine by the appearing Defendants, even after setting aside the ex- parte proceedings, and thirdly on the ground that some of the Defendants were minor.

5. Be that as it may, the First Appellate Court has committed glaring illegality. On the one hand, it set aside the judgment and decree of the trial Court, on the ground that the trial Court returned the findings of fact on the basis of inadmissible evidence and on the other hand, the First Appellate Court itself returned findings of fact on the same inadmissible evidence. Such a procedure is not permissible in law. For the above reason, I set aside the judgment and decree dated 5.12.2002 passed by the Additional District Judge, Karnal and the judgment and decree dated 22.9.2001 passed by Civil Judge (Jr. Division), Karnal and remand the matter back to the trial Court for de-novo trial. The parties are directed to appear before the trial Court on 13.9.2007. RSA is accordingly disposed of.