

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

R.S.A. No. 2404 of 1990

Date of Decision:- 12.08.2015

Ruru and another

.....Appellants

Versus

Gannu and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE SHEKHER DHAWAN

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest? Yes

Present: Mr. M.L. Sarin, Senior Advocate,
with Ms. Ankita Sambyal, Advocate, for the appellants.

Mr. Yogesh Saini, Advocate, for respondent No.1.

SHEKHER DHAWAN, J.

Present Regular Second Appeal against judgment and decree dated 06.08.1990 whereby appeal against judgment and decree dated 21.11.1987 passed by Sub-Judge, 1st Class, Pathankot was dismissed.

2. For the sake of convenience, the parties are being referred to as per their status before the Court of first instance. The detailed facts of the case have already been recapitulated in the judgments of the Courts below. Relevant facts for the purpose of decision of present Regular Second Appeal that plaintiff-Gannu had filed suit for declaration that he is owner of land measuring 158 kanals 3 marlas situated in the revenue estate of village Thara Jhikla Salari Tehsil Pathankot. Plaintiff asserted

his claim on the basis of Will dated 06.07.1982 of Kashmiro alias Kashmir Singh, who died on 05.09.1984. As per plaintiff, Kashmiro alias Kashmir Singh died issueless and was the exclusive owner of the disputed land. Defendant Nos.4 and 5 in collusion with other defendants forged a false Will of Kashmiro alias Kashmir Singh and alleged that they are in possession over the suit property. Defendants were requested by the plaintiff to admit his claim but no effect and as such the suit before the Court of first instance. Defendants contested the suit and admitted Kashmiro alias Kashmir Singh to be earlier the exclusive owner in the possession of the suit property and he died issueless but at the same time took the plea that Kashmiro alias Kashmir Singh had not executed any Will in favour of the plaintiff, who was not related to him.

3. As per defendant Nos.4 and 5, Kashmiro alias Kashmir Singh executed his last and valid will dated 04.07.1983 whereby he cancelled and superceded his earlier Will. Court of first instance settled issues and after appreciation of evidence available on file, returned the findings that as per law, the last Will of the deceased is to be given effect to and as such subsequent Will, if established, superceded the previously executed Will by the testator, if any. So, Will dated 04.07.1983 (D.W.6/A) executed by Kashmiro alias Kashmir Singh in favour of defendant Nos.4 and 5, regarding the disputed property is to be acted upon and given effect to and the earlier Will dated 06.07.1982 registered on 03.08.1983 (Ex.D.W6/A) was superceded and was rendered inconsequential. Resultantly, the suit of plaintiff was dismissed. Defendant Nos.1 to 3 preferred appeal against said judgment and first

appellate Court dismissed the appeal but for the reasons other than those given by the Court of first instance and appeal filed by defendant Nos.1 to 3 was dismissed.

4. Defendant Nos.4 and 5 preferred second appeal before this Court that Will dated 04.07.1983 (Ex.DW6/A) is a registered document and valid one and was a result of a free and fit mind. The first appellate Court fell in error while returning the findings to the contrary. Learned Court of first instance had given valid reasons that Will (Ex.DW6/A) a valid document. Mere fact that Kashmiro alias Kashmir Singh had executed three documents between 1991 to 1993 proves that he was fully aware of what he was doing and he was in a sound disposing mind. Finding on issue No.1 having been reversed, the suit of plaintiff-respondent had to be dismissed and findings under Issue No.2 was not at all necessary. The present appeal has been filed mainly on the ground that findings of first appellate Court under Issue No.2 cannot operate res-judicata and the same deserves to be reversed.

5. While arguing on this point, learned counsel for the appellants took the plea that facts are not disputed to the extent that Kashmiro alias Kashmir Singh was the owner of the suit property, who died issueless and he had not performed any marriage during his life time. The earlier Will was cancelled. Two appeals were filed. Court of first instance recorded findings on issue No.2 for exclusion of others, whereas first appellate Court reversed finding of Court of first instance but there was no mention of earlier Will. In fact learned counsel for appellants took the plea that appellants are aggrieved of such finding under issue. The

finding recorded by Court of first instance was well reasoned but the same have been reversed by first appellate Court without any reasons. So, the findings returned that judgment shall not operate as res-judicata because defendant Nos.4 and 5 are appellants before this Court and suit has already been dismissed.

6. Learned counsel for respondent No.1 took the plea that as per judgment of Court of first instance Will in favour of plaintiff has already been held to be invalid but first appellate Court reversed the said findings. However, no appeal was filed.

7. As the only question involved in this case is that appellants are before this Court to record the observation that findings recorded by first appellate Court shall not operate as res-judicata because appellants are before the Court who were otherwise defendant Nos.4 and 5 before the Court of first instance and that suit was dismissed. The first point involved in this case is whether appeal is maintainable in such circumstances. Similar matter had gone before Hon'ble Supreme Court in case M.B. Ramesh (dead) by LRs Vs. K.M. Veeraje Urs (dead) by LRs and others (2013) 7 SCC, 490. Hon'ble Supreme Court while dealing with Section 100 CPC and held that whether any particular issue is substantial question of law or not, depends on facts and circumstances of each case. Construction of a document of title or document which is foundation of rights of parties, necessarily raises a question of law. Then execution of Will and its construction is subject-matter of consideration, framing of said question of law cannot be faulted.

8. As regards to another aspect, whether the said findings

recorded by first appellate Court shall operate as res-judicata or not and whether the same can be decided by way of present Regular Second Appeal. The matter in controversy had gone before Hon'ble Supreme Court in case Most Rev. P.M.A. Metropolitan and others Vs. Moran Mar Marthoma and another, 1995 Supp (4) SCC 286, wherein, it has been observed that if there is an adverse finding against anybody, a plea of res judicata cannot be founded upon that decision because the defendant has succeeded on the other plea had no occasion to go further in appeal against the adverse finding recorded against him.

9. In view of the above ratio of law laid by Hon'ble Supreme Court and facts of the case, it is not disputed in any way that appellants have locus standi to file the present appeal and points regarded execution and validity of Will is certainly in controversy, which may be looked into by way of second appeal. However, the case in hand, the Court of first instance had given reasoning, so as to arrive at a conclusion that, Will dated 04.07.1983 (Ex.DW6/A), is to be taken as the last Will whereby earlier will dated 06.07.1982 registered on 03.08.1983 (Ex.P.W6/A) was superceded. However, the first appellate Court reversed the said finding without any merit and the said finding shall not operate as res judicata qua the appellants. Resultantly, the present Regular Second Appeal disposed of with the above observations.

August 12, 2015
naresh.k

(SHEKHER DHAWAN)
Judge