

SAO No.70 of 2011 (O&M)

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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**SAO No.70 of 2011 (O&M)
Date of decision:15.01.2015**

Vidya Devi and another ...Appellants

Versus

Indraj and others ...Respondents

CORAM: Hon'ble Mr. Justice Rakesh Kumar Jain

Present: Mr. C.M.Munjal, Advocate,
for the appellants.

Mr. Pardeep Kumar, Advocate,
for the respondents.

Rakesh Kumar Jain, J.

The present appellants filed a suit for declaration that they are owners of 1/5th share each in the agricultural land measuring 63 kanal 18 marlas, situated within the revenue estate of village Kandhwala Amarkot, Tehsil Abohar on the basis of judgment and decree dated 21.12.1990 and mutation no.2401 has no effect on their rights being secured by defendants no.4 to 7 on the basis of the Will, allegedly executed by Dana Ram father of the plaintiffs and defendants no.1 to 3 and also prayed for permanent injunction to restrain defendants no.4 to 7 from alienating the suit land in any manner.

On 26.03.2002, the following issues were framed by the trial Court:-

- “1. Whether the plaintiffs are owners of 1/5th share in land measuring 63 kanal 18 marlas as described in the headnote of plaint on the basis of judgment and decree dated 21.12.1990?OPP.
2. Whether the mutation no.2401 is illegal, null and void qua the right of plaintiffs?OPP.
3. Whether the plaintiffs are entitled to the declaration, as prayed for?OPP.
4. Whether the plaintiffs are entitled to the permanent injunction, as prayed for?OPP.
5. Whether the suit is within limitation?OPP.
6. Whether the deceased Dana Ram executed a valid Will dated 27.02.1985 in favour of defendants no.4 to 7?OPD.
7. Whether the suit is barred by principle of *res judicata*?OPD.
8. Whether the plaintiffs are estopped by their own act and conduct for filing the present suit?OPD.
9. Whether the plaintiffs have relinquished their right of ownership through affidavit?OPD.
10. Whether the Civil Court has not jurisdiction to entertain to try the present suit?OPD.
11. Relief.”

It was held by the trial Court that mutation no.2401 was entered

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in the names of Suresh Kumar, Ramesh Kumar, Mohinder Kumar and Rakesh Kumar on the basis of the alleged Will executed by Dana Ram, whereas the said Will was not accepted by the Court in Civil Suit No.715-1 of 1987 titled as “Balwant Singh v. Sultan Singh” and held that the estate of Dana Ram was to be devolved upon his heirs by way of natural succession. The suit was thus decreed by the trial Court on 08.09.2009 declaring that notwithstanding anything contained to the contrary in the revenue record or any other record, the plaintiffs are the owners of 1/5 share each of the agricultural land measuring 63 kanal 18 marlas.

Defendants no.2, 6 and 7 challenged the judgment and decree of the trial Court by way of appeal which was allowed on 29.08.2011 and the case was remanded back to the trial Court to decide issues no.6 to 10 on merits as it was observed while deciding issues no.6 to 10 that these issues were not pressed by the defendants. It is also observed that the trial Court has committed an error while deciding the issues no.6 to 10 because the parties had led evidence on the said issues.

Counsel for the appellants has vehemently argued that the only issue involved in this case was as to whether there is a Will in favour of the defendants, purported to have been executed by Dana Ram on 27.02.1985, and on the basis thereof, a mutation no.2401 was sanctioned in their favour. The said issue was categorically decided by the trial Court on the basis of a previous judgment between the same parties rendered in Civil Suit No.751-1 of 1987 decided on 21.12.1990. It is also submitted that the lower Appellate Court has committed an error in making an observation that the

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trial Court has not decided issues no.6 to 10 though they were hotly contested. Had it been so, the respondents should have filed an application for review of the judgment of the trial Court.

On the other hand, counsel for the respondents has argued that there is no error in the order of the lower Appellate Court in remanding the case as the jurisdiction has been exercised in terms of Order 41 Rule 23-A of the Code of Civil Procedure, 1908.

After hearing learned counsel for the parties and examining the record, I am of the considered opinion that the impugned order is patently illegal and deserves to be set aside. The parties to the dispute are the sons and daughters of one Dana Ram. The daughters have filed suit for declaration that they have 1/5th share each in the property of their father who had died intestate, whereas the respondents have claimed the suit property on the basis of a Will, purported to have been executed by Dana Ram on 27.08.1985, on the basis of which mutation no.2401 was also sanctioned in favour of the respondents.

Thus, the only material issue was issue no.6 which has been categorically decided by the trial Court in para 13 of its judgment. As regards the other issues which were to be proved by the defendants, no argument was addressed and as such, the finding was recorded while deciding issues no.6 to 10 which should have been issues no.7 to 10 in fact.

In any case, the lower Appellate Court has not returned any finding on this point that the Will in favour of the respondents has been proved or about the finding recorded in respect of the Will in the previous

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case i.e. Civil Suit No.751-1 of 1987 titled as “Balwant Singh v. Sultan Singh”. All that has been observed is that issues no.7 to 10 have not been specifically decided and then remanded the case back though the lower Appellate Court can still hear and decide the issues on merits. Once the defendants who had not pressed issues no.7 to 10 which were all technical issues and the lower Appellate Court has not reversed the finding on issue no.6 with regard to validity of the Will, there was no occasion for it to remand the case back as the matter has already been decided between the parties in an earlier suit.

In view of the aforesaid discussion, the present appeal is hereby allowed and the impugned order is set aside. Both the parties are directed to appear before the lower Appellate Court on 16.02.2015 who would now decide the appeal itself, in accordance with law.

January 15, 2015
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(Rakesh Kumar Jain)
Judge