

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

Regular Second Appeal No.2287 of 2013 (O&M)
Date of decision: 10.08.2015

Sukhpal Kaur

... Appellant

versus

Gurjant Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. Preetwinder Singh Dhaliwal, Advocate,
for the appellant.

1. Whether reporters of local papers may be allowed to see the judgment ? No.
2. To be referred to the reporters or not ? No.
3. Whether the judgment should be reported in the digest ? No.

K.Kannan, J. (Oral)

CM Nos.6231-6232-C of 2013

For the reasons stated in the applications, delay in re-filing and filing of the appeal is condoned.

Applications stand disposed of.

Regular Second Appeal No.2287 of 2013

1. The appeal is by the defendant who suffered a decree declaring the Will alleged to have been executed by Chamkaur Singh on 02.01.2002 as forged and fabricated and that the mutation made on the basis of such a Will was illegal, null and void. The suit had been filed by the mother of Chamkaur Singh and the contest was

entered by his widow as a sole defendant. The court framed an issue rather inartistically relating to the petitioner's entitlement to declaration and the competency to sue for injunction among other issues. The parties, however, knew that the plaintiff's declaration for the Will to be treated as forged and fabricated required an adjudication of the Will. By the very nature of things, the Will which was propounded by the widow/the defendant had to be established by calling at least one attester to speak about the attestation in the manner required under Section 68 of the Indian Evidence Act. The defendant produced neither the Will in original nor did she call the witnesses or the scribe to speak about the execution. On the other hand, the defendant was relying on the evidence of the Numberdar who was alleged to have given a statement about his knowledge that the Will had been duly executed. The trial Court decreed the suit finding that the defendant did not establish what was required of her.

2. In appeal, an application under Order 41 Rule 27 CPC was filed to produce the original Will which, according to her, had been misplaced by the government officials at the time when the mutation of entries was sought to be obtained in her favour on the basis of the Will. The defendant was, therefore, stating that the original could not be produced at the trial stage and wanted the reception of the same. The appellate Court again confirmed the

decision of the trial Court and dismissed also the application for reception of additional evidence on a reasoning that the defendant could not be permitted to fill-up a lacuna in her evidence by allowing for additional evidence to be brought at the higher court.

3. Learned counsel for the appellant would make submission that there was not even a specific issue regarding the truth and genuineness of the Will and the defendant cannot be faulted for not giving appropriate evidence therefor. The counsel would also state that the mother of the deceased herself has given a statement before the revenue authorities accepting the Will and there was a justification for not summoning of any of the witnesses. The appellate Court also failed to give adequate opportunity for her to produce the Will and prove the same. These factors, according to him, have vitiated the judgment and the case would require a reconsideration on substantial questions of law that arise in the manner referred to above.

4. If the suit contains a declaration that the Will is not true and the defendant sets up a plea affirming the Will and the court framed an issue of whether the plaintiff is entitled to a declaration, as I have already observed that although the issue as framed was inartistic, the issue of declaration of what the plaintiff was seeking was a manner of requiring the defendant to prove whether the Will had been true or not. There was no other issue for a court to

consider when the court was examining whether the plaintiff was entitled to a declaration. It is inconceivable that the defendant must believe that the plaintiff had admitted the Will and, therefore, there was no requirement for its proof. Section 68 of the Evidence Act itself constitutes an important rule of evidence that any document which is admitted, not being a Will, could be proved only by calling at least one attesting witness. The manner in which Section 68 of the Evidence Act is drafted, would show that an admission of a party cannot dispense with the requirement in law of calling at least one attesting witness to prove the Will. No evidence was given nor explanation offered as to why anyone of the witnesses mentioned in the Will could not be examined. It is one thing to state that the original could not be produced but quite another to say that even a witness could not be examined for proof of execution by referring to the certified copy of the Will. The justification for non-production of the original at the trial, even if it should be found to be adequate that the State had misplaced the original document, could not have given sufficient justification for the defendant not to examine anyone of the attestors to prove the Will. Permission sought at the appellate court for production of original, if granted, would not have advanced the case of the defendant, for, the defendant cannot bargain for proving of the Will for the first time after taking permission at the appellate court. If the defendant will not produce

an appropriate evidence with reference to the same at the trial and the court had granted the decree to the plaintiff allowing for a 2/45th share in a land measuring 416 kanals 16 marlas and 1/15th share in the land measuring 129 kanals 14 marlas, it should be taken to its logical stage of allowing for the plaintiff to enjoy such rights as a co-owner with the defendant as the law admits.

5. I find no error in the approach of the two courts below to render a decree as sought for by the plaintiff.

6. There is no merit in the second appeal and I find no substantial question of law arise for consideration for modification or reversal of the decision. Second appeal is dismissed.

(K.KANNAN)
JUDGE

10.08.2015
sanjeev