

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.4616 of 2014 (O&M)
Date of Decision.01.12.2015

Hardial Singh and another

.....Appellants

Vs.

Pritam Singh and others

.....Respondents

Present: Mr. Harsh Aggarwal, Advocate
for the appellants.

CORAM:HON'BLE MR. JUSTICE K. KANNAN

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

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K. KANNAN J. (ORAL)

1. Delay of 36 days in refiling the appeal is condoned.
2. The defendants who are the sons of the 1st plaintiff and the brothers of plaintiffs No.2 to 4 lost out in a contest made against the claim for share in the property as heirs to the estate of the father. The defendants pleaded a case of Will said to have been executed by the father on 29.09.1978 which was said to have been produced before the revenue authorities and a mutation obtained in favour of the sons who are the beneficiaries under the Will. The defendants' contention was that the plaintiff who was actually present before the revenue authorities and admitted to the bequest had later denied their very presence and the suit had been filed for a declaration that the father was civilly dead and that the father had not been known to be alive for seven years prior to the institution of the suit. Such a contingency was even unnecessary, for the original Will was produced before the Revenue

Authority on a plea that the father had died on 14.09.1982 and the mutation was sanctioned in favour of all the sons to the exclusion of the mother and daughters under the terms of the Will. One of the sons who had been a beneficiary had also made a gift on the basis of the bequest that he obtained and defendant Nos.1 and 2 who were the other brothers have now resiled from the Will and were on the side of the plaintiff to seek for division of the property on inter se succession. Before the Appellate Court also the original Will was not produced. The attempt of the defendant to secure a certified copy of the Will from the revenue authorities was also not favourable since the so-called original had not been available with the revenue authority to make a certified copy and none of the witnesses was also examined who could have spoken about the valid execution and attestation.

3. Learned counsel appearing on behalf of the appellants contends that the Will was referred to in the mutation proceedings and that itself must be taken as proved. In any event, the suit itself is barred by Article 110 of the Limitation Act where a claim to inter se succession must be pressed within a period of 12 years from the time when the succession opened. The argument presented is not tenable in law. The proof of execution and attestation of a Will marks an exception under the scheme of the Indian Evidence Act that it is the only instrument which even if admitted would require to be proved by calling at least one attester. The Court cannot presume that there was a genuine Will propounded by a defendant in the absence of any document to support the same. A reference in a mutation proceeding to existence of Will is hardly a document which can affirm a Will and if a Will was

produced and witnesses examined, the reference in mutation proceedings would obtain corroborative value. On stand alone basis, it is impermissible to be relied on for proof of Will.

4. The argument that the suit is barred by limitation is also not tenable. Article 110 of the Limitation Act contemplates an action in relation to a joint family property where one member of the family was excluded. Plea of exclusion by ouster an extension to the principle of law of limitation relating to the adverse possession between the co-owners ought not to be applied for persons who are claiming succession to the property where the defendant is unable to prove such exclusion. Ouster of possession must be such as to bring home to the knowledge of the other heirs that the right was expressly denied by the defendant who was making an assertion of title in his own name. There had been no plea of ouster or proof and all that the defendant was contending was that the plaintiffs knew about the Will and they were willing for the transmission of the revenue entries in favour of the defendants on the basis of the Will. The plaintiffs were actually denying that they were ever present before the revenue authorities to approve of the Will. No attempt was also made by the defendant to take any one of the officers who had caused the entry to vouch for their presence.

5. The decree granted partly in favour of the plaintiffs and the dismissal of the appeal brought by the defendant were justified under the circumstances and I will find no cause for intervention in the second appeal.

(K. KANNAN)
JUDGE

December 01, 2015

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