

In the High Court of Punjab and Haryana, at Chandigarh

Regular Second Appeal No. 1798 of 1987 (O&M)

Date of Decision: 30.03.2016

Raja Ram and Others

... Appellant(s)

Versus

Smt. Sunder (since deceased) through LR. and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Shekher Dhawan.

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

Present: Mr. L.N.Verma, Advocate
for the appellant(s).

Mr. P.N.Aggarwal, Advocate
for respondents No.1, 5 & 6.

Shekher Dhawan, J.

Present regular second appeal, filed by defendants No. 1- Raja Ram and legal representatives of defendant No.2-Bhoop Singh, against the concurrent findings of facts having been recorded by both the Courts below.

For the sake of convenience, parties are being referred to as per their status before the Court of first instance.

Relevant facts of the case that plaintiff-Smt.Sunder had filed a suit for declaration that she and proforma defendants No. 5 to 7

are the owners in equal share of ½ share of the suit land; Will dated 4.4.1969 is null and void and that does not affect the rights of the plaintiff and proforma defendants and mutation No. 662 dated 11.8.1970, sanctioned on the basis of impugned Will is also null and void. As per plaintiff, Smt. Dhappan widow of Ram Karan, mother of plaintiff and proforma defendants, was the owner of the suit land after the death of Ram Karan. Smt. Dhappan died on 28.3.1970 leaving behind the suit land. The suit land was to go to plaintiff and proforma defendants being the real daughters of Smt. Dhappan as her two sons died unmarried and there was no legal heir of deceased Smt. Dhappan except them. However, defendant No.3 Sohan Lal son of Ladhu is a very clever person and he, in connivance with the revenue authorities, got mutation No. 622 dated 11.8.1970 sanctioned in favour of his two sons, namely Raja Ram and Bhup Singh. As per plaintiff, mutation No. 685 dated 25.4.1971 and mutation No. 726 dated 4.5.1972 are also illegal and void and the same be set aside.

Defendants No.1 to 3 contested the suit *inter alia* taking the plea that Sohan Lal is son of Smt. Dhappan being son of Ram Karan and defendants No.1 & 2 are the sons of Sohan Lal, defendant No.3 and Smt. Dhappan was the real grand mother of defendants No.1 & 2, who had executed registered Will on 4.4.1969 with respect to the suit land and after the death of Smt. Dhappan, plaintiff has got no right, title or interest in the suit land. Mutations were also sanctioned on the basis of Will and no objection was raised by the plaintiff or the proforma defendants and at this stage and they have no legal right to agitate the

same and prayed that suit be dismissed.

On these facts, the Court of first instance settled the issues and parties were asked to lead their respective evidence. The Court of first instance, after appreciating the entire oral and documentary evidence and after considering the submissions made by learned counsel for the parties, returned the finding that plaintiff and proforma defendants are owner in equal share of ½ share of land. The Will dated 4.4.1969 is null and void. The first appeal, filed by appellant No.1-Raja Ram and defendant No.2-Bhup Singh, was dismissed by the Court of first appeal and as such present regular second appeal before this Court.

Learned counsel for the appellants submitted that Smt. Dhappan was owner of the suit property. She was having two sons, who died unmarried. During her life time, Smt. Dhappan was living with Sohan Lal and on 3.4.1969, she had executed Will in favour of Raja Ram and Bhup Singh and they are in possession of the suit property. Mutation dated 11.8.1970 (Ex.P5) was duly sanctioned.

Learned counsel for the appellants mainly submitted that the provisions of Article 65 of the Limitation Act, 1963 had come into operation as appellants are in possession of the suit property. Though plaintiff filed a suit for possession, ad valorem court fee was not affixed. The Courts below have not recorded any finding on the issues of limitation and the court fee. The limitation period of three years to challenge the same started at least on the death of Smt. Dhappan or from the date of sanctioning of mutation. But the present suit was not

filed within a period of limitation and the same was filed in the year 1981. As per Section 65 of the Limitation Act, suit for possession of movable property or interest thereon based on title is to be filed within 12 years. But if suit is for declaration, as in the present case, the period of limitation is three years only. However, in the present case, provisions of Article 58 of the Limitation Act shall attract and the period of limitation shall be three years when the right to sue first accrued. On this point, reliance was placed upon judgments rendered by the Hon'ble Apex Court in ***Prem Singh and Others v. Birbal and Others 2006(3) RCR (Civil) 381, Kamlesh Babu and Others v. Lajpat Rai Sharma and Others 2008(2) RCR (Civil) 872*** and view taken by this Court in case ***Pat Ram and Others v. Gram Sabha Digrota and Others 1986 PLJ 679***.

Learned counsel for the appellants further submitted that as plaintiff was not in possession of the suit property and the possession was with the appellants and mutation dated 11.8.1970 (Ex.P5) was sanctioned in their favour on the basis of Will, suit for declaration is not maintainable under Section 34 of the Code of Civil Procedure, 1908. More so, it had come in the statement of PW.1-Smt. Sunder (plaintiff), wherein it is stated that plaintiff and his sisters were cultivating the land and the Court has not granted the relief of possession. As per learned counsel for the appellants, law on the point is settled that if relief for possession is claimed and decree is not passed, simple decree for declaration is useless and if possession is not claimed along with declaration, said suit is not maintainable. The said

finding recorded by the Court of first instance has not been modified by the first Appellate Court. Otherwise, the Will in favour of the present appellants have been able to prove on the file. The Will was scribed by DW.6 Sh. Kulbhushan, Advocate and DW.3 Liak Ram & DW.4 Gopal Ram are the attesting witnesses and all these three witnesses were examined and appeared before the Registrar. The said Will is a registered document. More so, in case of registered Will, even endorsement alone is sufficient. On this point, reliance was placed upon the judgment rendered by the Hon'ble Apex Court in ***Rabindra Nath Mukherjee v. Panchanan Banerjee (dead) by LRs. 1995(3) R.R.R. 520*** and the view taken by this Court in ***Surinder Kaur v. Mohinder Singh 2004(1) PLR 51, Joginder Singh (Died) through his LRs. V. Surinder Singh 1997(1) RCR (Civil) 479*** and ***Naranjan Singh etc. v. Parsa Singh alias Parsu 1971 CLJ 195.***

Learned counsel for the appellants further submitted that even the execution of Will has been denied and there is no allegation of fraud or misrepresentation and such a plea is not tenable especially against the registered Will. On this point, reliance has been placed upon the judgment rendered by the Hon'ble Supreme Court in ***P.P.K.Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar 1996(1) RRR 266.***

Learned counsel for the appellants further submitted that even in case of execution of registered Will, if daughter is excluded, that does not make out a suspicious circumstance, if the Will is otherwise proved. On this point, reliance has been placed upon the judgment

rendered by the Hon'ble Supreme Court in ***Satya Pal Gopal Das v. Smt. Panchubala Dasi and Others AIR 1985 Supreme Court 500*** and the view taken by this Court in ***Mangat Ram and Others v. Dina Nath 1997(2) PLJ 122, Mohinder Kaur v. Harbhajan Singh 2002(1) RCR (Civil) 134*** and ***Amar Kaur v. Paramjit Kaur 2003(3) RCR (Civil) 213.***

Learned counsel for the appellants also submitted that if legatee was present at the time of execution of the Will and his active participation in calling the scribe and the witnesses, the same cannot be described as exercise of undue influence. On this point, reliance has been placed upon the judgment rendered by this Court in ***The State of Punjab v. S. Bhagwant Singh 1972 PLJ 296*** and ***Naranjan Singh v. Mst. DIPO and Others 1976 PLJ 523.***

Learned counsel for the appellants further submitted that all these facts have been completely ignored by the Courts below. Appellants were serving Smt. Dhapan and she had executed a valid Will in their favour and there is nothing suspicious against the registered Will, which has been duly proved on the file. Smt. Dhapan was 70 years old lady and certainly wanted help of one person to lead her old age life and as the appellants were serving her during her old age, the Will was executed and the same was duly registered and proved on the file but the Courts below ignored these facts and returned the findings against the appellants, which are liable to be set aside and prayed appeal be accepted.

While arguing on these points, learned counsel for the

respondents submitted that present appeal is against the concurrent findings of facts having been recorded by the Courts below and there is no substantial question of law involved in this case and as such present appeal is not maintainable. More so, the present suit is for declaration simpliciter, rather the same is not for possession and hence, it is not maintainable. On this point, reliance has been placed upon the judgment rendered by the Hon'ble Supreme Court in ***C.Mohammad Yunus v. Syed Unnissa and Others AIR 1961 Supreme Court 808.***

Learned counsel for the respondents further submitted that issue of limitation was not raised by the appellants at any stage and now the said plea cannot be taken in a second appeal. On this point, reliance was placed upon the judgment of this Court in ***Haryana State Agricultural Marketing Board and Another v. Harish Chander and Others 2006(3) PLR 606.***

Learned counsel for the respondents also took the plea that in the present case, limitation period for the present suit is under Article 65 of the Limitation Act and not Article 58 ibid because the question whether the suit is barred by the limitation or not would depend upon the facts and circumstances of each case. In a suit for declaration and possession based on title, Article 58 will have no application. On the same point, reliance was placed upon the judgment of the Hon'ble Supreme Court in ***C.Natrajan v. Ashim Bai and Another (2007) 14 Supreme Court Cases 183*** and view taken by the Andhra Pradesh High Court in ***Boya Pareshappa and Another v. G. Raghvendra***

and Others 2015(5) RCR (Civil) 275 and this Court in ***Mohinder Singh (deceased by LRs) and Another v. Kashmira Singh AIR 1985 Punjab and Haryana 215.***

While arguing further, learned counsel for the respondents submitted that in case of execution of Will and proof thereof, strict compliance of Section 63(c) of the Succession Act, 1925 is required. On this point, reliance has been placed upon the judgments rendered by the Hon'ble Supreme Court in ***Janki Narayan Bhoir v. Narayan Namdeo Kadam (2003)2 Supreme Court Cases 91*** and ***Bharpur Singh and Others v. Shamsher Singh 2009(1) Civil Court Cases 804 (SC)*** and the view taken by this Court in ***Gurnam Singh v. Smt. Ass Kaur and Others AIR 1977 Punjab and Haryana 103*** and ***Surender Kumar v. Subhash Chander and Others 2016(1) Law Herald (P&H) 268.***

Learned counsel for the respondents also submitted that in case any Will is surrounded by suspicious circumstances, it is for the propounder of the Will to remove all the suspicious circumstances. On this point, reliance has been placed upon the judgment rendered by the Hon'ble Apex Court in ***Ramchandra Ram Bux v. Champabai and Others AIR 1965 Supreme Court 354*** and the view taken by this Court in ***Jang Bahadur and Others v. Manjit Kaur 2009(3) Civil Court Cases 408 (P&H).***

While arguing on the point of registration of Will and its effect, learned counsel for the respondents submitted that if it is a case of exclusion of daughter on the ground that sufficient property was

given to her as dowry at the time of her marriage and beneficiary of Will was present at the time of its execution, the Will certainly becomes suspicious and in case of failure to remove all these suspicious circumstances, even a registered Will cannot be said to have been duly executed and proved. On this point, reliance has been placed upon the judgments rendered by the Hon'ble Supreme Court in ***M.L.Abdul Jabbar Sahib v. H. Venkata Sastri and Sons and Others AIR 1969 Supreme Court 1147, Rani Purnima Debi and Another v. Kumar Khagendra Narayan Deb and Another AIR 1962 Supreme Court 597*** and ***S.R.Srinivasa and Others v. S. Padmavathamma 2010(3) Civil Court Cases 359 (SC)*** and the view taken by this Court in ***Dyal Singh v. Meeko and Another 2009(4) Civil Court Cases 193 (P&H)***.

While arguing on the point of payment of Court fee, learned counsel for the respondents submitted that the respondents are ready to pay the Court fee, if any, required as per law and the relief of joint possession of the suit land was sought for by the plaintiffs is claimed if the entire plait is taken into consideration. Learned counsel for the has placed reliance upon the view taken by this Court in ***Bhura Mal Din Dayal v. Imperial Flour Mills Limited and Others AIR 1959 Punjab 629***, which reads as under:-

Page 75

The present regular second appeal involves following substantial questions of law:-

- 1) Whether present suit for declaration and permanent

injunction is maintainable?

- 2) Whether present suit was filed within the period of limitation?
- 3) Whether Will dated 4.4.1969 was duly executed and proved on the file?
- 4) Whether there is misappreciation of evidence regarding execution and proof of the Will by the Courts below resulting into erroneous findings?

After hearing learned counsel for the parties and having gone through the record of the case and relevant provisions and judgments rendered by the Hon'ble Supreme Court, Andhra Pradesh High Court and views taken by this Court, I am of the considered view that present suit was filed by Smt. Sunder wife of Budh Ram and daughter of Smt. Dhappan for declaration that she is owner in equal share of ½ share of the suit land and Will dated 4.4.1969 is null and void and mutation sanctioned on the basis thereof bearing No. 682 dated 25.4.1971 and No. 726 dated 4.5.1972 are also null and void. Plaintiffs had also sought relief of permanent injunction. That way the present suit was not simpliciter suit for declaration and the same is maintainable and both the Courts below held so by recoding detailed reasons. Taking the case from undisputed facts, the suit property was owned by Smt. Dhappan widow of Ram Karan. Though plaintiff challenged that Sohan Lal was not son of Smt. Dhappan, but the Court of first appeal had already recorded finding that Sohan Lal has been proved to be son of Smt. Dhappan and plaintiff Smt. Sunder and

proforma defendants Smt. Reshma, Smt. Jhimni and Smt. Shanti are to inherit the estate in equal share. As regard to validity of Will Ex.D1 dated 4.4.1969, law point is settled that execution of the Will has to be proved strictly in accordance with Section 63 of the Indian Succession Act. It is also the requirement of law that both the witnesses should sign or append their signatures or thumb marks on the Will in the presence of testator and in the absence of that, the execution of document i.e. Will, itself cannot be said to have been proved. The Court of first appeal held that mere endorsement on the execution of Will alone cannot be considered to be the deciding factor. The propounder of the Will has to prove the Will by removing all the suspicious circumstances. Such a view was taken by the Hon'ble Supreme Court in case ***Jang Bahadur and Others v. Manjit Kaur*** (*supra*).

It had come in the evidence that beneficiary of the Will was actively participating at the time of execution thereof, though that fact alone is not sufficient but keeping in view the other attending circumstances that daughters had been excluded from the vast empire of the deceased and the propounder of the Will failed to prove the due execution of the same. More so, in the present case the scribe of the Will did not appear before the Sub Registrar and both the Courts below have already appreciated the evidence on this point and returned the finding and there is no reason to conclude that there was misappreciation of the evidence by the Courts below.

In view of above discussion, all the substantial questions of

law are decided against the appellants and the present appeal is without any merit and the same stands dismissed.

(Shekher Dhawan)
Judge

March 30, 2016
"DK"