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

RSA-2823-2007 (O&M)

Date of decision : 01.04.2016

Hardeep Singh and another

...Appellants

Versus

Karora Singh and others

...Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Arvind Singh, Advocate
for the appellants.

Mr. Pritam Saini, Advocate and
Mr. Rajesh Goyal, Advocate
for the respondents.

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?

AMIT RAWAL, J. (ORAL)

The appellants-defendant Nos.8 & 9 are aggrieved of the impugned judgment and decree of the lower Appellate Court whereby, the suit for declaration and permanent injunction at the instance of Karora Singh has been decreed and the judgment and decree of the trial Court dismissing the suit has been reversed.

Mr. Arvind Singh, learned counsel appearing on behalf of the appellants-defendant Nos.8 and 9 submits that the case set up by Karora Singh in a suit was that the property at the instance of the Hazara Singh along with

other brothers, namely, Ajmer Singh and Jagir Singh was ancestral in nature and therefore, Hazara Singh could not have willed away the property vide Will dated 12.01.1990 in favour of the appellants. He submits that in order to prove the character and nature of the property being ancestral, no evidence has been led and therefore, the property at the instance of Hazara Singh has to be treated as self-acquired property. He further submits that the respondent(s)-plaintiff(s) in the cross-examination admitted that vide partition dated 19.11.1989 (Ex.D2), all the siblings had partitioned the property and thus, there was a severance of jointness. Once, the property had been partitioned, the nature and character of the property does not remain ancestral. In support of his contentions, he relies upon the judgment of Hon'ble Supreme Court in **"K.G. Shivalingappa (dead) by LRs V/s G.S. Eswarappa" 2005 (1) RCR (Civil) 371**. He further submits that the Will, aforementioned, has been proved through the plaintiff only, thus, there was no occasion to comply with the requirement of Section 68 of the Indian Evidence Act and in this regard, he has also drawn the attention of this Court to the statement of PW-3 Ms. Veena Rani, Clerk in the office of Sub-Registrar, where the Will is stated to be registered. It has also come on record through her testimony that Hazara Singh had appeared before the Sub-Registrar for execution of the Will and he was asked whether he had gone through contents of the Will to which he acknowledged the contents of the Will. The Will was identified by Gurmeet Singh and Krishan Pal, but the Courts below did not rely upon the said statement. In support of his contentions, he relies upon the judgment rendered by the Hon'ble Supreme Court in **"Ved Mitra Verma V/s Dharam Deo Verma" 2014 (4) RCR (Civil) 568**, to contend that where both the attesting

witnesses had died and the Sub-Registrar is examined, the requirement of law is deemed to have been complied with and the Will cannot be discarded on this ground. He further submits that the appeal has been admitted on the following substantial questions:-

1. Whether the Courts below were justified in placing onus of proof on the defendants of issue No.2 even though it was the case of the plaintiff-respondent that the Will was illegal, null and void?
2. Whether in the facts and circumstances of the case, learned lower appellate court was justified in rejecting the application for leading additional evidence.

He submits that since, the respondent(s)-plaintiff(s) had challenged the Will, the onus was on him to prove, that the Will was surrounded by the suspicious circumstances and in case of failure to discharge the onus, the burden did not shift that there was no need to prove the Will being a registered document.

Mr. Pritam Saini, Advocate and Mr. Rajesh Goyal, learned counsel appearing on behalf of the respondent(s)-plaintiff(s) submits that the nature and the character of the property even after the partition, would remain the same and would not become as self-acquired property. The onus of proving the issue No.2 was on the defendants, but failed to discharge the same. It was a sufficient cause by the defendant to aver that the Will was not allegedly executed by Hazara Singh and had the defendant discharged the onus by

examining the witnesses, much less, expert, the plaintiff would have had a chance to cross-examine the witness to prove the case, much less, would have also led some evidence in rebuttal owing to issue No.2 being a rebuttal one. Even if the character and nature of the property has not proved as ancestral, the property owned by Hazara Singh has to be treated as self-acquired and all the brothers being class II/collaterals would have a right to succeed his shares by way of natural succession and urges this Court that no substantial question of law arises for determination.

Mr. Arvind Singh, in rebuttal, submits that Jagir Singh had appeared in support of appellants-defendant Nos.8 and 9 as he had also executed the Will of even date in favour of the appellants and thus, all the brothers had foregone their right in favour of the appellants and during interregnum, the land was acquired and the compensation stated to have been deposited before the Land Acquisition Officer.

I have heard the learned counsel for the parties and appraised the paper book and of the view that the ratio decidendi culled out by the judgment of Hon'ble Supreme Court in **"Ved Mitra Verma's case"** (supra) would not be applicable as it is not a case of the defendant where both the witnesses have died. At the appellate stage, an application under Order 41 Rule 27 CPC was moved to examine one of the witnesses of the Will to comply with the requirement of Section 68 of the Indian Evidence Act, the same has rightly been declined as the appellants failed to prove the requirement of law, much less, expressions "despite exercise of due diligence" and also did not explain as to how the witnesses of the Will were prevented from being examined. In case, the additional evidence is allowed, it will amount to de novo trial and filling up

the lacuna in the evidence, which is not permissible in order to unsettle the settled things. No doubt the respondents-plaintiffs have failed to prove the nature and character of the property being ancestral and therefore, the property has to be treated as self-acquired property, therefore, the ratio decidendi culled out in the judgment of Hon'ble Supreme Court in “K.G. Shivalingappa's case (supra) with regard to the severance of the property from the character of joint Hindu family, much less, coparcenary, would be meaningless. Since, the appellants have failed to prove the Will, the property at the hands of Hazara Singh would be self-acquired property and all the brothers being collaterals would be entitled to claim their respective shares viz-a-viz the compensation stated to be lying deposited in the office of the Land Acquisition Officer.

There is another aspect of the matter, that had the appellants examined the expert to prove the veracity and genuinity of the Will and as well as the witness, the plaintiff would have got chance to cross-examine the witness and also examine the Expert in rebuttal as question of proving Will keeps on shifting. Having failed to examine the witness, the plaintiff had no opportunity to lead evidence. The statement of PW-3, Clerk, from the office of Sub-Registrar where the Will has stated to be registered, does not discharge the requirement of Section 68 of the Indian Evidence Act.

Keeping in view the aforementioned facts and circumstances, the substantial question of law on issue No.1 is answered in favour of the respondent(s)-plaintiff(s) and against the appellants-defendant Nos.7 and 8. The judgment and decree of the lower Appellate Court is hereby modified and held that the property at the hands of Hazara Singh was a self-acquired property and since, the Will has not been proved, all the brother would succeed

to his share by way of natural succession.

It has been brought to the notice of this Court that the respondent(s)-plaintiff(s) vide order dated 01.07.2008 had already been granted liberty to withdraw their shares, thus, they will not be entitled to withdraw their share and the *lis* would be between two brothers, namely, Ajmer Singh and Jagir Singh and one sister, namely, Jagir Kaur.

The appeal stands disposed of.

01.04.2016
yogesh

(AMIT RAWAL)
JUDGE