

In the High Court of Punjab and Haryana at Chandigarh

**RSA No.2523 of 2009(O&M)
Date of Decision:18.1.2016**

Tarsem Lal

---Appellant

vs.

Sohan Lal and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Anmol Rattan Sidhu, Senior Advocate
with Mr. Rajesh Narang, Advocate
for the appellant

Mr. Pawan Kumar, Senior Advocate
with Mr. Rozer Kumar Aggarwal, Advocate
for the respondents

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

Rekha Mittal, J.

The present regular second appeal has been directed against the judgment and decree dated 14.5.2009 passed by the District Judge, Sangrur whereby the appeal preferred by respondent Sohan Lal against the judgment and decree dated 17.12.2005 passed by the Additional Civil Judge (Senior Division), Dhuri has been allowed and as a consequence, the suit filed by the appellant-plaintiff claiming inheritance to the estate of deceased Walaiti

Ram on the basis of natural succession has been dismissed with costs.

The facts relevant for disposal of the present appeal are that Walaiti Ram (since deceased), father of the appellant and respondents was owner in possession of the suit property. It is averred that the appellant has become owner in possession to the extent of 1/6th share in the suit property being one of the class-I legal heirs of deceased Walaiti Ram. Sohan Lal -respondent got mutation of land measuring 01 bigha 14 biswas detailed in clause (a) of the head note of the plaint, sanctioned in his favour on the basis of Will dated 1.6.1988 allegedly executed by deceased Walaiti Ram. The deceased had great love and affection for all his children and he never executed any will in favour of respondent No. 1. The said Will was got cancelled by Walaiti Ram vide cancellation deed dated 30.10.1991 because respondent No. 1 had not been serving him properly.

The contesting respondents filed their written statement jointly and raised preliminary objections to challenge the maintainability of the suit in the present form; suit being barred by limitation; without any cause of action and locus standi to file the suit. It has been averred that Walaiti Ram used to reside with respondent No. 1 and he executed a registered Will dated 1.6.1988 in his favour as he used to render services to the deceased. The appellant had been residing separately whereas Smt. Shimla Devi-respondent No. 2 and Walaiti Ram had been residing with Sohal Lal. They have denied that Walaiti Ram got the registered Will dated 1.6.1988 cancelled with the averments that there was no occasion for Walaiti Ram to cancel the Will and the cancellation deed is a forged and fabricated document.

The appellant preferred replication, reiterated his stand taken in the plaint and controverted the allegations raised in the written statement.

The controversy between the parties led to framing of following issues by the learned trial court:-

1. Whether the plaintiff is entitled for declaration that he is owner in joint possession of 1/5th share of the property, fully described in the head note of the plaint?OPP
2. Whether suit is not maintainable in the present form?OPD
3. Whether plaintiff has no locus standi and cause of action to file the present suit?OPD
4. Whether defendant No. 1 is owner in possession on the basis of Will dated 1.6.1988 executed by late Sh. Walaiti Ram?OPD
5. Relief

The learned trial court, having heard counsel for the parties in the light of materials on record, determined issues No. 1 and 4 in favour of the appellant-plaintiff while issues No. 2 and 3 were answered against the respondents/defendants and eventually decreed the suit holding the appellant entitle to 1/6th share in the suit property.

Feeling aggrieved by the judgment and decree passed by the learned trial court, Sohan Lal-respondent preferred an appeal, came to be decided in his favour and as a result, the suit of the plaintiff/appellant was dismissed with costs.

Feeling dissatisfied with the judgment and decree passed by the first appellate court, the present appeal has been preferred by Tarsem

Lal, appellant-plaintiff.

I have heard counsel for the parties and perused the records. The substantial question of law which arises for adjudication is “*whether the appellant has proved the cancellation deed Ex. P3 in accordance with law?*”

Counsel for the appellant has vehemently argued that the appellate court committed a serious error in holding that the appellant has failed to prove the cancellation deed dated 30.10.1991 in accordance with the provisions of Sections 68 and 69 of the Indian Evidence Act, 1872 (for short “the Evidence Act”). To substantiate his contention, it is argued that the appellant examined Sadhu Singh Sharma (PW1), the scribe of the cancellation deed and his testimony is sufficient to discharge the onus as per Section 69 of the Evidence Act because the attesting witnesses of the cancellation deed namely Numberdar Jot Ram and Major Singh were not available for examination as they had passed away. It is further argued that the appellant also examined Narain Dutt PW4, a clerk from the office of the Sub Divisional Magistrate, Sangrur and Sh. Kultar Singh, retired Naib Tehsildar who has registered the cancellation deed dated 30.10.1991.

Counsel for the contesting respondents would urge that the learned appellate court, on a detailed consideration of the provisions of Sections 68 and 69 of the Evidence Act, has rightly concluded that the appellant has failed to prove the cancellation deed, in accordance with law. It is further argued that it is not the quantity of evidence but the quality which matters for adjudication of civil rights of the parties. Though the appellant has examined six witnesses besides his own statement but none of

the witnesses has been able to prove that the cancellation deed was executed by Sh. Walaiti Ram and it was attested by Jot Ram Numberdar and Major Singh in the presence of Walaiti Ram. In addition, it is argued that as Walaiti Ram, his wife Shimla Devi and one of their daughters with disturbed matrimony were happily residing with respondent Sohal Lal as has been proved by Gopal Dass DW6, one of the close relatives of the parties, there was no occasion/reason for Walaiti Ram to cancel the registered Will dated 1.6.1988, admittedly, executed in favour of Sohan Lal.

I have heard counsel for the parties and perused the records.

Before advertng to the rival submissions made by counsel for the parties, it is pertinent to take note of the application filed by the appellant under Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure (in short “CPC”) for leading additional evidence. In para 6 of the application, it has been pleaded that though the evidence adduced by the applicant satisfies the requirements contained in Section 69 of the Evidence Act but as an abundant precaution, the applicant-appellant seeks permission to lead additional evidence to prove thumb impression of Jot Ram Numberdar and signatures of Major Singh (attesting witnesses of the cancellation deed) either by examining an expert or by examining any person acquainted with the writing/signatures/thumb impressions of the said witnesses. During the course of arguments, counsel for the applicant-appellant has not made any submissions on the application for additional evidence. A plain reading of the averments made in para 6 of the application would clearly show that the application is vague and the applicant is not clear in his mind as to which witness he wished to examine

by way of additional evidence.

Order 41 Rule 27 CPC provides for three contingencies in which the court in appeal may allow additional evidence to be adduced. A relevant extract from Order 41 Rule 27 CPC reads as follows:-

27. Production of additional evidence in Appellate Court.-

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced, by an Appellate Court, the court shall record the reason for its admission.”

In the case at hand, the application filed by the appellant does not fall within the purview of clause (a) or/and (aa). Concededly, the appellant examined as many as 07 witnesses and closed his evidence. It is not the plea of the appellant that he could not produce evidence sought to be adduced by way of additional evidence despite exercise of due diligence or such evidence was not within his knowledge at the time when the decree

appealed against was passed. In this view of the matter, I am of the considered opinion that the applicant-appellant has no case to plead on the basis whereof, he is entitled to seek indulgence for leading additional evidence. Accordingly, the application filed by the appellant for additional evidence is ordered to be dismissed.

This brings the Court to examine correctness and legality of the judgment passed by the appellate court thereby setting aside the judgment and decree of the trial court. Before proceeding to deal with the rival submissions, it is appropriate to mention that as the appellant has staked his claim on the basis of cancellation deed dated 30.10.1991 in regard to Will dated 1.6.1988 (registered) executed by the deceased in favour of respondent Sohal Lal, the Will propounded by Sohan Lal respondent stands admitted. Even otherwise, counsel for the appellant is fair enough to concede that the appellant does not dispute that the deceased executed a registered Will dated 1.6.1988 in favour of Sohan Lal.

Counsel for the appellant has pressed into service the statements of Sadhu Singh Sharma PW1, Narain Dutt PW4, Kultar Singh PW6 to assail the findings of the appellate court that the cancellation deed has not been proved in accordance with law. Before advertng to the testimony of these witnesses, it is pertinent to point out that though the death certificates of Jot Ram and Major Singh have not been proved on record to prove the factum of their death but Labh Singh PW2 grand son of Jot Ram appeared in the witness box and deposed in unequivocal terms that Jot Ram and Majot Singh have already passed away. There is no challenge to his testimony in regard to the factum of death of Jot Ram and Major

Singh and thus it amounts to an admission on the part of the respondent.

The next question which arises for consideration is “*whether the appellant has been able to prove the cancellation deed in compliance with the provisions of Section 69 of the Evidence Act?*”.

A relevant extract from Section 69 of the Evidence Act reads thus:-

Proof where no attesting witness found.—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

A plain reading of the aforesaid extract makes it apparent that if no such attesting witness can be found, it must be proved that attestation of one attesting witness at least is in his handwriting and that the signatures of the person executing the document is in the handwriting of that person.

Sadhu Singh Sharma PW1 has stated himself to be the scribe of cancellation deed Ex. P3. He tendered into evidence his affidavit by way of examination-in-chief. He has deposed that cancellation deed dated 30.10.1991 was scribed by him at the instance of Walaiti Ram son of Kirpa Ram in regard to cancellation of Will dated 1.6.1988. The same was read over to Walaiti Ram and he appended his signatures after accepting the same to be correct. The same was witnessed by Jot Ram Numberda, Dhuri and Major Singh son of Bant Singh resident of Dhuri. He entered the document in his register at Sr. No. 460 dated 30.10.1991 and got the signatures/thumb

impressions of Walaiti Ram and witnesses in the register. He knows Jot Ram, Numberdar of village Dhuri being the Numberdar and he has passed away. When he tendered his affidavit in his examination in chief, he further deposed that Jot Ram Numberdar affixed his thumb impression in his presence on the cancellation deed. Walaiti Ram and Major Singh signed the same. During his cross examination, in the opening line, he has candidly admitted that he did not know Walaiti Ram and Major Singh personally. Though the witness has not specifically stated that he is conversant with the thumb impression of Numberdar Jot Ram or identifies thumb impression of Jot Ram on cancellation deed but still his testimony can be taken sufficient to prove the attestation of cancellation deed by Jot Ram, Numberdar. Nevertheless, the appellant cannot derive any advantage from the testimony of Narain Dutt PW4, Kultar Singh PW6 as both these witnesses have fairly admitted that they did not know Walaiti Ram, executant, Jot Ram, Numberdar and Major Singh attesting witnesses personally.

Tarsem Lal son of Walaiti Ram, the appellant appeared in the witness box and tendered into evidence his affidavit by way of examination-in-chief. His evidence is conspicuously silent that either he is conversant with the signatures of his father having seen him writing and signing or the cancellation deed Ex.P3 bears the signatures of his father. The statement of Tarsem Lal, appellant does not prove the cancellation deed in any manner whatsoever.

Counsel for the appellant has not made any submission if testimony of Navdeep Gupta PW7, handwriting and finger print expert can lead anywhere to prove that the cancellation deed bears the signatures of

Walaiti Ram. I would hasten to add that though Navdeep Gupta PW7 has tried to justify his report that the cancellation deed bears the signatures of the person who has signed the registered Will dated 1.6.1988 propounded by respondent Sohan Lal but he has fairly admitted that he has not taken any formal education in Urdu. During cross examination of the witness, counsel for the respondents has pointed out several flaws, lacuna and discrepancies sufficient to hold that the statement of Navdeep Gupta PW7 cannot be sufficient to prove that the cancellation deed bears the signatures of Walaiti Ram. This apart, to counter the report of Navdeep Gupta, the respondent examined Gopal Krishan Sharma DW1, another expert to say on oath that the cancellation deed does not bear the signatures of Walaiti Ram. This Court is not oblivious of the fact that ordinarily the expert examined by a party toes the line of the party by whom he/she has been engaged. Equally true is that science of handwriting examination is not a perfect and foolproof science. In view of two contradictory and inconsistent reports given by the so called experts, the appellant cannot derive any advantage to his contentions from the report and testimony of Navdeep Gupta PW7 to assail the findings of the learned appellate court. It appears to the Court that as counsel for the appellant was conscious that report and testimony of Navdeep Gupta would not be sufficient to discharge the onus to prove that the signatures on cancellation deed is in the handwriting of Walaiti Ram, the alleged executant, for that reason, he did not press into service the said report for assailing the findings of the appellate court. The appellant failed to adduce satisfactory much less cogent and convincing evidence that the cancellation deed bears the signatures of Walaiti Ram. In this view of the

matter, no fault can be found in the findings of the appellate court that the cancellation deed propounded by the appellant has not been proved in accordance with law.

One of the recitals in the cancellation deed is that Walaiti Ram was not being served well by his son Sohan Lal or was being harassed by him and for that reason, he decided to cancel the registered Will dated 1.6.1988. There is not even an iota of evidence on record that Walaiti Ram was not being served well much less being troubled by Sohan Lal. One of the close relatives of the parties Sh. Gopal Dass DW6 was examined. He deposed that Walaiti Ram had been residing with his son Sohan Lal and Sohan Lal served him till his death. He has further deposed that the last rites including path of *Garurh Puran* were performed by Sohan Lal. After the death of Walaiti Ram, Sohan Lal has been looking after his mother and destitute sister. He further deposed that Tarsem Lal separated from the family immediately after his marriage and never served his father Walaiti Ram. The witness was cross examined at length by counsel for the appellant and he failed to elicit any such facts either to impeach his credibility or to prove that his testimony is not worthy of reliance. There is nothing in the cross examination of Gopal Dass, the maternal uncle (Mama) of the parties that either he was inimical towards the appellant or was favourably inclined towards the respondent. The statement of Gopal Dass creates a serious doubt in the foundation laid for execution of the cancellation deed, therefore, the cancellation deed is shrouded by suspicious circumstances. In the light of cumulative effect of the facts and circumstances discussed hereinabove, it can be safely held that the appellant

has failed to prove the cancellation deed in accordance with law as well as to convince the Court that the cancellation deed represents the last wish of the deceased as to how his property would be dealt with after his departure from the world. As a result, the question of law formulated for consideration is answered against the appellant and in favour of the respondent.

For the reasons aforesaid, the appeal fails and is accordingly dismissed with costs.

(Rekha Mittal)
Judge

18.1.2016
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