

In the High Court of Punjab and Haryana, at Chandigarh

Regular Second Appeal No. 4910 of 2009 (O&M)

Date of Decision: 24.05.2016

Marru Ram

... Appellant(s)

Versus

Kheta Ram (since deceased) through LRs. and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Shekher Dhawan.

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| 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.S.Sidhu, Advocate
for the appellant(s).

Mr. R.V.S.Chugh, Advocate
for Legal Representatives of
respondents No.1 & 2.

Mr. Radheshyam Sharma, Advocate
for respondents No. 3 to 15.

Shekher Dhawan, J.

Present regular second appeal, filed by the plaintiff, against judgment & decree dated 25.9.2009, passed by learned Additional District Judge, Mansa, whereby judgment & decree dated 20.8.2008, passed by learned Additional Civil Judge (Senior Division), Sardulgarh was set aside.

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 as set up by the plaintiff that he had filed suit for declaration on the ground that he is joint owner in possession of the suit property on the basis of registered Will No. 371 dated 17.3.1966 of Ravat Ram. Defendants have no concern with the suit land but they got it mutated vide mutations No. 2934 dated 15.1.1976 & No. 3953 dated 3.7.1992, which are wrong, illegal and against law and fact, the same are liable to be set aside. Plaintiff also sought relief of permanent injunction restraining defendants No.1 to 12 from alienating the suit land more than their share.

Defendants contested the suit on the ground that the suit land was owned by Ravat Ram. Relationship of Ravat Ram and Seo Ram as well as pedigree table was also admitted. Defendants denied the execution of Will of Ravat Ram dated 17.3.1966 bearing No. 371 but took the plea that Will No. 372 dated 17.3.1966 executed by Sheo Ram in favour of Aas Ram was correct. That way, Ravat Ram was not entitled to execute any Will. Defendants prayed for dismissal of the suit.

On these facts, the Court of first instance settled the issues and parties were asked to lead their respective evidence. After hearing both the parties and appreciating the evidence, the Court of first instance decreed the suit of plaintiff. Defendants preferred appeal before the first Appellate Court, who reversed the said findings, thereby dismissing the suit of plaintiff. Feeling aggrieved of passing of the judgment & decree by the first Appellate Court, plaintiff is before this Court by way of present regular second appeal.

Learned counsel for the appellant/plaintiff submitted that first Appellate Court has set aside the well reasoned judgment, passed by the

Court of first instance, without any reasoning or justified grounds. The first Appellate Court had taken a technical view of the matter that application for secondary evidence was not proved before tendering the Will in question dated 17.3.1966 (Ex.P1/A) in evidence of PW.1 Mr. Ved Bhushan Goyal, Advocate. To the contrary, PW.4 Thakur Dass, from the office of Deputy Commissioner, Mansa also proved certified copies of Will No. 371 (Ex.P1), its endorsement (Ex.P2) and Will No. 372 (Ex.P3) and its endorsement (Ex.P4). Both the attesting witnesses have already expired. Raja Ram appeared as PW.5 and proved death certificates of attesting witnesses as Ex.P15 & Ex.P16. Plaintiff had produced on the file the best evidence available with them. It was not a case of simply tendering the evidence. So the first Appellate Court took erroneous view and as such the impugned judgment & decree are liable to be set aside.

Learned counsel for the respondents submitted that undisputedly both the Wills are registered. However, the Will (Ex.P1) established by plaintiff has been disputed by the defendants and the main objection is regarding mode of proof of the Will.

Learned counsel for the appellant submitted that undisputedly Will (Ex.P1) is more than 30 years old document and beneficiaries of the Will were minor at that time. The said Will has already been proved by examining the scribe of the Will, namely Mr. Ved Bhushan Goyal, Advocate (PW.1). Apart from that, plaintiff himself stepped into the witness box as PW.2 and produced certified copy of the Will of Ravat Ram and Sheo Ram and their endorsements. The ancestral nature of the property is not disputed.

More so, as the document is more than 30 years old, there is valid

presumption of its being genuine under Section 90 of the Indian Evidence Act, 1872 (hereinafter referred to as “the Act”). More so, the trial Court has accepted the presumption to be correct and first Appellate Court reversed the findings without any reason. Law on the point is settled that first Appellate Court should be slow on this point while reversing the findings of the trial Court. On this point, reliance was placed upon the judgment rendered by this Court in ***Kirpal Singh (Deceased) by LRs. v. Aas Kaur and Others AIR 1997 (P&H) 240***. The first Appellate Court has completely ignored this fact while reversing the findings recorded by the Court of first instance. The certified copy of Will was produced and the same was issued from the office of Deputy Commissioner, Mansa. PW.4 Thakur Dass, who made statement on the basis of record of the office of Deputy Commissioner, proved that the Will was duly registered. PW.5 Raja Ram, Chowkidar deposed that Mangla and Deepa Ram, Lamberdar attesting witnesses of the affidavit have also died and their death certificates are proved on record as Ex.P15 & Ex.P16, respectively. But the Court below completely ignored this fact. The Will was produced and no objection was taken at that time and such an objection cannot be taken at later stage. On this point, reliance has been placed upon the judgment rendered by the Bombay High Court in ***M/s Mohanlal Kisanlal Agrawal v. Shri Ajitnath Jain Shetambar 2011(2) Civil Court Cases 551***

Learned counsel for the respondents submitted that the first Appellate Court has rightly taken a view that Will (Ex.P1) has not been proved in accordance with law. There is no presumption of document with regard to certified copy of Will. But the presumption of due execution of the

Will is 30 years old document is in respect of original document. On this point, reliance was placed upon ***Kapil Dev and Another v. Smt. Surinder alias Bima Kaul and Others 2006(2) RCR (Civil) 65.***

Learned counsel for the respondents also submitted that production of copy of Will does not dispense with its proof. The Will is a most important document and the detailed procedure has been given in the Act to prove the Will. But that has not been done in the present case. Mere marking of document as exhibit does not dispense with its proof. On this point, reliance has been placed upon the judgment rendered by Hon'ble the Apex Court in ***Sait Tarajee Khimchand and Others v. Yelamarti Satyam and Others 1972(4) SCC 562*** and view taken by this Court in ***Diwan Chand v. Sardari Lal 2009(2) PLR 754*** and ***Kailash Devi v. Jai Kishan (Lance Naik) and Another 2004(2) HLR 429.***

Learned counsel for the respondents also submitted that if the photocopy of any document is produced on the record without any application for seeking permission to lead secondary evidence, such a document cannot be read into evidence. On this point, reliance has been placed upon the judgment rendered by this Court in ***Balwinder Kaur v. Bawa Singh and Others 2002(3) RCR (Civil) 217.***

Learned counsel for the respondent also submitted that Will (Ex.P1) is dated 17.3.1966 and the suit was filed after 31 years of its execution despite the fact that revenue entries were in existence and as such there was no justification for filing suit after 31 years, much beyond the period of limitation. On this point, reliance was placed upon the judgment rendered by this Court in ***Jagir Singh v. Smt. Gurdial Kaur 1992(2) RRR***

92.

Having considered the submissions made by learned counsel for the parties; appraisal of the record of the case and the law points involved and law of precedence settled by learned counsel for the respondents, this Court is of the considered view that the first Appellate Court has taken the correct view of the matter because original of Will (Ex.P1) was not produced, rather certified copy of the same was tendered by marking by the plaintiff. Thereafter, certified copy was tendered by PW.4-Thakur Dass. The first Appellate Court has rightly taken the view that as per amended provisions of Order 18 Rule 4 CPC, the examination-in-chief of a witness shall be recorded on affidavit and copies thereof are to be supplied to the opposite party. Relevant provisions of Order 18 Rule 4 CPC are reproduced as under:-

“4. Recording of evidence - (1) *In every case , the examination in chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:*

Provided that where documents are filled and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) *The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court*

shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit:

(3) *The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner, he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.*

(4) *The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination:*

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.

(5) *The report of the Commissioner shall be submitted to the Court appointing the commission within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.*

- (6) *The High Court or the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.*
- (7) *The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.*
- (8) *The provisions of rules 16,16A, 17 and 18 of Order 26, in so far as they are applicable, shall apply to the issue, execution and return of such commission under this rule."*

Undisputedly, admissibility of the said document and exhibiting and placing the same on record as mark is to be decided by the Court. That way, amended provisions of Order 18 Rule 4 CPC shows that mere marking of a document as an exhibit does not dispense with its proof. Rather, the party leading evidence by way of affidavit is not required to exhibit or mark any document and to decide whether the document is to be exhibited or marked, the same is to be decided by the Court. At any rate, undisputedly, the execution of the document in the affidavit does not dispense with the proof of document in any manner. The first Appellate Court has rightly taken the view that admissibility of affidavit was subject to order of the Court.

Undisputedly, the original Will has not been produced and only secondary evidence has been led without obtaining any permission from the Court and the first Appellate Court, while placing reliance upon the judgment of this Court in ***Balwinder Kaur's case*** (*supra*) took the correct view that without permission of the Court for leading secondary evidence,

document cannot be said to be proved as per law. As regard to evidentiary value of document, which is 30 years old, there is a presumption with regard to due execution by the person by whom it is purported to have been tendered and being duly attested. But that is with regard to original document and the said presumption is not with regard to copy of document. The first Appellate Court rightly placed reliance upon the judgment rendered by this Court in ***Diwan Chand's case*** (*supra*), wherein similar controversy was dealt with, where no permission was obtained from the Court for proving the document by way of secondary evidence and a view was taken that mere exhibiting of document does not dispense with the proof of the same and the same cannot be read into evidence.

As regard to proof of the Will by examining the attesting witness, the first Appellate Court again took a correct view that the Will was required to be proved by examining the attesting witness and in case both the attesting witnesses are dead, some witness must be examined who is to depose that he was known to the testator and had identified his signatures. But in the instant case, no such witness has been examined. Even plaintiff-Marru Ram, who appeared as PW.1 was not present at the time of execution of Will. PW.3 Chunni Lal was also not in a position to say that Marru Ram, deceased, had put his signatures in his presence and he identified his signatures. That way, the Will (Ex.P1) cannot be said to have been genuine. More so, present suit filed by the plaintiff is much beyond the period of limitation. The mutation was sanctioned on the basis of natural succession after the death of Ravat Ram, who died on 3.4.1975, whereas the present suit was filed in the year 2006 i.e. after about 31 years and that way suit of the

plaintiff was much beyond the period of limitation. Mere taking the plea by the plaintiff that he came to know regarding existence of the Will about two months prior to the filing of the suit does not make out a case for condonation of such a delay of 31 years and that does not sound to be a genuine reasoning at all.

In view of above, the facts of the case in hand are entirely distinguishable from the facts of judgments rendered by the Bombay High Court in *M/s Mohanlal Kisanlal Agrawal's case (supra)* and of this Court in *Kirpal Singh's case (supra)* because in view of amended provisions of Order 18 Rule 4 CPC, exhibiting of document is to be decided by the Court and the same is not to be decided on the basis of filing of the affidavit by the party. Learned counsel for the appellant has placed reliance upon the judgment rendered by this Court in *Kirpal Singh's case (supra)* that once presumption under Section 90 of the Act has been raised, the first Appellate Court should not set aside the findings of the Court of first instance. But as per view taken by Hon'ble the Apex Court in *Kapil Dev's case (supra)*, the presumption with regard to 30 years old document is in respect of original document only.

As regard to limitation, the present suit was filed much beyond the period of limitation and plea that plaintiff came to know about existence of Will (Ex.P1) just two months prior to filing of the suit was rightly negated by the first Appellate Court. More so, in the present case, mutation on the basis of inheritance was sanctioned long back and that way period of limitation started to run from that point of time. Such a view was taken by this Court in *Jagir Singh's case (supra)*.

In view of above, the first Appellate Court has rightly taken the

view in the matter and rightly reversed the findings recorded by the Court of first instance. There is no substantial question of law involved in the present appeal.

As per view taken by Hon'ble the Supreme Court in *Deity Pattabhiramaswami v. S. Hanymayya and Others AIR 1959 SC 57*, the provisions of Section 100 CPC are clear and unambiguous. There is no jurisdiction to entertain a second appeal on the ground of finding of fact. As per view taken by Hon'ble the Apex Court in *Commissioner, Hindu Religious & Charitable Endowment v. P. Shanmugama & Others JT 2005(1) SC 201* and *Biswanath Ghosh (Dead) by LRs and Others v. Gobinda Ghosh alias Gobindha Chandra Ghosh & Others AIR 2014 SC 1582*, second appeal cannot be entertained if there is no substantial question of law involved therein.

In view of the above, present appeal is not maintainable as per the provisions of Section 100 of the Code of Civil Procedure, 1908 and the same stands dismissed.

(Shekher Dhawan)
Judge

May 24, 2016
“DK”