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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-2457-2010 (O&M)
Date of decision : 23.08.2016

Gurmeet Kaur and another

... Appellants

Versus

Sarabjit Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Ms. Sarika, Advocate for
Mr. B.S. Jaswal, Advocate
for the appellants.

Ms. Divya Godara, Advocate
for respondent Nos.1 to 3.

Ms. Neha Jain, Advocate for
Mr. K.S. Dadwal, Advocate
for respondent Nos.4 to 6.

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-plaintiffs are aggrieved of the concurrent findings of fact, whereby the suit claiming joint possession of 2/8th share of the suit land on the basis of the natural succession viz-a-vis the estate of Resham Singh, has been dismissed by both the Courts below.

Ms. Sarika, learned counsel appearing on behalf of the appellants submits that the appellant-Gurmeet Kaur was the second wife of Resham Singh and Ranjit Kaur was born out of the aforementioned marriage. The defendants, namely, Sarabjit Singh, Hardeep Singh and Jagdip Singh, are the sons of Resham Singh born out of his first marriage

i.e. marriage with Jit Kaur. Resham Singh died intestate and in this process,

sought the share aforementioned. However, the defendants set up a Will dated 15.08.1982 with valid documents.

She submits that the defendants herein had filed appeal bearing **RSA No.4808 of 2009** titled as **“Sarabjit Singh and others V/s Gurmeet Kaur”** against the appellants-plaintiffs herein, against the judgment and decree of the trial Court rendered in respect of a civil suit, where the Will was upheld by the trial Court, but the High Court set aside the Will on the ground that there is no compliance of the provisions of Section 63-C of the Indian Succession Act and Section 68 of the Evidence Act, as no attesting witness of the alleged Will has been examined. Once the Will had already been discarded, it cannot be taken into consideration.

During the course of the arguments, she has handed over the copy of the order dated 13.05.2011 passed in RSA No.4808 of 2009 and the same is taken on record. The Courts below have relied upon the Will and discarded the claim, thus, urges this Court for formulation of the following substantial questions of law:-

1. Whether the judgment and decree of the Courts below suffers from illegality and perversity?
2. Whether the appellants-plaintiffs are entitled to declaration on the premise that Resham Singh died intestate?
3. Whether the Will set up by the respondents-defendants was suffering from suspicious circumstances or not?

Ms. Divya Godara and Ms. Neha Jain, learned counsel appearing on behalf of the respondent Nos.1 to 3 and 4 to 6 respectively, submits that there is no illegality and perversity in the judgment and decree of both the Courts below. In the instant case, the respondents-defendants have proved the execution of the Will and it has already been held to be

legal and valid in view of the findings in Civil Suit bearing No.109 of 1987 decided on 07.12.1989 and therefore, the Will cannot be held to be forged and fabricated. The concurrent findings of fact cannot be interfered until and unless there is a gross illegality and perversity, much less, substantial question of law arises for determination, thus, urges this Court for affirming the findings under challenge.

I have heard the learned counsel for the parties and appraised the paper book.

This Court had already an occasion to ponder upon the applicability of the decision in Civil Suit bearing No.109 of 1987 decided on 07.12.1989 relied upon by both the Courts below on the ground that the aforementioned findings cannot be read as *res judicata*. For the sake of brevity, the finding given by this Court in the appeal bearing RSA No.4808 of 2009 reads thus:-

“I have heard learned counsel for the appellants and perused the case file.

Learned counsel for the appellants vehemently contended that finding on issue No.1 regarding Will set up by defendants No.1 to 3/appellants has been recorded in favour of the appellants and, therefore, their counter-claim could not be dismissed. The contention cannot be accepted. Appellants herein had earlier filed suit on the basis of same Will, which was dismissed in default under Order 9 Rule 8 of the Code of Civil Procedure (in short, the CPC). Appellants herein filed another suit No.109 of 1987 thereafter, which was dismissed vide judgment and decree dated 07.12.1989 in view of bar of Order 9 Rule 9 CPC although finding in that suit regarding Will was returned in favour of the appellants herein. On the basis of said finding, the trial court decided issue No.1 relating to Will in favour of the appellants herein. Lower appellate court, however observed that the said finding on Will in previous suit No.109 of 1987 will not operate as res judicata because the said suit was dismissed and defendants of that suit had no right to file appeal. In spite of this observation, the lower appellate court upheld the finding of the trial court

on issue No.1 regarding Will by observing that the said finding had not been challenged by respondents i.e. by plaintiffs and defendants No.4 to 6. This approach of the lower appellate court is patently perverse and illegal. Once finding in previous suit No.109 of 1987 regarding the Will was held to be not operating as res judicata, then the finding of the trial court regarding the said Will based merely on the finding in the said previous suit, could not be upheld by the lower appellate court. Observation of the lower appellate court that the said finding had not been challenged by respondents is also contrary to record because plaintiffs, who were respondents No.1 and 2 in the lower appellate court, had specifically challenged the said finding of the trial court by filing cross objections.

From the aforesaid, it is manifest that finding recorded by the courts below on issue no.1 regarding Will is patently perverse and illegal and therefore, unsustainable. The said finding is based on judgment dated 07.12.1989 in suit No.109 of 1987, but since the said suit filed by the appellants herein was dismissed, defendants of that suit had no right of preferring appeal against that judgment so as to challenge the said finding. Consequently the said finding cannot operate as res judicata in the instant suit regarding the Will. Except the said judgment, there is practically no evidence in the instant suit to prove the alleged Will. Only Hardeep Singh defendant No.2 appeared as DW-1 in the instant suit but admittedly he is not attesting witness of the alleged Will. No attesting witness of the alleged Will has been examined. Consequently in view of Section 68 of the evidence Act read with Section 63 of the Indian Succession Act, the alleged Will is not proved because it was essential to examine at least one attesting witness of the Will to prove the same.

For the reasons aforesaid, I find that finding of the lower courts on issue No.1 in favour of appellants herein is patently perverse and illegal and is, therefore, liable to be set aside being based on misreading and misappreciation of evidence. Substantial question of law to this effect arises in this second appeal and the same is answered accordingly .

Since the Will is not proved, the appellants' counter claim cannot be decreed.

In addition to the aforesaid, since first suit filed by the appellants herein on the basis of the same Will was dismissed in default under Order 9 Rule 8 of the CPC, second Suit No.109 of 1987 filed by the appellants herein was dismissed vide judgment dated 07.12.1989 in view of bar created by Order 9 Rule 9 of the CPC. The same bar also applies to the counter claim set up by the appellants herein. The counter claim is also in

the nature of a suit. Appellants herein could not claim the same relief by way of counter claim which they are barred from claiming by filing independent suit in view of bar created by Order 9 Rule 9 of the CPC.

For the reasons aforesaid, I find that counter claim of the appellants herein cannot be decreed. Dismissal of counter claim of the appellants herein by the Courts below is, therefore, upheld although for different reasons. There is no merit in the instant second appeal, which is accordingly dismissed in limine.”

Once, this Court had already held that the Will has not been proved in the accordance with law i.e. as per the provisions of Section 63 (c) of the Indian Succession Act and Section 68 of the Evidence Act, the defendant, in my view, have not discharged the onus and the consequential fact that Resham Singh died intestate and therefore, the appellants-plainitffs being the daughter and wife of Resham Singh are entitled to 2/8th share.

For the foregoing reasons, there is a illegality and perversity committed by the both the Courts below as they have not appreciated the aforementioned facts and not applied the law in correct perspective and accordingly, the judgment and decree of both the Courts below are hereby set aside. The suit is decreed. The substantial question of law as noticed above are answered in favour of the appellants-plaintiffs and against the respondents-defendants.

Decree sheet be prepared.

With the aforesaid observation, the appeal stands allowed.

(AMIT RAWAL)
JUDGE

23.08.2016
yogesh

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Whether speaking/reasoned Yes/ No

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Whether Reportable Yes/ No