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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Date of decision : 14.03.2016

1.

RSA-2491-2011 (O&M)

Dharma and another

...Appellants

Versus

Tarsem and another

...Respondents

2.

XOBS-17-C-2012

Dharma and another

...Appellants/Cross-objector

Versus

Tarsem and another

...Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Vijay Lath, Advocate
for the appellants in RSA-2491-2011 and
XOBS-17-C-2012.

Mr. Ishpuneet Singh, Advocate
for the respondent in RSA-2491-2011 and
for the cross-objector in XOBS-17-C-2012.

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporters or not? YES
3. Whether the judgment should be reported in the digest?

AMIT RAWAL, J. (ORAL)

This order of mine shall dispose of appeal bearing **RSA No.2491**

of 2011 and cross-objection bearing **XOBS No.17-C of 2012.**

The appellants-plaintiffs are aggrieved of the judgment and decree of the lower Appellate Court, whereby the appeal filed by respondent-defendant has been partly allowed and the appellant-plaintiff has been held entitled to inherit only 1/3rd share out of the entire property of Hazi by virtue of registered Will dated 03.09.2001.

Mr. Vijay Lath, learned counsel appearing on behalf of the appellants-plaintiffs submits that the appellants-plaintiffs, namely, Dharma and Gulzar instituted a suit for declaration claiming ownership, viz-a-viz the estate of Hazi and respondent No.2- Karam Chand was made as proforma defendant and all three aforementioned sons are beneficiaries, whereas Tarsem fourth son, was arrayed as respondent No.1, who was excluded. The trial Court on the basis of the oral and documentary evidence, found that the Will aforementioned being registered had been proved, even the attesting witnesses, Sadhu Singh and Jeet Singh, have deposed in terms of the provisions of Section 68 of the Indian Evidence Act and proved the execution of the Will, even the scribe was also examined. However, the lower Appellate Court by applying the provisions of Muslim Personal Law (Shariat) Application Act, 1937 (hereinafter called 'the 1937 Act') held that Hazi being a Muslim cannot bequeath more than 1/3rd share and upheld the Will to the extent of 2/3rd share and release the land from scope and purview of the Will, in these circumstances, the present appeal has been filed and prays that Section 2 of the 1937 Act, does not apply to the agricultural land whereas the Will is with regard to the land measuring 197 kanals 19 marlas situated in Village Diwari, Tehsil and District Ropar, thus, urges to this Court to formulate the following substantial questions of law for determination:-

1. Whether Hazi was governed by the 1937 Act.
2. Whether Section 2 of the 1937 Act would apply or not?
3. Whether in the absence of any declaration under Section 3 of the 1937 Act, the provisions of Section 2 of the 1937 Act, would apply or not?

Mr. Ishpuneet Singh, learned counsel appearing on behalf of the respondent and cross-objector submits that the Will has not been proved in accordance with law. There were seven to eight suspicious circumstances inasmuch as that after the demise of Hazi, who died on 18.05.2002, a mutation as per the natural succession, was entered on 13.06.2002 and one of the attesting witnesses of the Will, also appeared before the mutation proceedings, whereas the suit was filed on 19.07.2004. One of the attesting witnesses stated that the Will was written in hand, but it is a typed document. All the suspicious circumstances would lead to a irresistible conclusion that Hazi had never executed a Will, and therefore, all the children would succeed by way of natural succession and would have right to the share to the extent of 1/4th share. In support of his contentions, he relies upon the judgment of Division Bench of Madras High Court in **“Sulaika Bivi V/s Ramzeeza Bivi” 2001 (3) RCR (Civil) 9**, to contend that the Will can be only valid to the extent 1/3rd share and the judgment of the Division Bench of Bombay High Court in **“Damodar Kashinath Rasane V/s Shahajadibi and others” 1989 AIR (Bombay) 1**, and as well as the judgment of Madras High Court in **“Mukkattumbrath Ayisumma V/s Vayyaprath Pazhae Bangalayil Mayomoothy Umma and others” 1953 AIR (Madras) 425** and judgment of Gujarat High Court in **“Mohmedbhai Rasulbhai Malek and others V/s Amirbhai Rahimbhai Malek” 2001 AIR (Gujarat) 37**, whereby the plea of the custom was belied and held the parties

were governed as per the 1937 Act, thus, prays for dismissal of the appeal as no substantial question of law arises for determination.

I have heard the learned counsel for the parties and appraised the paper book and of the view that the view expressed by the lower Appellate Court is totally contrary to the provisions of Sections 2 and 3 of the 1937 Act. It would be apt to reproduce the Sections 2 and 3 of the 1937 Act which reads thus:-

“2. Application of Personal Law to Muslims Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ıla, zihar, lian, khula and mubaraat, maintenance, dower guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal law (Shariat).

3. Power to make a Declaration:- (1) Any person who satisfies the prescribed authority-

(a) that he is a Muslim, and

(b) that he is competent to contract within the meaning of section 11 of the Indian Contract Act, 1872, and

(c) that he is a resident of the territories to which this Act extends, may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of the provisions of this section, and thereafter the provisions of section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated

therein adoption, wills and legacies were also specified.

(2) Where the prescribed authority refuses to accept a declaration under sub-section (1), the person desiring to make the same may appeal to such officer as the State Government may, by general or special order, appoint in this behalf and such officer may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same.”

On plain and simple reading of the aforementioned provisions, an irresistible conclusion is drawn that the Muslim Personal Law does not apply to the agricultural land. Assuming for an argument sake, the same applies, a person would be only governed by the Muslim Personal Law in case, he makes an application seeking declaration that he will be governed by the provisions of the 1937 Act, only then, the provisions of Section 2 of the 1937 Act would come into play. No evidence has been led on behalf of the defendants that Hazi had sought any declaration and therefore, the Will could not be more than 1/3rd share. On the contrary, the Will has been proved through the testimony of the attesting witnesses as a registered document. Mr. Vijay Lath, has also drawn the attention of this Court to the Affidavit (Ex.P-1) executed by Hazi during his lifetime, wherein it has been stated that the cross-objector Tarsem had not only been passing an abusive and insinuating remarks, but indulging into causing beatings and slapping. The aforementioned document has not been rebutted by any corroborative evidence. In these circumstances, the testator had excluded Tarsem respondent No.1, from his succession/estate. There is no dispute to the ratio decidendi culled to the view expressed by the Courts below particularly in **Sulaika's case** (supra) but that pertained to non-agricultural land, viz-a-viz the view expressed by the Division Bench of Bombay High Court in **Damodar**

Kashinath Rasane's case (supra), the provisions of Sections 2 and 3 of the 1937 Act have not been brought into notice, and therefore, the said judgment would not be applicable and shall be treated to be a judgment in *per curiam*. given to the provisions of Section 5 of the Punjab Laws Act, 1872 (hereinafter called 'the 1872 Act') to say that where the parties are Muslim, they shall be governed by the Muslim Law, but the 1970 Act has repealed the applicability of the aforementioned Act and thus, the 1872 Act would not be applicable. No documentary evidence has been proved on record to belie the genuinity and authenticity of the Will, as no attempt was made to examine as no attempt was made to examine any expert. Both the Courts below concurrently found that the Will being registered one had actually been handed over to them, but the lower Appellate Court restricted its validity to the extent of 1/3rd share, which is, in my view, not in accordance with the provisions of Section 2 and 3 of the 1937 Act.

Keeping in view the aforementioned facts and circumstances, the judgment and decree of the lower Appellate Court is hereby set aside and that of the trial Court is restored. Substantial questions of law noticed above are answered in favour of the appellants-plaintiffs and against the respondents-defendants. Cross-objection is dismissed.

With the aforesaid observations, the appeal is allowed.

14.03.2016
yogesh

(AMIT RAWAL)
JUDGE