

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

**SAO No.12 of 2011(O&M)
Decided on: 23.05.2016**

Rajpal and another

....Appellants

Versus

Durgi Devi and another

....Respondents

CORAM: HON'BLE MRS JUSTICE REKHA MITTAL

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

Mr. Sanjiv Gupta, 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?*

REKHA MITTAL, J.

The present appeal lays challenge to the order dated 07.01.2011 passed by the Additional District Judge, Karnal, whereby the judgment and decree dated 31.01.2009 passed by the Civil Judge (Jr. Division), Karnal vide which suit filed by the predecessors-in-interest of the appellants namely Sukho Devi was decreed was set-aside and the matter was remitted to the trial Court for adjudication afresh.

Sukho Devi (since deceased) represented by Rajpal and another filed a suit for declaration claiming that mutation No.2220 sanctioned by the Assistant Collector, IInd Grade, Karnal is illegal, null and void and not binding on her rights and she be declared owner of the suit land to the extent of ½ share on the basis of natural succession to

the estate left behind by Sh. Karta Ram resident of village Sangoha, Tehsil and District Karnal. It is averred that plaintiff is the daughter of Karta Ram from his previous wife who died just after her birth. Karta Ram performed second marriage with Durgi Devi – respondent /defendant. Karta Ram died about 13/14 years ago leaving behind the plaintiff and defendant as his legal heirs as no child was born out of wedlock of Karta Ram and Durgi Devi. Karta Ram was owner in possession of agricultural land measuring 16 kanal 03 marlas being 741/2021 share of 47 kanal 17 marlas, detailed in Para 2 of the plaint. The defendant, with an illegal intention and help of revenue officials got mutation No.2220 dated 13.02.1990 sanctioned on the basis of oral Will dated 08.06.1990. Karta Ram never executed any such Will during his lifetime, therefore, mutation is not binding upon her.

The defendant filed the written statement raising preliminary objections *inter alia*, *locus standi*, time barred, cause of action and the plaintiff having approached the Court with unclean hands. It is admitted that Karta Ram was owner in possession of the suit land but the same was self-acquired property of Karta Ram. Raj Kumar is adopted son of the defendant who was adopted when he was 1½/2 years' old. The mutation was rightly sanctioned in favour of the defendant and the plaintiff has no right to claim ½ share in the suit property.

The learned trial Court framed following issues for determination:-

1. *Whether mutation No.2220, sanctioned by ACIIG on the basis of alleged oral will is illegal, null and void and not*

*binding on the rights of the plaintiff, if so to what effect?
OPP (Reframed vide order dated 28.1.09).*

- 2. If issue No.1 is decided in favour of the plaintiff whether the plaintiff is entitled to get ½ share of the suit property?
OPP.*
- 3. Whether the plaintiff is entitled to a decree for permanent injunction, as prayed for? OPP.*
- 4. Whether the plaintiff has no locus standi to file and maintain the present suit? OPD.*
- 5. Whether the suit is time barred? OPD.*
- 6. Relief.*

The parties were permitted to adduce evidence in support of their respective claims. Kamlesh Rani, daughter of Sukho Devi – plaintiff (since deceased) appeared in the witness-box and examined Hawa Singh – PW2, Sughan Chand – PW3 and Rajpal son of Sukho Devi – PW4.

To rebut evidence of the plaintiff, Durgi Devi appeared as her own witness and examined Raj Kumar – DW2, Baljit Singh – DW3, Tara Chand – DW4 and Ganesh – DW5.

The learned trial Court, on due consideration of materials on record and the rival submissions made by counsel for the parties, answered issues No.1 to 3 taken up jointly in favour of the plaintiff whereas issues No.4 and 5 were determined against the defendant and as a consequence thereof, suit of the plaintiff was decreed and mutation No.2220 was held to be illegal, null and void and not binding upon rights of the plaintiff. Further the plaintiff was held entitled to ownership of the suit land to the extent of ½ share.

Feeling dissatisfied with the judgment passed by the trial

Court, the matter was carried in appeal by unsuccessful defendant – Smt. Durgi Devi widow of Sh. Karta Ram.

The Court of appeal, in view of observations made in Paras 13 to 15 of the judgment while adverting to the application filed by the appellants therein under Order 41 Rule 27 CPC has set-aside the judgment and decree passed by the trial Court with the following observations:-

“.....it is a fit case to allow additional evidence in appeal, in view of the fact that no issue regarding validity of the Will was framed, in the exercise of power under Order 41 Rule 23-A, the case is remanded to the learned trial Court with a direction to re-admit the suit under its original number in the register of civil suits, to frame additional issue regarding validity of the Will of deceased Karta Ram, give opportunity to the parties to lead evidence on the issue and thereafter proceed to determine the suit on the basis of the evidence led before the remand and thereafter. The judgment and decree dated 31.1.2009 passed by learned trial Court are accordingly set-aside and re-trial is ordered.”

Counsel for the appellants has submitted that as the respondents failed to produce and prove any Will purported to be executed by Sh. Karta Ram despite sufficient time and number of opportunities granted for the purpose, there was no occasion for the Appellate Court to conclude that either it is a fit case to allow additional evidence in appeal or to direct framing of additional issue regarding validity of the Will more particularly in the circumstances that question of Will would be covered by Issue No.1 which is comprehensive in nature. Another submission made by counsel is that

as neither a copy much less the original Will has seen the light of day till date, application filed by the respondents to adduce additional evidence under Order 41 Rule 27 read with Section 151 CPC and Sections 65 and 66 of the Evidence Act is highly misconceived and liable to be rejected.

Counsel for the respondents, on the contrary, has supported the impugned order with the submissions that as the learned trial Court did not frame a specific issue *qua* the Will in dispute, no fault can be found in the impugned order whereby the trial Court has been directed to frame a specific issue regarding Will and then permit the parties to adduce evidence on the said issue and thereafter to decide the case afresh, in accordance with law.

I have heard counsel for the parties, perused the paperbook and the records received from the Courts below.

The Appellate Court in Para 13 of the impugned order has held, reads as follows:-

“Plaintiff challenged the Will of her deceased father Karta Ram in favour of her stepmother, on the basis of which, mutation No.2220 was sanctioned in by ACIInd Grade, Karnal on 13.2.1990. Though no declaration regarding invalidity of the Will has been sought in the relief clause, mutation No.220 could be declared illegal, null and void, only if the Will of deceased Karta Ram was found to be illegal and void. The dispute between the parties hinges on the validity or otherwise of the Will executed by deceased Karta Ram in favour of his second wife Durgi Devi. Therefore, the issue regarding validity or otherwise of the Will was a material issue but record reveals that though the issues were reframed on 28.1.2009,

no issue regarding the Will was framed.”

Mutation No.2220 was sanctioned in favour of widow of the deceased to the exclusion of Sukho Devi, admittedly, daughter of deceased Karta Ram. Mutation Ex.DW5/A in Column No.13 (unnumbered) says “*Virasat* (inheritance) *bafaria* (via) *vasiat* (Will) *Jabani* (Oral) *tithi* (date) 28.3.86 *tithi* (Date) *foti* (not legible) 8.11.89.” However, in the remarks column, there is reference that today Smt. Durgi Devi presented the Will. Accordingly, after entering the mutation of Will, the case is presented. This entry appears to be made under the signatures of a Patwari – Jai Raj (not clearly readable) and the same is dated 13.02.1990. Later, the mutation was sanctioned by Assistant Collector, IInd Grade on 08.06.1990. In the remarks column, there is no reference to the date, month and year of any such Will produced by Smt. Durgi Devi.

The plaintiff in Para 3 of the plaint has challenged mutation No.2220 sanctioned by Assistant Collector, IInd Grade, Karnal. A relevant extract therefrom reads as follows:-

“After the death of said Sh. Karta Ram, his entire property was to be inherited by the plaintiff as well as defendant in equal shares as per the law of natural succession prevailing in the society, but the defendant illegally and unlawfully with the connivance of revenue officials got sanctioned the mutation No.2220 dated 13.02.1990 by the order of Assistant Collector, IInd Grade, Karnal on the basis of alleged oral Will on 08.06.1990. However, said Sh. Karta Ram never executed or expressed any Will during his lifetime. The said mutation is illegal,

null and void ab initio, not binding upon the rights of the plaintiff and has no sanctity in the eyes of law.”

The reply of defendant in response to Para 3 reads as follows:-

“That para No.3 of the plaint is totally wrong, hence denied. It is only the defendant who is the legal heir of the said Karta Ram. Moreover, the agri. Land in dispute is not an ancestral property but it is a self-acquired property purchased by the said Karta Ram. It is also correct that the mutation No.2220 was sanctioned by the A.C.II. Grade, Karnal on the basis of a Will on 8.6.1990 which is legal and lawful made in favour of the defendant. Moreover, the real son of the plaintiff i.e. Raj Kumar was adopted by the defendant when he was only 1½ /2 years old.”

A careful reading of the written statement would make it manifest that the same does not make reference to any Will in writing purported to be executed by deceased – Karta Ram. There is no specific averment that mutation was not sanctioned on the basis of oral Will rather the same was sanctioned on the basis of a Will in writing. Once the defendant has not pleaded any Will purported to be executed by Sh. Karta Ram much less to produce original or copy thereof at any stage of the proceedings that remained pending before the trial Court since 2002 till January, 2009, it is beyond comprehension as to where was the occasion for the Appellate Court to ask the trial Court to frame an issue *qua* correctness and validity of the Will and permitting the parties to adduce evidence in regard thereto as has been allowed. It further appears that the observations made by the Appellate Court in Paras 13

to 15 of the judgment are the result of its failure to take note of pleadings of the parties and the fact that the respondent/defendant did not allege and produce any Will on record. As the respondent never alleged that the deceased left behind any Will in writing in her favour, there was no reason for the Appellate Court to say that application filed by the respondent for adducing additional evidence by way of secondary evidence deserves to be accepted and the matter requires to be remitted to the trial Court for adjudication afresh after framing additional issue *qua* the Will.

This apart, in case the trial Court has omitted to frame or try any issue which appears to the Appellate Court essential to the right decision of the suit upon the merits, the case would be covered by Rule 25 of Order 41 instead of Rule 23A invoked by the Appellate Court. In this view of the matter, I find merit in the contentions of the appellants that the order passed by the Appellate Court setting-aside the judgment and decree passed by the trial Court and remitting the matter for adjudication afresh by invoking Order 41 Rule 23-A CPC cannot be allowed to sustain and liable to be set-aside and ordered accordingly.

In view of what has been discussed hereinabove, the appeal is allowed, the impugned order is set-aside and the matter is remitted to the Appellate Court for decision of the appeal afresh, in accordance with law.

23.05.2016

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(REKHA MITTAL)
JUDGE