IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA-3064 of 2013 (O&M)
Date of decision: 11.05.2016

D.K. Sood

...Appellant

Versus

Harish Sood and others

...Respondents

CORAM: HON'BLE MR.JUSTICE JITENDRA CHAUHAN

Present: Mr. Manish Jain, Advocate
for the appellant.

Mr. Akshay Bhan, Sr. Advocate with
Mr. Santosh Kumar, Advocate
for the respondents.

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Jitendra Chauhan, J. (Oral)

This Regular Second Appeal is directed against judgment and decree dated 23.11.2012, passed by learned Addl. District Judge, Chandigarh (for brevity 'the 1st Appellate Court') dismissing the appeal filed by the defendant No.2/appellant and also dismissing the cross objections/appeal filed by the plaintiffs (herein respondents); and the judgment and decree dated 20.09.2010, passed by the Civil Judge (Jr. Divn.), Chandigarh (for short 'the trial Court'), decreeing the suit of the

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plaintiff/respondents.

2. The facts giving rise to this appeal, briefly stated, are that the plaintiff/respondents filed a civil suit for partition, mesne profit and permanent injunction on the ground that Wing Commander N.D. Sood son of Lal Parshotam Dass Sood was owner of H.No.1555, Sector 36-D, Chandigarh. He died on 08.02.1981 leaving behind his wife i.e. Defendant No.1, two sons i.e. Plaintiff No.1 and defendant No.2 and two daughters i.e. Plaintiffs No.2 and 3. The mother of N.D. Sood had predeceased him. After the death of Mr. N.D. Sood, his estate i.e., H.No.1555/36-D, Chandigarh and other moveable properties including household goods, bank balances etc., was inherited in equal shares i.e. 1/5th share by each of the plaintiffs and each of the defendants. The plaintiffs do no claim any right in any of his moveable property. The defendants are residing in the said house. The plaintiffs requested the defendants to either pay their share market price of the house or divide it proceeds equally amongst themselves after selling the house in open market but they did not budge and refused to give the possession of any portion of the house to them. Hence the suit.

3. The defendants contested the suit tooth and nail and controverted the averments made in the plaint. It is submitted

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that Wing Commander N.D Sood had not died intestate. He had executed a Will in the name of his wife bequeathing all his properties on a format prescribed by the Air Force authorities. The plaintiffs very mischievously and wickedly did not stake their alleged claim till May, 2006 and after being satisfied that the record in the office pertaining to Wing Commander N.D. Sood has been destroyed being a old one, the plaintiffs racked up the issue. It is further pleaded that the suit has not been properly valued for the purposes of Court fee and jurisdiction. The plaintiffs were well aware that records pertaining to an officer are preserved only for 25 years from the date when the officer becomes non effective and thereafter it is destroyed.

4. After hearing the learned counsel for the parties and evaluating the material available on record, a preliminary decree was passed by the learned trial Court to the effect that the plaintiffs have 1/5th share each whereas defendant No.2/appellant has 2/5th share while observing that the Will was not proved to be in existence and that Wing Commander N.D. Sood had died intestate. The property was ordered to be partitioned as per law and the relief of mesne profit as claimed by the plaintiff/respondents was declined.

5. Feeling aggrieved both the parties filed separate

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appeals which were dismissed as mentioned in the foregoing para of this judgment.

6. Still aggrieved, defendant No.2 has filed the instant second appeal.

7. Learned counsel for the appellant has vehemently argued that both the Courts below failed to correctly appreciate the evidence and pleading of the parties and erroneously decreed the suit. Late Wing Commander N.D. Sood was an Air Force officer and as per service rules applicable to him, he was required to execute a service Will. As per Air Force Service Rules, every officer was to make a Will twice, one on commission and the second time at the time of marriage in favour of wife. If he declined to make a service Will, he had to give a written statement which was to be kept in service record. In this context, he refers to Air Force Orders Rule 366(7). Much stress has been laid on the point that Rules of Armed Forces are followed in true letter and spirit and conscientiously. The plaintiffs are only interested in grabbing the property and have not approached the Court with clean hands and they waited for the authorities to destroy the record. The suit was nothing but falsehood.

8. The aforesaid pleas have been rightly countered by

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the learned senior advocate appearing on behalf of the plaintiff/respondents, by pointing out that there was no evidence when and where the alleged Will was executed and in whose favour it was executed. Ex.DW4/A and Ex. DW4/B were merely instructions and not the law. The existence of Will was not proved and was belied by appellants by own document Ex.DW4/A.

9. It is now axiomatic that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. In the present case, the appellant has miserably failed on all accounts.

10. On examination, learned Courts below have rightly pointed out that the Air Force Rules and Orders requiring an officer to make a Will are not sufficient to hold that deceased Wing Commander N.D. Sood, did in fact executed a Will. It was entirely for the appellant to lead cogent, convincing and reliable evidence regarding the existence of Will and its execution. The onus to prove the existence of the Will was upon the appellant. Hence the main contentions advanced on behalf of the appellant is found to be without any merit.

11. It is apposite to mention here that Smt. Sukarma Sood

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(Defendant No.1), the widow of deceased Mr. N.D. Sood and the mother of the parties died during the pendency of the suit. She executed Will dated 01.08.2006, a few years before filing of the suit, wherein she mentioned that she was one of the legal heirs of Wing Commander N.D. Sood and was entitled to share in the property. Thus, it can be safely concluded that she executed the Will in respect of her share in the property and that deceased Wing Commander N.D. Sood had died intestate. The story propounded by the appellant that the plaintiff/respondent No.1 would have received the original Will from the Air Force authorities and destroyed the same, does not appeal to reason. As per Rule 366 (7) of Air Force Rules and orders heavily relied upon by learned counsel for the appellant does not make it mandatory for an officer to make a Will after marriage. The hollowness of the case of the appellant is exposed by the fact that the said rule only provides that the Commanding Officer is to interview the person after marriage and advised him to make a Will and if his current Will is more than five-year -old, he would advise him of the desirability of reviewing its provisions. In the instant case, admittedly, Wing Commander N.K. Sood had executed a Will in favour of his father but there is no evidence that after marriage, he executed any Will reviewing his earlier

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Will. The appellant has no case at all.

12. In the final analysis, this Court finds no merit in this appeal. These are pure findings of facts. No question of law, much less substantial question of law, arises in the present appeal. Hence, no interference is called for.

Dismissed.

11.05.2016 **(JITENDRA CHAUHAN)**
sumit.k **JUDGE**

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