

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

RSA No. 5533 of 2015 (O&M)

Date of decision: 02.05.2016

Dharam Pal Sahdev

... Appellant

versus

Ramesh Chander Sahdev and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH.

Present: Mr. Bhupender Singh, Advocate, for
Mr. Rajesh Gaur, Advocate,
for the appellant.

1. To be referred to the Reporters or not? Yes
2. Whether the judgment should be reported in the Digest? Yes

...

AMOL RATTAN SINGH, J. (Oral)

Civil Misc. No. 13309-C of 2015

For the reasons stated in paragraph 2 of the application, the application is allowed and the delay of 159 days in re-filing the appeal is condoned.

RSA No. 5533 of 2015

1. This is the defendants' second appeal after the suit filed by the plaintiffs (respondents No. 1 and 2 herein) was decreed in their favour and the first appeal filed by the present appellant (defendant No. 1 in the civil suit), was dismissed by the learned lower appellate Court.

The plaintiffs had sought a decree of declaration to the effect that they are owners in equal shares of a residential house bearing No. 19-B (L), Model Town, Yamuna Nagar. They also prayed that the five defendants

in the suit be permanently enjoined from alienating the suit property till it is partitioned by metes and bounds.

Still further, the plaintiffs sought the relief of separate possession of the suit property, after its partition amongst the parties.

2. The property is stated to have been originally owned by Sh. Piare Lal Sahdev, who was the father of plaintiff-respondent No. 1, the appellant-defendant No. 1, as also respondents No. 4 and 5 herein (proforma defendants No. 3 and 4), the father-in-law of respondent No. 3 (proforma defendant No. 2) and respondent No. 6 herein (contesting defendant No. 5, who is the wife of the present appellant). Respondent No. 1-plaintiff No. 2 is stated to be the grand-son of Piare Lal Sahdev.

3. The said Sh. Piare Lal Sahdev expired on 29.06.1987, after which, it was contended by the plaintiffs, that all his properties including the suit property, were to be divided between his children equally but a dispute arose, to settle which a compromise took place, by which the entire property of Sh. Piare Lal was entrusted to the present appellant-defendant No. 1 as a caretaker, till some amicable settlement was arrived at. It was contended that the present appellant had assured the plaintiffs and other defendants that he would maintain status quo on all the properties and maintain the accounts of business and would not enter into any kind of deal qua the said properties, without the permission of all the shareholders, i.e. the legal heirs of Sh. Piare Lal.

However, it was alleged in the plaint, that the appellant secretly entered into a deal with one Prem Chand Luthra, to sell the goodwill of the business and to hand it over to him, after which a legal notice was got served

upon the appellant-defendant No. 1.

Thereafter, it was further alleged in the plaint, that the plaintiffs came to know that the appellant had entered into an agreement to sell the suit property, i.e. the residential house also, to one Satinder Pal, vide an agreement dated 08.10.2003. Hence, with the appellant allegedly not agreeing to desist from the same, till the partition of the property, the suit was instituted.

4. Upon notice issued, the present appellant-defendant No. 1 appeared and filed his written statement taking the usual preliminary objections with regard to maintainability, *locus* etc. He further contended that the plaintiffs had deliberately not claimed any relief against defendants No. 2 to 4 (present respondents No. 3 to 5), who are the sisters of the first plaintiff and of the present appellant.

It was further contended in the reply that neither the plaintiffs nor the other defendants were in possession of the suit property and also had no right or interest in it, because the suit property had actually been given to defendant No. 5 (respondent No. 6) Kamlesh Rani, wife of the present appellant, through a Will dated 04.05.1983, executed by the late Sh. Piare Lal Sahdev. Hence, she was the true owner of the suit property, which fact was very well known to all the other legal heirs. Therefore, no portion of the suit property can be partitioned.

The said Kamlesh Rani (defendant No. 5), filed her separate written statement, virtually reiterating the stand of her husband and further stating that half of the suit property had already been given to her children, on the strengthen of a release deed dated 22.01.2004.

(It needs to be noticed here that the suit was instituted on 30.07.2004).

Seemingly, the other defendants did not file any written statements.

5. The learned Civil Judge (Junior Division), Jagadhri, framed the following issues thereafter:-

1. Whether plaintiffs are owners in possession of suit property as alleged? OPP
2. Whether plaintiffs are entitled to the relief of permanent injunction sought?OPP
3. Whether suit is not maintainable?OPD
4. Whether plaintiffs have no locus standi to file the present suit?
5. Relief.

The plaintiffs examined plaintiff No. 1, present respondent No. 4, one Harish (clerk), the aforesaid Satinder Pal and one Ram Pal, as PWs 1 to 5 respectively. They also tendered the following documents in evidence:-

1. Ex. P1 Agreement/compromise dated 17.05.1988;
2. Ex. P2 Site Plan;
3. Ex. P3 Death Certificate of Piare Lal Sahdev;
4. Ex. P4 Clearance certificate;
5. Ex. P5 Copy of legal notice dated 07.09.1993;
6. Mark-A Copy of agreement to sell dated 10.08.2003;
7. Mark-B Copy of conveyance deed;
8. Mark-C Copy of release deed dated 20.01.2004.

6. The defendants examined Baldev Raj, Raj Kumar Chopra, Kamlesh Rani and Ram Dhan Babbar, Handwriting expert, as DWs 1 to 4.

They also tendered the following documents in evidence:-

1. Ex. D1 Letter dated 16.11.1988;
2. Ex. D2 Special Power of Attorney;
3. Ex. D4 Will dated 04.05.1983;
4. Ex. D5 Conveyance deed dated 06.04.1985.

7. Upon appraisal of the evidence, the learned Civil Judge, recorded that the family settlement, dated 17.05.1988 (Ex. P1), had been proved by the testimony of the witnesses for the plaintiffs and in fact, even the appellant-defendant No. 1 had not denied his signatures on the said document.

Though counsel for defendant No. 5, i.e. the wife of the appellant, had disputed the execution of the settlement, however, since her husband, i.e. one of the signatories to the settlement, did not deny having signed it, the contention was rejected.

8. It was further found that the settlement reflected all moveable and immovable property of Sh. Piare Lal Sahdev, stating therein that all his legal heirs would be shareholders in all such properties. No will of Sh. Piare Lal Sahdev was even mentioned in the settlement, even though the stand taken by Smt. Kamlesh Rani was that the Will had been executed on 04.05.1983, i.e. five years prior to the settlement.

9. The learned Court further held that even if the Will was to be believed, obviously it was agreed not to act upon it, as otherwise it would have been submitted at least to the Municipal authorities, so as to mutate the suit property in favour of Smt. Kamlesh Rani. Yet, the suit property still continued to be shown in the name of the late Sh. Piare Lal Sahdev, in the municipal records.

Further, it was held that not even one attesting witness to the

Will had been examined and as such, it did not stand proved in terms of Sections 68 and 63 of the Indian Evidence Act, 1872. Though a handwriting expert had been examined by defendant No. 5, who testified that in his opinion, the signatures on the will were those of Sh. Piare Lal Sahdev, the said piece of evidence was not accepted by the learned Civil Judge as conclusive proof of execution of the Will, in terms of Section 68 of the Act of 1872.

The contention on behalf of Smt. Kamlesh Rani was rejected, that the attesting witness, Raj Kumar Chopra, though had tendered his affidavit, Ex. DW2/A, by way of his examination-in-chief, had not presented himself for cross-examination, as he had been won over. The onus being on the beneficiary of the Will to produce the attesting witness thereof, that contention was rejected by the Court.

10. Though the learned Civil Judge found that it was an admitted fact that defendants No. 1 and 5 (the present appellant and respondent No. 6), were in possession of the suit property, however, it was proved that the appellant had tried to sell the goodwill of the business of his father, and also had entered into an agreement to sell the suit property to the aforementioned Satinder Pal, (who, in fact, testified in favour of the plaintiffs to that effect).

It was also found by that Court that the appellant-defendant No. 1 had executed a release deed qua half the share of the suit property, in favour of his sons on 20.01.2004 and therefore, it was clear from all the above circumstances that he was bent upon alienating the suit property, to the detriment of the other legal heirs.

11. Consequently, the suit of the plaintiffs was decreed in their

favour, with a rider that the present appellant (defendant No. 1) would be restrained from selling anything beyond his own share in the suit property.

12. In the first appeal filed by the present appellant, against that judgment and decree, the learned lower appellate Court first noticed paragraph 3 of the pleadings, to the effect that the said paragraph of the plaint referred to the family settlement/compromise between the legal heirs of Sh. Piare Lal, whereas in the written statement of the present appellant-defendant No. 1, he had stated that the compromise was arrived at before the “notice of the Will became infructuous”. His wife, defendant No. 5, had stated that she had “no bearing with the family settlement” as it had just been entered into to throw out the Will validly executed by Piare Lal in her favour.

13. Consequently, it was held by the lower appellate Court that in addition to the fact that the appellant never stepped into the witness box to rebut the evidence with regard to the family settlement, the statement itself was not actually denied, though otherwise opposed.

However, going on to notice that the beneficiary of the Will, i.e. the wife of the present appellant, had not actually challenged the findings of the learned Civil Judge qua the Will, the first appellate Court also held that the appellant, Dharam Pal Sahdev, had no locus to challenge the said finding.

14. It was also noticed that selling of the suit property by the appellant and his wife, during the pendency of the appeal despite a stay to that effect, would not affect the rights of the plaintiffs.

Still further, the learned first appellate Court held that even the dismissal of an application for impleadment by the children of the appellant, who allegedly had purchased (part of) the suit property from one of the

sisters of the appellant, was not an order to be interfered with, as the children were also actually deriving their title from one of the defendants and as such, as regards the dispute between a defendant with someone other than them, (in this case, the father of the children), it would have no bearing on their own claim to the property in any separate suit.

15. The plea of non-joinder of necessary parties was also noticed in detail by the learned first appellate Court, inasmuch as it was alleged that other heirs of the second plaintiffs' father, i.e. the late Manohar Lal Sahdev, had not been impleaded. However, that contention was also rejected on the ground that it was actually the right of Manohar Lal Sahdev which first had to be determined, and since one of his legal heirs was representing him, the suit was not bad for non-joinder of necessary parties, as no relief in the present *lis* was claimed against other legal heirs of Manohar Lal.

16. The contention with regard to the issue of non-cross-examination of witnesses in favour of the appellant and his wife was also held in favour of the plaintiffs by the learned appellate Court, apparently on the same ground as was taken by the learned Civil Judge, that it was for the defendants to have ensured the production of their witness. It was also noticed that Kamlesh Rani had in fact approached this Court (High Court) to recall the attesting witnesses to the Will, Raj Kumar Chopra, and she had been granted one opportunity to do so but had failed to produce him even thereafter.

Consequently, the first appeal of the present appellant was dismissed by the learned Additional District Judge.

17. Before this Court, Mr. Bhupender Singh, learned counsel for the

appellant, first argued on the issue of the Will in favour of Kamlesh Rani by the late Sh. Piare Lal and thereafter, submitted that eventually no decree of partition, either preliminary or final, was passed by the Courts below and hence, the decrees are not binding on the appellant.

He also submitted with regard to the issue of non-joinder of a necessary party, in respect of the other legal heirs of Manohar Lal Sahdev, i.e. the present respondent No. 2.

18. Having considered the aforesaid arguments of the learned counsel, as regards the issue of the Will of Kamlesh Rani-present respondent No. 6, I see no error in the judgments of the Courts below, inasmuch as the Will not being a registered Will, it necessarily to had be proved to have been executed by the contended testator, by way of examining one of the attesting witnesses if he was alive. Undoubtedly, Raj Kumar Chopra was listed as a witness for the defendants (as DW2), but after tendering his affidavit by way of his testimony in examination-in-chief, he never stepped into the witness box. Thus, his testimony in examination-in-chief necessarily had to be discarded, in view of the fact that in Section 137 of the Indian Evidence Act 1872, examination-in-chief, cross-examination and re-examination are an essential part of the examination of witnesses, unless of course, the adverse party gives up its right to cross-examination. Similarly, Order 18 Rule 4 of the Code of Civil Procedure, 1908, speaks of the evidence to include cross-examination and re-examination, in addition to examination-in-chief.

Thus, I find no error in the judgments of the Courts below in holding that the Will stated to have been executed by late Sh. Piare Lal in favour of Kamlesh Rani was never duly proved and consequently, no benefit

can be derived by her, therefrom. This is especially so, as also held by the Courts below, in view of the fact that five years after the Will is stated to have been executed, the legal heirs of Sh. Piare Lal arrived at a settlement amongst themselves, agreeing to equally divide all properties of Sh. Piare Lal amongst themselves, including the suit property.

Hence, that contention of learned counsel is rejected.

19. Coming next to the contention that the Courts below having not passed any decree of partition of the suit property, the judgments and decrees are not binding upon the appellant. I find the said argument also to be unsustainable, inasmuch as, if a part of the prayer made by the plaintiffs in their suit has been not considered by the Courts below for any reason, that is a grievance which the plaintiffs may have, but as regards what has been held against the judgment debtor, i.e. the present appellant-defendant No.1, qua the rights of parties in the suit property, that would be binding upon the judgment debtor. Therefore, the decree in favour of the decree holders, holding that they along with defendants No. 1 to 4, are co-owners of the suit property in equal shares, determine the rights of the parties, including the present appellant, who has also been restrained, by way of the said decree, from alienating more than his share thereof. As such, no mileage can be derived by the appellant from the fact that the decrees of the Courts below do not direct partition of the suit property, qua the settlement of the rights of the parties to the *lis*, in the suit property, to the extent that such rights have been decreed.

20. Coming to the last argument, that the suit filed by respondents No. 1 and 2 herein was bad for non-joinder of necessary parties, I find no

error in the finding of the learned lower appellate Court, that qua the parties to the *lis*, the rights have been correctly determined, in terms of the family settlement dated 17.05.1988 (by which the signatories thereof were held entitled to an equal share in all the properties of the late Sh. Piare Lal). Hence, if the legal heirs of one of the sons of Sh. Piare Lal, who had died before the institution of the suit filed by present respondents No. 1 and 2, have any claim to the suit property as falls to the share of their father, Manohar Lal (also father of plaintiff No. 2), such rights of those legal heirs of Manohar Lal would obviously not be affected in any suit filed by them to claim their right in the suit property, if such right is denied to them.

Consequently, I find no merit in the appeal, which is dismissed *in limine*, but with no order as to costs.

Civil Misc. No. 13310-C-2015

Though the application seeking condoning the delay of 159 days in re-filing the appeal has been allowed by this Court, no notice having necessarily to be issued to the respondents in that application, the issue of condonation of 28 days delay in filing the appeal, as has been prayed for in this application, is not gone into, the appeal having been dismissed on merits and the question of, therefore, issuing notice in this application, to the respondents, having been rendered academic.

02.05.2016
nitin

(AMOL RATTAN SINGH)
JUDGE