

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

**R.S.A No.3395 of 2014 (O&M)
Date of decision :11.08.2016**

Mohd. Jamil and another

..... Appellants

Versus

Anwari Begum and others

..... Respondents

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

Present: Mr. Mohd. Yousaf, Advocate
for the appellants.

DARSHAN SINGH,J

The present appeal has been preferred against the judgment and decree dated 26.03.2014 passed by the learned Additional District Judge, Sangrur, whereby the appeal filed by appellants-defendants no.1 and 2 against the judgment and decree dated 22.03.2011 passed by the learned Civil Judge (Jr. Division), Malrekotla, has been dismissed.

2. Plaintiff-respondent no.1 Anwari Begum filed the suit for declaration to the effect that she is co-owner/co-sharer in joint possession with defendants in the suit property as detailed and described in the head note of the plaint situated in village Jamalpura, Tehsil Malrekotla and the mutation no. 1468 sanctioned in favour of appellants-defendants no.1 and 2 is null and void as the same has been got sanctioned on the basis of invalid and void Will dated 09.07.1986 allegedly executed by Hazi Buta

in favour of defendants no1. and 2. The same is liable to be set aside having no effect on the rights of the plaintiff.

3. As per averments in the plaint, originally Maalan and Peer Bux were the owners of the agriculture land in dispute which was inherited by Hazi Buta, the father of the appellants and one Buba to the extent of $\frac{1}{2}$ share each. Hari Buta died on 17.07.1986. His estate was inherited by the plaintiff and appellants-defendants no.1 and 2 after his death. Plaintiff is cultivating her share in the suit land since the death of her father Hazi Buta. Plaintiff and defendants no.1 and 2 have become co-owner in joint possession of the property in dispute. It is further pleaded that on the basis of invalid, void, forged and factitious Will dated 09.07.1986, appellants-defendants got entered and sanctioned mutation no. 1468 in their favour in connivance with revenue officials. The entries in the revenue record in favour of the appellants-defendants no.1 and 2 are illegal, null and void. Hence the suit.

4. Appellants-defendants no.1 and 2 contested the suit on the grounds inter alia that Hazi Buta had executed the Will dated 09.07.1986 in favour of appellants-defendants no.1 and 2. The said Will was handed over to Halka Patwari at the time of mutation. The plaintiff and their mother Sharifan consented to the Will during mutation proceedings and mutation was rightly sanctioned in their favour. Plaintiff is married to Mohd. Sadique about 38 years ago and is residing with him. She is not entitled to inherit any share from the property of Hazi Buta. Appellants denied that the plaintiff is co-owner or in joint possession of the suit property. They also denied that they are governed by Mahomedan Law,

rather they are governed by Customary Law. It was further pleaded that the Will in question is genuine and valid document. Defendants have constructed the houses over the suit land and plaintiff has no concern therewith. With these pleas, they pleaded for dismissal of the suit.

5. Plaintiff also filed replication to the aforesaid written statement. From the pleadings of the parties, the following issues were framed by the learned trial Court:-

1. Whether the plaintiff is entitled to declaration as prayed for? OPP
2. Whether the plaintiff is entitled to permanent injunction as prayed for?OPP
3. Whether the plaintiff is estopped by her own act and conduct? OPD
4. Whether the suit is time barred?OPD
5. Relief.

6. On appreciating the material on record and the contentions raised by learned counsel for the parties, the learned trial Court decreed the suit vide impugned judgment and decree dated 22.03.2011.

7. Aggrieved with the aforesaid judgment and decree passed by the learned trial Court, the appellants-defendants preferred the appeal. The same has also been dismissed by the learned First Appellate Court vide impugned judgment and decree dated 26.03.2014. Hence this Regular Second Appeal.

8. I have heard Mr. Mohd. Yousaf, Advocate, learned counsel for the appellants and have meticulously gone through the paper book.

9. Initiating the arguments, learned counsel for the appellants contended that appellants-defendants no.1 and 2 are co-owners in possession of the suit property. Deceased-Hazi Buta has executed the legal and valid Will in favour of the appellants. The said Will was handed

over to the revenue authorities for sanctioning the mutation along with affidavits executed by the plaintiff-respondent no.1 and their mother Sharifan admitting the Will and giving their consent for the mutation. But, unfortunately, those documents were misplaced by the revenue authorities. He contended that in mutation Ex.D-8, it is categorically mentioned that the said mutation has been sanctioned on the basis of unregistered Will that too in the presence of the plaintiff and their mother Sharifan, who had consented to the said mutation. Thus, he contended that now the plaintiff cannot challenge the said Will. The Will is duly proved and has been acted upon by the revenue authorities.

10. He further contended that no issue regarding the Will has been framed by the learned trial Court, which has also resulted in prejudice to the rights of the appellants.

11. He further contended that the plaintiff is not in possession of the suit property which is evident from the revenue record brought on record. So, simple suit for declaration filed by the plaintiff was not maintainable as per Section 34 of the Specific Relief Act.

12. He further contended that the mutation in favour of the appellants was sanctioned in the year 1986 immediately after the death of Hazi Buta. But, the suit has been filed by the plaintiff in the year 2004. So, the suit of the plaintiff was hopelessly time barred.

13. He further contended that appellants-defendants had no right of succession. Thus, he contended that the impugned judgments and decrees are not tenable in the eyes of law.

14. I have duly considered the aforesaid contentions and found

the same to be without any substance.

15. This fact is not disputed that Hazi Buta, the father of the appellants and respondent no.1 was the owner of the property in dispute. Learned counsel for the appellants has contended that the plaintiff has not led any evidence to establish the ownership of the houses. But, that plea raised by learned counsel for the appellants has no legs to stand in view of their admission in the written statement that the suit property was originally owned by Hazi Buta. They are also claiming right to the property in dispute on the basis of Will dated 09.07.1986 allegedly executed by Hazi Buta in their favour. So, they cannot dispute the ownership of their father Hazi Buta qua the property in dispute.

16. Appellants are claiming the right, title or interest in the suit property on the basis of the Will dated 09.07.1986 allegedly executed by their father Hazi Buta in their favour. The plaintiff-respondent no.1 has challenged the said Will dated 09.07.1986. Appellants/defendants no.1 and 2 have also projected the said Will in their written statement. So, both the parties were fully aware about the controversy involved in the suit and had led evidence to prove their respective pleas. Thus, the non framing of specific issue regarding the Will has not resulted in any prejudice to the appellants.

17. It is settled principle of law that burden to prove the legal and valid execution of the Will is always on the person propounding the Will. It is also his duty to clear all the suspicious circumstances, if any, surrounding the said Will. In the instant case what to talk of the proof of the Will, even the original Will or the copy thereof has not been brought

on record. It is alleged that the Will was lost from the custody of the revenue officials as the same was entrusted to them for the purpose of mutation. The Will propounded by the appellants was an unregistered Will. The appellants have not moved any application at any stage of the proceedings to seek permission to lead the secondary evidence to prove the Will.

18. Thus, neither the original Will nor copy thereof have been produced in evidence by the appellants. Mere production of the mutation sanctioned on the basis of the Will is no ground to establish the legal and valid execution of the Will. Learned counsel for the appellant has vehemently contended that the mutation was sanctioned on the basis of the consent given by appellants and their mother Sharifan. They have also submitted their affidavits. However, the said affidavits have also not been placed on record. Learned First Appellate Court has observed that though in the mutation Ex.D-8, it is mentioned that the unregistered Will was produced in the presence of Rehim Din Lambardar, plaintiff and her mother-Sharifan and they had consented to it, but there is no signatures or thumb impressions of the plaintiff and Sharifan on the mutation sheet showing their consent for sanctioning the mutation on the basis of the Will. The defendants have summoned the record of mutation proceedings. But, the Will and affidavits were not available in that record and were stated to be missing. Thus, the appellants-defendants have not been able to establish that any legal and valid Will dated 09.07.1986 was executed by Hazi Buta in their favour.

19. The parties are Muslim and are presumed to be governed by

the Muhammadan Law. The appellants have not led any evidence to show that they are governed by Customary Law and what that custom is.

20. Plaintiff is the daughter of deceased-Hazi Buta. As per Hanafi Law of inheritance, there are three classes of heirs i.e. Sharer, Residuaries and Distant Kindred. Sharer are those who are entitled to a prescribed share of inheritance. Residuaries are those who take no prescribed share, but succeed to the residue after the claim of the sharers are satisfied. Distant Kindred are those relations by blood who are neither sharers nor residuaries. The daughter also figures in the table of sharer of Sunni Law appended in Mulla's Principle of Mohammedan Law Chapter 7 Page 66-A 20th Edition. As per illustration to Para 65 of Mulla's Principles of Mohamedan Law daughter shall be entitled to inheritance as residuers. The Hon'ble Andhra Pradesh High Court in case **Sheik Madar Vs. Kursheeda Begum, 2005 (36) AIC 482** has laid down as under:-

“15. The succession opens on the death of the Mohamedan. As a first-step, the property has to be applied and utilized for payment of funeral expenses, debts, legatees, and if any. Out of the balance, the sharers are to be allotted the property corresponding to their shares. The available sharers do not have any claim over the property, except to the extent of their share. However, where, the total of the shares of the available sharers exceeds unity, their shares are required to be diminished proportionately. This concept is known as 'Aul'. On the other hand, if such total is less than the unity, and a fraction of the property remains, after answering or satisfying the shares of the sharers, the left over fraction passes on to the residuaries, whose entitlement is also defined under the personal law. In case, the deceased Mohamedan does not have any residuaries after him, the property, which was otherwise available to be allotted to the residuaries, shall return to the sharers, subject to certain conditions. This principle is called Radd'. which is remotely comparable to the concept of reversion.

16. The very definition of 'residuary', suggests that, they are entitled to inherit the property under two circumstances, viz., (a) if there are no sharers, and, (b) there exist sharers, but a fraction of the property remains even after satisfying the shares of the sharers.

17. According to the settled principle of Hanafi Succession, a daughter of a deceased Mohamedan will get half of what, his son gets. There is no dispute that petitioners 1 and 3 and the respondent are residuaries. Their succession to the property is subject to the satisfaction of the claim of the only sharer i.e., the 2nd petitioner.”

In view of the aforesaid ratio of law, the plaintiff was entitled to succeed to the properties of her father on his death.

21. The plaintiff-respondent no.1 is claiming herself to be the joint owner in possession of the suit property. The appellants-defendants no.1 and 2 are her brothers who have also inherited the properties from their father-Hazi Buta by way of inheritance. Plaintiff has also become owner in the suit property to the extent of share permissible to her as per the Mahomedan Law. It is settled principle of law that every co-sharer is presumed to be in joint possession unless the opposite party establishes his/her ouster. In the instant case, no such evidence could be adduced by the appellants that they are in possession of the suit property in a clear ouster of the plaintiff by denying her title. So, plaintiff was not required to seek the relief of possession as she is presumed to be in joint possession of the suit property. Consequently, Section 34 of the Specific Relief Act will not bar the suit.

22. As the plaintiff-respondent had challenged the mutation in favour of the appellants and is claiming right, title and interest in the suit property by way of inheritance, so the suit filed by her cannot be stated to be barred by limitation.

23. Consequently, no question of law, much less, the substantial question of law arises in the present appeal.

24. Therefore, the present appeal being devoid of merits, is hereby dismissed with no orders as to costs.

August 11, 2016

s.khan

**(DARSHAN SINGH)
JUDGE**

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No