

In the High Court of Punjab and Haryana at Chandigarh

RSA No. 3544 of 2014(O&M)

Date of Decision:7.4.2016

Surjit Kaur

---Appellant

vs.

Lakshman Singh and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr.Hardip Singh, Advocate
for the appellant

Mr. J.S.Brar, Advocate
for respondents No. 1 to 3 and 5 to 8

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

Rekha Mittal, J.

The present appeal has been directed against the consistent findings recorded by the courts below whereby suit filed by Smt. Surjit Kaur appellant for possession and mesne profits was dismissed by the learned trial court vide judgment and decree dated 11.6.2012 and the findings recorded by the trial court have been affirmed in appeal.

Surjit Kaur appellant is admittedly the daughter of Smt.

Santokh Kaur widow of Sh. Rulia Ram and the suit land measuring 29 kanals 8 marlas, detailed in head note of the plaint was left behind by Smt. Santokh Kaur who died on 18.1.1988. The appellant claimed herself to be owner of the suit land and thus entitled to its possession and mesne profits on the plea that she being the sole class-I heir of deceased Smt. Santokh Kaur is entitled to inherit to the suit land. Her claim in regard to ownership has been disputed by the defendants-respondents on the basis of a registered Will dated 7.2.1983 purported to be executed by Smt. Santokh Kaur on the basis whereof, mutation was sanctioned in favour of the respondents/defendants after due contest before the authorities concerned.

The courts below accepted claim of the defendants by holding that the defendants have successfully proved the Will in question, having been validly executed by Smt. Santokh Kaur as Smt. Santokh Kaur was being served by the defendants and the appellant was happily residing in her matrimonial home and all social obligations qua the appellant were also being discharged by the respondents.

The short question that calls for determination is '*whether the respondents have been successful to prove the Will dated 7.2.1983 in accordance with law and dispel the suspicious circumstances surrounding the Will?*'

Counsel for the appellant has submitted that none of the attesting witnesses of the Will has been examined. There is no documentary evidence on record to prove that both the alleged attesting witnesses of the Will had passed away and, therefore, not available for examination in compliance with the provisions of Section 68 of the Indian Evidence Act. It

is further argued that the original Will has not seen the light of day and the certified copy of the Will has been marked as Ex. D1 without any permission from the Court to prove the Will by way of secondary evidence. It is argued with vehemence that as the appellant is the daughter and only class-I heir of deceased Smt. Santokh Kaur, there was no occasion for the deceased to execute Will in favour of the respondents and that too to exclusion of the appellant in regard to entire estate left behind by the deceased more particularly in the circumstances that there is nothing on record suggestive of the fact that the deceased did not have love and affection for the appellant much less she had animosity against her. Counsel would urge that the respondents have not only failed to adduce satisfactory evidence to prove the Will but they have further failed to dispel the suspicious circumstance in regard to exclusion of the sole natural heir from inheritance without any background.

Counsel for the respondents has supported the judgments passed by the courts below with the submissions that despite hot contest between the parties in the mutation proceedings, Will dated 7.2.1983 set up by the defendants was accepted and mutation in regard to the suit land was sanctioned in favour of the respondents. It is further argued that certified copy of the Will was produced on record by one of the officials from the office of the Sub Registrar and document was marked as Ex. D1 as the said official brought the original record at the time of his examination in the Court. The attesting witnesses of the Will namely Kehar Singh and Bakhtawar Ram Lambardar as well as the scribe have already passed away. The respondents examined Sh. Sushil Kumar Gupta son of late Sh. Hari

Chand Gupta Deed Writer DW1 to prove entry at serial No. 41 dated 7.3.1983 in the Register which was being maintained by Sh. Hari Chand Gupta (since deceased). Raj Kumar son of Bakhtawar Ram, one of the attesting witnesses of the Will was examined and his testimony is sufficient to prove the signatures of Bakhtawar Ram on the Will in question. It is further argued that as the deceased was being served by the defendants who also performed all the rituals and ceremonies at the death of Smt. Santokh Kaur, there is nothing abnormal in conduct of the deceased to execute the Will in favour of the respondents when otherwise the purpose of executing a Will is to deviate from natural succession and to deny the right of inheritance to the heirs either exclusively or partially.

I have heard counsel for the parties, perused the paper book and the original records of the trial court.

There is no dispute between the parties that Surjit Kaur is the daughter of Smt. Santokh Kaur and is the only class-I heir left behind by the deceased. The appellant shall be entitled to inherit to the suit property in case the testament propounded by the respondents is held to be either not admissible in evidence or otherwise cannot be accepted. There cannot be dispute about the settled proposition in law that it is obligatory for the person setting up a Will to prove the same in accordance with the provisions of the Evidence Act and further to convince the court that the Will represents a true and genuine wish of the deceased as to how his/her property is to be dealt with after his/her departure from the world. Equally true is that the court has an onerous obligation to discharge while dealing with the question of succession on the basis of a Will so that the wish of the

deceased is given effect to.

In the case at hand, the original Will has not been produced on record. Admittedly, the respondent did not seek any permission of the Court to prove the Will by way of secondary evidence. There is no material on record as to who is the custodian of the said Will and where it lies. None of the attesting witnesses of the Will has been examined. Statement of Raj Kumar son of Bakhtawar Ram is sufficient to prove that one of the attesting witnesses of the Will has passed away. There is no document on record to prove that the other attesting witness namely Kehar Singh has also passed away.

Assuming that both the attesting witnesses of the Will have passed away, the question rises whether the Will has been proved in compliance with the provisions of Section 69 of the Evidence Act. A relevant extract from Section 69 of the Evidence Act reads thus:-

“Proof where no attesting witness found.—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

A plain reading of the aforesaid extract makes it apparent that if no such attesting witness can be found, it must be proved that attestation of one attesting witness at least is in his handwriting and that the signatures of the person executing the document is in the handwriting of that person.

Counsel for the respondents has fairly conceded that the respondents have not adduced any evidence to prove that thumb impression on the Will is that of Smt. Santokh Kaur. Once the respondents have failed to prove thumb impression of Smt. Santokh Kaur, an irresistible conclusion is that the respondents (propounders of the Will) have failed to prove the Will in dispute in compliance with the requirements of Section 69 of the Evidence Act. Both the courts below, for the reasons best known, neither adverted to the provisions of Section 69 of the Evidence Act nor bothered to examine if the Will in question has been proved in accordance with the provisions of Section 68 or 69 of the Evidence Act. As the respondents failed to prove the Will in accordance with law, it would be an exercise in futility at the cost of making the judgment lengthy to dilate on the issue if the Will is shrouded by suspicious circumstances or otherwise. As the respondents have failed to prove that the Will was executed by Smt. Santokh Kaur much less voluntarily and in sound disposing mind, the property left behind by the deceased would be inherited by her heirs in view of provisions of the Hindu Succession Act, 1956. As has been noticed hereinbefore, Surjit Kaur is the only class-I heir left behind by the deceased, therefore, the appellant has become owner of the suit land and entitle to recover its possession.

To be fair to the respondents, counsel has made submissions in regard to sanction of mutation in favour of the respondents on the basis of the Will. Any order passed by the authorities while deciding the mutation proceedings has no bearing on adjudication of rival claims qua inheritance by the civil court. Equally settled is that mutation neither creates nor

extinguishes title to the property. That being so, sanction of mutation in favour of the respondents/defendants would neither be fatal to the right of the appellant in the suit property nor would enure to benefit of the respondents.

The appellant has also claimed mesne profits since kharif 2005 till delivery of possession. As the courts below have non-suited claim of the appellant qua ownership to the suit land, there was no occasion for the courts to determine the mesne profits. Keeping in view the fact that claim of the appellant qua ownership of the suit land has been accepted by the court, the matter with regard to assessment and entitlement of mesne profits is remitted to the trial court for decision on the basis of materials already on record. The trial court shall decide the question of mesne profits after providing an opportunity of hearing to the parties in accordance with law.

As an upshot of the aforesaid discussion, the judgments and decrees passed by the Courts below are set aside. The suit filed by the appellant/plaintiff for possession as owner of the suit land is decreed with costs throughout. The claim of the appellant in regard to recovery of mesne profits for use and occupation of the land in question since kharif 2005 till delivery of possession is left open to be decided by the trial court.

The appeal stands disposed of in the aforesaid terms.

(Rekha Mittal)
Judge

7.4.2016
paramjit