

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

RSA No.429 of 2014(O&M)

Date of decision:9.5.2016

Chawali Devi

....Appellant

VERSUS

Chhabil Dass and others

.....Respondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

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

Present: Mr. Sumit Sangwan, Advocate for the appellant.

Mr. Jatin Hans, Advocate for respondent No.1.

REKHA MITTAL, J.

The present appeal has been directed against the consistent findings recorded by the Courts below whereby claim of the plaintiff/appellant that she is owner in joint possession to the extent of 1/4th share of the suit property shown in red colour marked with letters ABCD in the site plan and remaining 3/4th share being owned and possessed by defendants in equal shares situated in village Dhani Miran, Tehsil Tosham, District Bhiwani and challenge to the judgment and decree for partition passed in Civil Suit No.159 of 1996 titled Chhabil Dass vs. Manphool and others being not binding upon the rights of the plaintiff, has been dismissed by the trial Court vide judgment and decree dated 26.03.2013 and the findings recorded by the trial Court have been affirmed in appeal by the

Additional District Judge, Bhiwani vide judgment and decree dated 21.12.2013.

The present litigation pertains to inheritance to the suit house which was previously owned by Sh. Khiraj, grandfather of the plaintiff and defendants. The appellant and the contesting respondent are the real sister, brother and children of Sh. Surja Ram son of Sh. Khiraj. The entitlement of Sh. Surja Ram to the extent of half share in the entire house was decided in Civil Suit No.159 of 1996 titled Chhabil Dass vs. Manphool and others. The appellant has claimed to be co-owner in the suit property to the extent of 1/4th share being one of the class - I heirs of Sh. Surja Ram.

The substantial questions of law that arise for adjudication are (1) whether the suit property is Joint Hindu Family co-parcenary property in the hands of Sh. Surja Ram? (2) Whether Sh. Chhabil Dass – respondent No.1 has become exclusive owner of the suit property on the basis of Will dated 03.05.1979 purported to be executed by Sh. Surja Ram in his favour?

Counsel for the appellant has submitted that there is no evidence on record to prove that the suit property was co-parcenary property in the hands of Sh. Surja Ram. In the alternative, it is argued that even if the suit property is held to be co-parcenary property, the appellant cannot be altogether denied of her right in the suit house. Another submission made by counsel is that the Will in question has not been proved in accordance with law as none of the attesting witness has been examined nor any witness has been examined to prove that the thumb impression on the Will is that of testator Sh. Surja Ram.

Counsel for the respondent, on the other hand, would submit that as the suit property was admittedly owned by Sh. Khiraj, grandfather of the parties, the same is co-parcenary in the hands of Sh. Surja Ram, and therefore, the appellant at best shall be entitled to 1/12th share in the suit house, in case the findings recorded by the Courts below qua the Will set up by the respondent are reversed. It is further argued that as both the attesting witnesses of the Will have already passed away, the statement of Beghraj DW-1 son of Sh. Mula Ram, one of the attesting witnesses and a close relative of the parties is sufficient to prove the Will in compliance with the provisions of Section 69 of the Indian Evidence Act, 1872 (in short 'Evidence Act') as Beghraj has categorically deposed that the Will (Ex.P1) was executed in his presence by Sh. Surja Ram.

I have heard counsel for the parties, perused the judgments passed by the Courts below and the original records of the learned trial Court particularly the Will in dispute and testimony of Beghraj.

This is an admitted position of the case that the suit house was previously owned by Sh. Khiraj, grandfather of the parties, who are the children of Sh. Surja Ram son of Sh. Khiraj. There is no denial that the present appellant was not a party to the litigation that remained pending between Chhabil Dass and Manphool and others and decided up to this Court. The appellant being not a party to the earlier litigation would not be bound by decision in that litigation.

So far as the plea that the suit house is coparcenary property, there is no denial that a property becomes co-parcenary if the same is received by way of succession from a father, father's father and father's father's father. In the case at hand, it is none of the plea of the respondent

that the suit house was inherited by Sh. Khiraj from his father and Khiraj's father inherited it from his father. In view of the plea that the suit house was originally owned by Sh. Khiraj, it is difficult to accept the contention that the suit house is a co-parcenary property in the hands of Sh. Surja Ram. Accordingly, the first question is answered in favour of the appellant and against the respondent.

This brings the Court to the Will set up by the respondent. Concededly, the only witness examined to prove the Will is Beghraj. Beghraj is not an attesting witness to the Will. As per the Will (Ex.D1), the same was thumb-marked by the testator and attesting witnesses. The testimony of Beghraj that he was present at the time of execution of the Will cannot be accepted for the reason that the Will does not bear any endorsement or attestation of Sh. Beghraj. The recitals in the Will do not make reference to presence of Sh. Beghraj at the time of execution of the Will.

Though, there is no documentary evidence on record that other attesting witness of the Will has passed away but assuming that both the attesting witnesses of the Will have passed away, the question before the Court is whether the Will has been proved in accordance with Section 69 of the Evidence Act.

Section 69 says that 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 signatures of the person executing the document is in the handwriting of that person. To satisfy the requirements of Section 69 of the Evidence Act, it is obligatory upon the propounder of

the Will to comply with two conditions. (1) Attestation of one attesting witness is in his handwriting, (2) the signature of the person executing the document is in the handwriting of that person.

A person will be able to identify the signatures of a person to whom he has seen writing or putting signatures. It is not possible for a person to say that thumb impression on a document is the thumb impression of a particular person. The respondent has not examined a handwriting and fingerprint expert to prove that the thumb impression on the Will is that of Sh. Surja Ram, the testator of the Will.

As has been noticed hereinbefore, there is no evidence on record that the purported thumb impression on the Will dated 03.05.1979 is that of Sh. Surja Ram, the alleged executant of the Will in question. This apart, the Will in question is prepared on a paper, appears to be a part of Bahi. The thumb impressions of the alleged testator and attesting witnesses appear to have been affixed with ordinary ink. On examination of the original Will with a naked eye, it is sufficiently clear that no loops, lines, whirls etc. of thumb impressions are there. In absence of characteristics of a thumb impression being available, it creates a serious doubt if the Will in question is a genuine and valid document executed by deceased Surja Ram. I would hasten to add that the law imposes an onerous obligation upon the Court to be very vigilant and circumspect while examining a testament so that the Court does not falter in dealing with the estate left behind by a person who is no more in the world. The Courts below have committed a gross error rather perversity by relying upon the document (Ex.D1) and statement of Beghraj to uphold plea of the

respondent that he has become exclusive owner of the suit house on the basis of Will (Ex.D1).

In view of the above, the finding recorded by the Courts below that the respondent is the exclusive owner of the suit house on the basis of testamentary succession cannot be allowed to sustain and liable to be set aside. As a result, question No.2 is answered in favour of the appellant and against the respondent.

As the Will propounded by the respondent has been discarded in view of the discussion made hereinbefore and the suit property has not been found to be co-parcenary property in the hands of Sh. Surja Ram, as a natural corollary, the same is to be inherited by class-I heirs of the deceased on the basis of natural succession. Counsel for the parties have not disputed that Surja Ram left behind 4 class-I heirs namely three daughters and one son, parties to the suit being plaintiff, defendant No.1 (contesting) and performa defendants. That being so, the appellant shall be entitled to 1/4th share in the suit house.

No other point has been raised.

In view of what has been discussed hereinabove, the appeal is partly allowed. The judgments and decrees passed by the Courts below are set aside. The suit filed by the appellant is decreed that she is owner in joint possession of the suit house to the extent of 1/4th share and the judgment and decree for partition passed in Civil Suit No.159 of 1996 titled Chhabil Dass Vs. Manphool and others is not binding upon her. The parties are left to bear their own costs.

MAY 9, 2016
'D. Gulati'

(REKHA MITTAL)
JUDGE