

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No. 1764 of 1987

DATE OF DECISION:08.05.2017

Malooka (deceased) through his LRs

.....Appellants

Versus

Joginder Kaur and others

.....Respondents

BEFORE:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. HS Grewal, Advocate
for the appellants.

None for the respondents.

DAYA CHAUDHARY, J.

Briefly, the facts of the case as made out in the present appeal, are that plaintiff-Joginder Kaur filed a suit for 1/3rd possession from joint possession, which was decreed vide judgment/decreed dated 4.1.1984. Aggrieved by the aforesaid judgment and decree of the trial Court, defendant No.2 filed an appeal before the Additional District Judge, Jalandhar, which was dismissed vide judgment dated 27.2.1987.

After losing the case before the two Courts below, appellant-defendant No.2 through his LRs has filed the present second appeal to challenge the judgments and decrees passed by both the Courts below.

Learned counsel for the appellants submits that both the Courts below have not properly appreciated the evidence available on record. The findings recorded by the trial Court as well as first appellate Court are

contrary to the evidence and have been passed without taking into consideration the evidence lead by the appellants. Learned counsel further submits that the appellants have proved on record the Will, which was executed by Mihan Singh. Both the Courts below have not assigned any reason to disbelieve the testimonies of marginal witnesses of the Will. One of the marginal witness was Numberdar of the village for the last about 40 years but still his testimony has not been believed. The appellants by proving the Will on record have become owner of the suit land by way of adverse possession. The suit was filed by respondent No.1 after 15 years of death of Mihan Singh and throughout this period, the appellants were in exclusive possession of the suit land. At the end, learned counsel for the appellant submits that both the Courts below have relied upon irrelevant, inadmissible and untrustworthy evidence lead by respondent No.1 and as such judgments of both the Courts below are liable to be set aside.

Service was effected upon respondent No.1 but none has appeared inspite of intimation sent to counsel for respondent No.1.

Heard the arguments advanced by learned counsel for the appellants and have also gone through the judgments and decrees passed by both the Courts below and other documents available on the file.

The facts relating to filing of suit by respondent No.1-plaintiff and its decreetal as well as dismissal of the appeal filed by the appellants by the lower appellate Court are not disputed.

Respondent No.1-Plaintiff-Joginder Kaur filed a suit for 1/3rd possession as per her share, whereas, appellant-defendant No.2 has claimed his right on the basis of unregistered Will. The trial Court has framed the following issues:-

- i) Whether the plaintiff is the daughter of Mihan Singh S/o

Surajan? OPP.

ii) If issue No.1 is proved, then whether the plaintiff is entitled

to joint possession 1/3rd share of the suit land? OPP.

iii) Whether Mihan Singh executed a valid Will in favour of defendant No.2, if so, its effect as alleged in the written statement? OPD.

iv) Whether defendant No.2 has become owner of the suit land by way of adverse possession? OPD.

v) Relief.

The findings recorded by the trial Court are reproduced as under:-

“12. No doubt there is statement of one of the marginal witnesses, who has fully stated regarding the execution of this Will, copy of which is Ex. D1 and the original is in the mutation file attached but still it does not stand proved that this is the last testimony deposition of the deceased Mihan Singh. The execution of this document is shrouded in suspicious circumstances and which the statement of the scribe Dharam Pal as well as Maluka defendant No.2 or the attesting witness Umar Singh has not been able to dispel from the mind of the Court. Firstly it is an unregistered document. Although it is nowhere laid down that a Will to be genuine is required to be registered but this fact coupled with the surrounding circumstances makes this document highly doubtful and suspicious in nature. As the plaintiff has been proved to be the daughter of Mihan Singh, it was expected from Mihan Singh to give the preference to his daughter in the Will as to why she is

being debarred. There is absolutely not any mention in this will said to have been executed by deceased Mihan Singh that he has no daughter. It is subsequently mentioned that he is issueless and except Maluka, he has no other relation. This is very serious matter which goes to the root of this document and makes its execution highly doubtful and suspicious. Even it does not contain any reference to other brothers of the deceased as well as sisters. They too were the natural heirs along with Maluka, if it is accepted for academic sake that Mihan Singh was issueless. There is not any reference about the brothers and sisters of the deceased as to why they are being debarred. This is an unnatural document and this is not proved to be the last testimony or deposition of the deceased Mihan Singh. Mihan Singh was said to be blind when he executed this document. The statement of Umar Singh, marginal witness of this Will, that the testator had come to him and had asked him to reach the shop of Dharam Pal, scribe, next morning and which he did and he found the testator present all alone, does not appeal to reason. He was unescorted as per the statement of the marginal witness. How a blind person reached all alone in the shop of Dharam Pal unescorted, has remained unexplained on the file. As such, I hold that Mihan Singh never executed any valid Will in favour of defendant No.2 and the issue as such is decided accordingly against the defendants and in favour of the plaintiff.

13. The plaintiff being the sole heir of the property of Mihan

Singh has become the co-owner with possession of the extent of 1/3rd share of the suit land after the death of Mihan Singh. There can be no adverse possession by one co-owner against another co-owner. Even if one co-owner is in possession of the property, he is considered to be in possession on behalf of the other co-owner, as one co-owner has got the interest on each and every part of the land. There is absolutely nothing on record to prove the ingredients of adverse possession. Even otherwise, as discussed above, a co-owner cannot claim adverse possession against another co-owner. So this issue as such is also decided in favour of the plaintiff and against the defendants.”

Similarly, the findings recorded by the lower appellate Court are reproduced as under:-

“9. Malooka-defendant-appellant is the brother of Mihan Singh deceased and has propounded the Will dated 23.9.1962 said to have been executed by Mihan Singh in his favour. Copy of the Will is Ex. D1. The will is unregistered. Dharam Pal DW 4 is scribe of the Will and Udham Singh DW 5 is one of its marginal witnesses. Dharam Pal stated that Mihan Singh was known to him as Lambardar. It is in the statements of both the witnesses, i.e. DWs 4 and 5 that Mihan Singh executed the Will in sound and disposing state of mind in favour of the defendant. As note above, the Will is unregistered. It is in the statement of Udhan Singh DW 5 that Mihan Singh died 7-8 years after the execution of the Will. There are certain glaring circumstances

which cast doubt on the genuineness of the Will. It is made out that Mihan Singh went to the scribe unaided. It is in the statement of Joginder Kaur PW1 that Mihan Singh was not blind. In case Mihan Singh was blind, he could not go unaided to the scribe for execution of the Will. In that case, Dharam Pal DW 4 is also falsified when he stated that Mihan Singh used to attest certain document and was known to him on that account. The recital in the Will that Mihan Singh was blind, therefore, makes the document highly suspicious. The other significant factor is that the Will makes absolutely no mention of the plaintiff, who is daughter of the testator. On the other hand, it is stated in the Will that Mihan Singh had no issue. It has been proved on record that the plaintiff is daughter of Mihan Singh. The recital in the Will that Mihan Singh had no issue, only shows that Mihan Singh was not the author of the Will and the Will does not reflect his mind. It is admitted that mother of Mihan Singh was alive at the time of the making the Will and even at the time of the death of Mihan Singh. There is no explanation in the Will as to why the other brother and mother of the testator were excluded from inheritance. These factors are sufficient to create suspicion in the genuineness of the document. I, therefore, uphold the findings of the learned trial Court that the Will is not genuine instrument and it is not proved that Mihan Singh executed the valid Will in favour of Malooka. The decision of the learned trial Court on issue No.3 is affirmed.”

The Will relied upon by the appellants has not been believed by both the Courts below. No doubt there is a statement of one of the marginal witnesses, who has stated regarding execution of the Will but it is unregistered and the execution of the Will appears to be suspicious under the facts and circumstances of the case. Respondent No.1-plaintiff has been able to prove her case on the basis of evidence led by her. Nothing has been mentioned in the Will regarding share of respondent No.1-plaintiff and there was no reference about the brothers and sisters of the deceased and no reason whatsoever has been mentioned as to how and why they have been deprived of their rights. Mihan Singh was stated to be blind at the time of execution of the Will but as per statement of Umar Singh, who is marginal witness of that Will, Mihan Singh came to him and asked him to reach at the shop of Dharam Pal, Scribe on the next morning. He reached there and found Mihan Singh present all alone. It was not practically possible for a blind person to reach to that place all alone. Nothing has come on record to show as to how Mihan Singh reached at that place without having any assistance of any person. Respondent No.1-plaintiff is sole owner of the property of Mihan Singh being daughter and has become co-owner to the extent of 1/3rd share of the suit property after death of Mihan Singh. There cannot be any adverse possession by one co-owner against another co-owner. Even otherwise also in case one co-owner is in possession of the property, he is considered to be in possession on behalf of other co-owner, as co-owner is having right over each and every part of the land being co-sharer. There is nothing on record to prove the ingredients of adverse possession as for establishing adverse possession, one must establish his adverse title against all co-sharers for a continuous period of 12 years and it

must be open and totally hostile. As per case of the defendants-Mihan Singh was issueless, whereas, he left behind his daughter and as such wrong facts were mentioned in the written statement. It was not proved on record that Mihan Singh ever executed any Will in favour of the appellant. A finding has been recorded by both the Courts below that the Will is a forged document. It was proved on record from document Ex. PX i.e. birth certificate of respondent No.1-plaintiff being daughter of Mihan Singh S/o Surjan.

In view of the above, the Will allegedly executed by Mihan Singh was not proved on record and even the averments made in the written statement were not proved neither by the statement of the witnesses nor by documentary evidence. Both the Courts below have concurrently held and decided the claim in favour of the plaintiff.

Accordingly, in view of findings recorded by both the Courts below, I find no reason to interfere with the judgments and decrees passed by both the Courts below and as such the appeal being devoid of any merit is hereby dismissed.

May 08, 2017
pooja

(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
Yes