

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

**1. RSA No.1262 of 2010 (O&M)
Date of Decision: 10.01.2017**

**Surjit and othersAppellants
Vs
Jai Pal and othersRespondents**

2. RSA No.1263 of 2010 (O&M)

**Baljit and othersAppellants
Vs
Ram Phal and othersRespondents**

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present:Mr. C.B. Goel., Advocate with
Mr. B.K. Singh, Advocate and
Mr. P.S. Bhullar, Advocate
for the appellants.

Mr. Shilak Ram Hooda, Advocate
for respondent No.4 in RSA No.1262 of 2010 and
for respondent No.3 in RSA No.1263 of 2010.

RAJ MOHAN SINGH, J.

[1]. Vide this common judgment RSA Nos.1262 and 1263 of 2010 are being decided as common facts are involved in both the appeals. For brevity, facts are being culled out from RSA No.1262 of 2010.

[2]. Defendants have preferred this appeal against the concurrent judgments and decrees passed by the Courts below in a suit for declaration with consequential relief of permanent

injunction.

[3]. Brief facts are that two suits were filed for declaration and permanent injunction i.e. Civil Suit No.346 of 2008/2001 titled "*Ramphal and others vs. Godawari and others*" and Civil Suit No.482 of 2007/2001 titled "*Jaipal vs. Smt. Godawari and others*" in which estate of deceased Chandgi was involved. Late Sudhan had four sons namely Zile Singh, Chandgi, Bhikan and Suraj Mal. Plaintiffs Ramphal and others were sons of Zile Singh. Chandgi was issueless. Godawari/defendant No.1 was the widow of Chandgi. Defendant Nos.2 to 5 were the sons of Bhikan. Defendant No.6 Jaipal was son of Suraj Mal. Estate of Chandgi was in issue for which oral family settlement was claimed to have been executed, whereby plaintiffs were given 1/3rd share out of estate of Chandgi. Defendant Nos.2 to 5 were given 1/3rd share in the estate of Chandgi and defendant No.6 was also given 1/3rd share in the estate of Chandgi. In this way, the entire share of Chandgi was apportioned and distributed amongst the heirs of other three brothers in consonance with the aforesaid oral family settlement, a Will dated 25.10.2000 was executed by Chandgi and it was recited therein that after the death of Chandgi, legal representatives will make *Samadhi* of Chandgi in one acre of land and also construct a room in the name of Chandgi in Baba Muni Ram Ashram. It was alleged that

after the death of Chandgi, mutation No.2593 was illegally sanctioned in favour of defendant No.1 i.e. the widow of Chandgi, who in turn executed Will dated 18.06.2001 in favour of defendant Nos.2 to 5.

[4]. In the suit, plaintiffs claimed decree for declaration to the effect that the plaintiffs were owners in possession of 1/3rd share of the suit property as shown in the plaint and the mutation No.2593 was wrong and illegal. Further permanent injunction was sought restraining the defendants from alienating or creating any encumbrance over the suit property and also from dispossessing the plaintiffs from suit property in an illegal manner. No reference of the Will dated 18.06.2001 executed by Smt. Godawari was made, rather reference was made to Will dated 25.10.2000, which was executed by Chandgi in consonance with the family settlement. Will dated 18.06.2001 has been set up by the defendants in para No.4-A of the written statement.

[5]. After appraisal of the evidence, trial Court decreed the suit of the plaintiffs thereby declaring mutation No.2593 to be illegal, null and void. Plaintiffs were held entitled to inherit 1/3rd share in the estate of deceased Chandgi as per Will dated 25.10.2000.

[6]. Issue Nos.1 and 2 were decided against the plaintiffs,

but execution of Will dated 25.10.2000 was proved on the basis of evidence of scribe i.e. Ran Singh PW-3 and attesting witnesses namely Karam Singh-PW-2 and Naresh PW-4. Execution of Will dated 25.10.2000 was proved to the hilt. Whereas under issue No.7, trial Court refrained from commenting upon the Will executed by Godawari in the light of proof of execution of Will dated 25.10.2000 as Godawari was not found to be absolute owner of the property in question.

[7]. Defendants remained unsuccessful in the First Appeal before the lower Appellate Court. It was held by the lower Appellate Court that even though Will Ex.P-1 was unregistered, but the execution of Will was proved as per requirement of Section 68 of the Indian Evidence Act. Scribe and both the attesting witnesses were examined, who had deposed in one voice that Chandgi was in a fit state of health and was possessing sound disposing mind on 25.10.2000, when Will was executed in the presence of the attesting witnesses. The Will was scribed at the instance of the Chandgi by the scribe Ran Singh (PW-3) and the same was attested by the attesting witnesses, who also signed the documents in the presence of testator.

[8]. Non-registration of Will was assailed to be a suspicious circumstance, particularly when Chandgi was a resourceful

person having served the village community in the capacity of Sarpanch for 15 years, apart from being a member of Block Samiti for one term of five years. The said ground was not appreciated by the lower Appellate Court. The Will dated 18.06.2001 was not assailed in the plaint. Once execution of Will dated 25.10.2011 was proved with reference to the evidence and the amendment of the plaint was allowed by the Court, nothing remained thereafter to be assailed on that score.

[9]. Learned counsel for the appellants at the time of arguments raised the following substantial questions of law:-

- “i) Whether the aforesaid judgment and decree based on un-registered Will dated 25.10.2000, which was neither probated nor letter of administration of the will was ever obtained/granted by any court of competent jurisdiction, was not without jurisdiction and barred under Section 213(1) of the Indian Succession Act, 1925?*
- ii) Whether the Hon'ble Court of Civil Judge (Junior Division), Sonipat had no jurisdiction to adjudicate upon proof or validity of a will dated 25.10.2000, subject matter of this case?*
- iii) Whether a suit for declaration and injunction be converted into the suit for probaton of a will, wherein the will is to be proved?*
- iv) Whether the impugned judgment(s) and decree(s)*

passed in this case are not in violation of this judgment/guidelines of the Hon'ble Supreme Court in Mrs. Hem Nolini Judah (since deceased) Vs. Mrs. Isolyne Sarojbashini Bose and other [3 Judges], AIR 1962 SC 1471?

- v) *Whether the judgments and decrees in this case are not in violation of the law as set up and reiterated by the Hon'ble Supreme Court in Charanjilal Shrilal Goenka (deceased) Vs. Jasjit Singh and others, (1993) 2 SCC 507 and in T.Venkata Naryana and others Vs. Venkata Subbamma (Smt.) (Dead) and others, (1996) 4 SCC 457?"*

[10]. Learned counsel for the appellants contended that the impugned judgments and decrees have been passed on the basis of unregistered Will which was neither probated, nor any letter of administration was ever obtained from the competent Court. Therefore, in terms of Section 213(1) of the Indian Succession Act, jurisdiction of civil Court was barred. Reference was made to **Mrs. Hem Nolini (since deceased) vs. Mrs. Isolyne Sarojbashini Bose and others, AIR 1962 SC 1471;** **Charanjilal Shrilal Goenka (deceased) vs. Jasjit Singh and others, (1993)2 SCC 507** and **T. Venkata Narayana and others vs. Venkata Subbamma (smt.)dead) and others, (1996) 4 SCC 457.**

[11]. Learned counsel for the appellants further contended

that plaintiffs filed a suit for declaration with consequential relief of permanent injunction for declaration of their title to the extent of 1/3rd share in the suit property and nullification of mutation No.2593, however without the Will being probated, no relief should have been granted to the plaintiffs by the civil Court. The validity of Will could have been examined by way of probate petition in terms of Indian Succession Act as the Succession Act is a self-contained code in so far as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of probate Court. The probate proceedings shall be conducted by the probate Court in the manner prescribed in the Act and not in any other ways. The only Issue in the probate proceedings relates to the genuineness and due execution of Will and the Court itself is under duty to determine in view of **Charanjilal Shrilal Goenka (deceased)**'s case (supra).

[12]. Learned counsel further contended that in view of ratio laid down in **T. Venkata Narayana and others'** case (supra), mere suit for injunction cannot be converted into a suit for probate of a Will, whereas the Will is to be proved. If the Will is to be proved according to law, it has to be by way of probate in the Court having competency and jurisdiction according to procedure prescribed under Indian Succession Act, 1925.

[13]. Learned counsel relied upon ratio of **Mrs. Hem Nolini Judah (since deceased)'s** case (supra), wherein it was held that no right as an executor or legatee can be established in any Court, unless probate or letters of administration have been obtained of the Will under which the right is claimed and, therefore, it is immaterial, who wishes to establish the right as a legatee or an executor.

[14]. Section 213 of the Indian Succession Act creates a bar to the establishment of any right under Will by an executor or a legatee, unless probate or letter of administration of the Will has been obtained, whether that right is claimed by the person as a plaintiff or defendant. Learned Counsel also relied upon Section 264 read with Section 300 of the Act in the context of granting or revoking probate and letter of administration.

[15]. Learned counsel further submitted that the dismissal of application under Order 41 Rule 27 CPC by the First Appellate Court seeking permission for additional evidence to challenge the validity of the Will was wrongly declined.

[16]. I have considered the submissions made by both the sides.

[17]. Defendants relied upon the Will dated 18.06.2001 in para No.4-A of the written statement. In view of Section 213(1) of the Indian Succession Act, no right as an executor or legatee

can be established in any Court, unless the Court has granted probate of the Will under which right is claimed or has granted letter of administration with the Will. Though it was immaterial whether right under the Will was claimed as a plaintiff or defendant. Since questions of title are not decided in the proceedings or grant of probate or letter of administration and the proceedings would not establish the title to the property in favour of either of the party, therefore, the defendants being beneficiary of the Will dated 18.06.2001 were under legal obligation to prove execution of the Will or could have obtained probate of the same by way of resorting to proceedings in terms of Hindu Succession Act.

[18]. Since even in the amended plaint only mutation No.2593 was assailed, therefore, plaintiffs never relied upon the Will in question. Defendants never filed any counter claim seeking to establish their rights on the basis of Will dated 18.06.2001 or challenging the Will dated 25.10.2000 executed by Chandgi. Since the plaintiffs were not relying upon the Will dated 18.06.2001, therefore, the proposition of law as enshrined in **Mrs. Hem Nolini Judah (since deceased)'s** case (supra) would have barred the initiation of proceedings at the instance of defendants in the Court of law without being any probate of the Will in question.

[19]. Defendants led no evidence on issue No.7 and execution of Will dated 18.06.2001 in favour of defendant Nos.2 to 5 was not proved on record in the absence of any counter claim or cross-suit or objection. The plea of the defendants raised for the first time at the stage of Regular Second Appeal could not be gone into, particularly when no evidence was led by the defendants to prove execution of the Will dated 18.06.2001. It is true that questions of law can be raised at any stage of litigation, but in view of fact that the plaintiffs never relied upon the Will dated 18.06.2001 executed by Godawari in favour of defendant No.2 to 5 either in the capacity of plaintiff or otherwise, therefore, question of getting the same probated or issuance of letter of administration does not arise. It was for the defendants to establish the factum of Will by leading cogent evidence or they could have obtained the probate or letter of administration on the basis of Will dated 18.06.2001.

[20]. In the plaint the plaintiffs had pleaded factum of Will dated 25.10.2000 in para No.4-A of the plaint. Since the defendants had not set up any counter claim to the aforesaid Will, nor filed any cross-suit, therefore, probate of Will dated 18.06.2001 which was neither pleaded by the plaintiffs, nor set up in the counter-claim by the defendants does not arise at all. The Courts below had no opportunity to go into the issue in the

absence of any pleadings as well as evidence.

[21]. Reading of para nos.4, 4-A, 5 and 6 of the plaint would show that only challenge was made to the mutation No.2593. Thereafter defendants while filing written statement to the amended plaint pleaded factum of Will dated 18.06.2001 in para No.4-A of the written statement. Specific issue No.7 was framed in respect of validity of the Will dated 18.06.2001 executed by Godawari in favour of defendant Nos.2 to 5.

[22]. The evidence led by the defendants to prove the Will in question was discarded by the Courts below as the Will was never executed, nor thumb marked by Godawari in the presence of the witnesses. The applicability of Section 213(1) of the Indian Succession Act, in considered opinion of this Court operates in different field. The defendants could have resorted to probate proceedings in respect of Will dated 18.06.2001 or could have obtained letter of administration thereof. Since the probate proceedings do not decide the question of title, therefore, in the absence of execution of Will dated 18.06.2001, no title was passed over to the defendants. In view of aforementioned, the questions as decided in **Mrs. Hem Nolini Judah (since deceased)** and **Charanjilal Shrilal Goenka (deceased)**'s cases (supra) are in different context.

[23]. Challenge made to the validity of Will dated 25.10.2000

at appellate stage was wholly inconsequential as the execution of Will already stood established on record. Since, no evidence was led by the defendants on this aspect, therefore, the challenge by way of proposed additional evidence without there being any foundation in the pleadings of written statement would have paled in insignificance. In opinion of the Court, plea of additional evidence was rightly discarded by the lower Appellate Court.

[24]. The cumulative effect of all the questions so argued by the learned counsel for the appellants would be to see the ratio of the precedents cited in the context of Section 213(1) of the Indian Succession Act, therefore, after the consideration of facts and fact situation as discussed in preceding paras, I am of the view that no substantial question of law worth consideration is involved in the appeal.

[25]. In view of aforesaid and in considered opinion of this Court the questions of law as propounded by learned counsel for the appellants do not arise at all. Both the appeals are accordingly dismissed.

January 10, 2017

Atik

**(RAJ MOHAN SINGH)
JUDGE**

Whether speaking/reasoned

Yes / No

Whether reportable

Yes / No