

RSA No.2769 of 2010 (O&M)

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

**RSA No.2769 of 2010 (O&M)
Date of Decision: 1.5.2017**

Kanta and others

.....Appellants

Vs.

Krishan Kumar and others

.....Respondents

CORAM : HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

Present : Mr. C.B. Goel, Advocate
for the appellants.

Mr. Kulvir Narwal, Advocate
for the respondents.

RAMESHWAR SINGH MALIK J. (ORAL)

Unsuccessful defendants are in regular second appeal, against the concurrent findings of facts recorded by both the learned courts below, whereby suit for declaration and permanent injunction filed by plaintiff-respondent No.1, was decreed by the learned trial court vide impugned judgment and decree dated 11.6.2005 and the first appeal of the defendants was dismissed by the learned first appellate court, vide impugned judgment and decree dated 3.9.2009.

Brief facts of the case, as noticed by the learned first appellate court in para 2 of its impugned judgment, are that parties are Hindu and governed by the provisions of Hindu Law in the matters of succession, inheritance etc. Ram Chander, father of the plaintiff and defendants No.1 to

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5 and grandfather of defendants No. 6 to 14, was karta of the Hindu undivided family and the suit property, as detailed in para No.2 of the plaint which was ancestral property of the parties, stood in his name as karta and plaintiff and defendants No. 1 to 3 were having 1/5th share each in the aforesaid land. Said Ram Chander died intestate on 10.9.1992, leaving behind the parties as his legal heirs. After the death of Ram Chander, plaintiff and defendants No. 1 to 5 inherited 1/7th share each in the suit property whereas remaining 1/7th share was inherited and succeeded by defendants No. 6 to 14, being sons and daughters of Raj Kumar, pre-deceased daughter of Ram Chander. Defendants wanted to alienate the suit property illegally and more than their share despite the fact that they had no alienable interest in the suit land nor they could alienate more than 1/7th share in the estate left by Ram Chander (Since deceased). Defendants further failed to recognise 1/7th share of the plaintiff in the joint inherited suit property and rather threatened to alienate the land and got the land. When the request of the plaintiff was not acceded to, he file the civil suit before the learned trial court.

Upon service, defendants No.1 and 2 appeared and filed their joint and contesting written statement, taking more than one preliminary objections. However, defendants No. 3, 5, 7 and 11 to 14 filed their written statement admitting the claim of the plaintiff. Remaining defendants were proceeded against ex parte before the learned trial court. Replication was filed by the plaintiff to the contesting written statements of defendants No.1 and 2. On completion of pleadings of the parties, the learned trial court framed the following issues:-

1. Whether the plaintiff is co-sharer to the extent of 1/5

and 1/7 share in the suit land? OPP

2. Whether the suit is not property valued for the purpose of court fees and jurisdiction? OPP

3. Whether the plaintiff has suppressed the material facts from the court, its effect?OPP

4. Relief.”

With a view to substantiate their respective stands taken in their pleadings, both the parties brought on record documentary as well as oral evidence. After hearing learned counsel for the parties and going through the evidence brought on record, learned trial court came to the conclusion that plaintiff has duly proved his case by leading cogent and convincing evidence. Accordingly, his suit for declaration and permanent injunction was decreed by the learned trial court, vide its impugned judgment and decree dated 11.6.2005. Feeling aggrieved, defendants No.1 and 2, through their legal representatives, filed their first appeal, which also came to be dismissed by the learned first appeal vide its impugned judgment and decree dated 3.9.2009. Hence this regular second appeal at the hands of legal representatives of defendant Nos.1 and 2.

Heard learned counsel for the appellants and respondent No.1-caveator.

Relationship between the parties is not in dispute. Plaintiff-respondent No.1 namely Krishan Kumar was real brother of defendants No. 1 to 3 namely Jagan Nath, Atam Parkash and Roop Narain, respectively. In fact, Ram Chander had four sons and three daughters. Krishan Kumar-plaintiff and Roop Narain-defendant No.3 were not living in the village. Defendants-Jagan Nath and Atam Parkash were claiming entire landed property left behind by their father-late Sh. Ram Chander. This was the

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reason that when defendants were served in the suit for declaration and permanent injunction filed by the plaintiff-Krishan Kumar, only defendants No.1 and 2 contested the same. Roop Naraian-defendant No.3, who was the third brother of plaintiff, as well as his three sisters did not contest the suit, as they were supporting the claim putforth by the plaintiff. Thus, it becomes clear that two sons of late Sh. Ram Chander, who were defendants No.1 and 2 namely Jagan Nath and Atam Parkash were on one side and his remaining two sons namely Krishan Kumar-plaintiff and Roop Nariain-defendant No.3 as well as three daughters, including legal representatives of pre-deceased daughter-Raj Kumari were on another side. This was the reason that plaintiff claimed 1/7th share in the property left behind by his father late Sh. Ram Chander.

It is also not in dispute that entire pleaded and argued case on behalf of the appellants-defendants No.1 and 2 was based on the Will dated 1.2.1990 (Ex. DW2/A). Defendants No.1 and 2 had propounded the Will. It was their further pleaded and argued case that on the basis of this registered Will dated 1.2.1990 (Ex. DW2/A), mutation No. 5492 (Ex. DW1/A) was entered and sanctioned in their favour. On the basis of the abovesaid Will and mutation, defendants No.1 and 2 were claiming themselves to be absolute owners in possession of the suit property. On the other hand, case set up by plaintiff-respondent No.1 was that late Sh. Ram Chander died intestate and after his death, suit property would be inherited by all of his seven children in equal shares to the extent of 1/7th share each. Plaintiff also pleaded that suit property was ancestral in the hands of late Sh. Ram Chander.

On the basis of abovesiad pleaded case on behalf of both the

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parties, learned trial court rightly formulated following four questions to be decided, before arriving at a conclusion:-

- i) Whether the suit property was ancestral property in the hand of Ram Chander.
- ii) Whether Ram Chander had executed any will in favour of defendants No.1 and 2.
- iii) Whether defendants No.1 and 2 had succeeded the entire suit property on the basis of Will dated 1.2.1990.
- iv) Whether the plaintiff is entitled to any share in the suit property or not.

After having detailed deliberations on the abovesaid four questions formulated, the learned trial court recorded its categoric and convincing findings, deciding questions No.1 to 3 in favour of the plaintiff and against the contesting defendants-appellants herein, holding that although the land was not proved by the plaintiff to be ancestral in the hands of his father-late Sh. Ram Chander, yet since defendants No.1 and 2 could not prove the Will dated 1.2.1990 (Ex. DW2/A), all the seven children of late Sh. Ram Chander would be entitled to inherit the property left behind by him to the extent of 1/7th share each. Defendants were restrained from alienating the suit property more than their share, till the suit property was partitioned by metes and bounds, thus, the suit was rightly decreed by the learned trial court vide its impugned judgment and decree dated 11.6.2005.

Similarly, the learned first appellate court rightly upheld the abovesaid impugned judgment and decree of the learned trial court, holding that suit for declaration and permanent injunction was rightly decreed by the learned trial court. No fault was found with the findings recorded by the

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learned trial court and the first appeal of defendants No.1 and 2 was dismissed by the learned Additional District Judge, vide impugned judgment and decree dated 3.9.2009. A combined reading of both the impugned judgments and decrees passed by the learned courts below would make it crystal clear that since entire case of contesting defendants No.1 and 2-appellants was based on the Will dated 1.2.1990 (Ex.DW2/A) and they failed to prove it, in accordance with law, despite being propounders thereof, they were bound to fail. That is what has been rightly held by the learned courts below, recording their concurrent findings of facts and the same deserve to be upheld.

Will intends to deviate from natural succession. This is the reason that onus to prove the Will is always on its propounder, by leading cogent and convincing evidence, dispelling all the suspicion circumstances surrounding the Will. In the case in hand, Jagan Nath and Atam Parkash, both sons of late Sh. Ram Chander, wanted to inherit the entire property left behind by their father on the basis of Will dated 1.2.1990 (DW2/A) and consequent mutation No. 5472 (DW1/A), to the complete exclusion of their remaining two brothers, i.e. plaintiff and defendant No.3 as well as three sisters. In this view of the matter, a heavy onus was on defendants No.1 and 2-appellants herein, to prove the Will, in accordance with law, but they failed to do so. Having said that, this Court feels no hesitation to conclude that the learned courts below were well within their jurisdiction to pass the impugned judgments and decrees and the same deserve to be upheld.

A bare perusal of the Will (Ex.DW2/A), which was allegedly executed by late Sh. Ram Chander on 1.2.1990 and is available at page 57 of the lower court record, would show that Sarv Sh. Ved Parkash s/o Ganeshi

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Dass and Shanti Lal s/o Chiman Lal have put their signatures at the foot of second page of the Will, as attesting witnesses. It is also not in dispute that none of these two attesting witnesses was produced as witness by defendants No.1 and 2 in the court, so as to prove the Will. Reverse side of second page of the Will would show that when this Will was presented before Sub-Registrar for its registration on 2.2.1990, only one out of the abovesaid two witnesses namely Ved Praksh appeared and put his signatures as witness. One Faqir Chand, Lambardar, put his thumb impression as witness to the Will, who was also stated to be identifier. A careful perusal of the Will at page Nos. 57 and 58 of the LCR would also show that Faqir Chand was nowhere in the picture during the execution of Will on 1.2.1990 by its executant-late Sh. Ram Chander.

It is also pertinent to note here that first page of the Will was signed only by late Sh. Ram Chander in Urdu at one place in the left margin whereas on the second page, he has put its signatures in Urdu on the left margin as well as at the foot of the Will between the signatures of abovesaid two attesting witnesses. Before the Sub-Registrar, attesting witness-Ved Prakash has put his signatures in English whereas Ram Chander-executant of the Will, put his thumb impressions. In this view of the matter, contention raised by learned counsel for the appellants that Faqir Chand, Lambardar, was also an attesting witness to the Will and he was examined before the Court as DW2, thus, Will stands duly proved, has been found wholly misplaced and not worth acceptance. The reason to say so is that Faqir Chand, Lambardar, was not at all in the picture on 1.2.1990, when the Will was written and executed by late Sh. Ram Chander, which was signed by abovesaid witnesses namely Sarv Sh. Ved Prakash and Shanti Lal. Under

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these peculiar facts and circumstances of the case, it can be safely concluded that the learned courts below committed no error of law, while passing the impugned judgments and decrees and the same deserve to be upheld, for this reason also.

Admittedly, suit property was unpartitioned. It is the settled proposition of law that possession on joint property by one co-sharer would amount to possession of all even if all but one are actually out of possession. In this view of the matter, the plea raised on behalf of appellants that since the plaintiff did not claim consequential relief of possession, his suit for declaration alone was not maintainable, has also been found misplaced for the reason that appellants-defendants No.1 and 2 would be treated in possession on behalf of all the co-sharers and the plaintiff would be entitled to be declared as owner in possession to the extent of 1/7th share in the property left behind by his father-late Sh. Ram Chander. It was rightly so held by both the learned courts below and the impugned judgments and decrees deserve to be upheld, for this reason as well.

The view that has been taken by this Court also finds support from the following judgments of the Hon'ble Supreme Court as well as different High Courts, including this Court:-

Himmatrao Vs. Kaolosamdass, 1966 AIR (SC) 1974 (SC)

Thakkar Vrajilal Bhimjee Vs. Thakkar Jamnadas Valjee and another, 1994 (4) SCC 723 (SC)

Bhartu Vs. Ram Sarup, 1981 PLJ 204 (P&H)

Netar Singh Vs. Harnek Singh, 2001 (4) RCR (civil) 524 (P&H)

Ram Chander Vs. Bhim Singh and others, 2008 (3) RCR (civil) 685 (P&H)

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**Shantilal Vs. Mahendra Kumar and others, 2002 (3) LJR
390 (Rajasthan H.C.)**

No doubt, plaintiff could not prove the suit property as ancestral in the hands of his father-late Sh. Ram Chander. The property was treated to be self acquired by late Sh. Ram Chander. However, once defendants No.1 and 2-appellants could not prove the Will (Ex.DW2/A) in accordance with law, despite being propunders thereof, their entire case falls flat. Case of the plaintiff stands duly proved, he being one of the sons of late Sh. Ram Chander. In the absence of the Will, as late Sh. Ram Chander died intestate, all his seven children, including the plaintiff, shall inherit the entire property left behind by their father to the extent of 1/7th share each.

So far as argument raised by learned counsel for the appellants that appropriate issue regarding the validity of the Will was not framed, is concerned, it has also been found without any merit. It is so said, because once parties have led their entire evidence with a view to prove their pleaded case, alleged omission on the part of the learned trial court in not framing specific issue regarding validity of the Will would not prove fatal, as it would be too technical to dismiss the suit of the plaintiff, which was otherwise duly proved. Technicalities must not weigh with the court, while doing complete and substantial justice between the parties. Rules of procedures are meant for advancing the cause of justice.

Further, once appellants-defendants No.1 and 2 have propounded the Will and produced evidence to prove the same, they shall not be entitled to raise this technicality at a later point of time. In this regard, reliance can be placed on a judgment of the Hon'ble Supreme Court in **Nedunuri Kameswaramma Vs. Sampati Subba Rao, 1963 AIR (SC)**

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884 and a judgment of this Court in **Mohd. Jamil and another Vs. Anwari Begum and others, 2017 (1) PLR 341.**

Before arriving at a judicious conclusion, the learned first appellate court examined, considered and appreciated true facts of the case as well as evidence available on record, in correct perspective. Cogent findings recorded by the learned first appellate court in para 20, 21 and 26 of its impugned judgment, which deserve to be noticed here, read as under:-

“20. Admittedly, the perusal of the written statement of the defendants shows that they have claimed the exclusive ownership and possession over the suit property on the basis of the will allegedly executed by late Shri Ram Chander. The defendants have also averred that the suit land was self acquired property of deceased Ram Chander. The learned trial court after perusing the evidence of both the parties came to the conclusion that the defendants have failed to prove the execution of the Will while returning the findings on issue No.1. Admittedly, the defendants have not examined any witness i.e. Shanti Lal or Ved Parkash of the will before the learned trial court.

21. It is not in dispute that the onus of proving the due execution of the Will is upon its propounder. Reference in this regard can be placed on the law laid down in Seth Beni Chand (since dead) now by Lrs Versus Smt. Kamla Kunwar and others, 1997 Page-1.

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26. Shri O.P. Chug, the learned counsel for the defendants further submitted that the learned trial court erred in holding that the plaintiff is co-sharer in the joint possession of the suit property. However, he submitted that the plaintiff was not having any share nor he is in possession of any part of the suit property.

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However, this contention is not tenable because as per jamabandi for the year 1974-75 Exhibit PZ, Shri Ram Chander was owner of the suit property. So, after the death of Shri Ram Chander, in natural course, it was devolved upon all his legal heirs. It is not in dispute that the plaintiff is also one of the sons of deceased Ram Chander. It is also settled proposition of law that succession never remains in abeyance, so, naturally after the death of Ram Chander father of the plaintiff, he has also become owner in possession of the suit property being co-sharer alongwith the legal heir of deceased Ram Chander.”

Mutation does not confer any title. Defendants also failed to prove their possession, as rightly recorded by the learned first appellate court in para 27 of its impugned judgment. Appellants-defendants produced only one document, i.e. the mutation Ex. DW1/A to prove their ownership over the suit property. Neither the mutation is a document of title, nor it proved exclusive possession of the defendants-appellants over the suit property. Possession of the appellants shall be treated on behalf of all the co-sharers, because of the admitted fact that suit property was undivided and it shall be deemed to be in possession of entire body of co-sharers, as already held by the Hon’ble Supreme Court in **Himmatrao’s case** (supra). Thus, it is unhesitatingly held that plaintiff shall be co-sharer in the joint possession, to the extent of his 1/7th share. Since the learned courts below rightly appreciated the peculiar fact situation of the case, discussed hereinabove, as well as evidence available on record, while recording their concurrent findings of facts, the impugned judgments and decrees deserve to be upheld.

During the course of hearing, learned counsel for the appellants failed to point out any patent illegality or perversity in either of the

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impugned judgments rendered by the learned courts below. He also could not refer to any question of law much less substantial question of law, which is sine qua non for entertaining a regular second appeal at the hands of this Court, while exercising its appellate jurisdiction under Section 100 of the Code of Civil Procedure. In this regard, reliance can be placed on the law laid down by the Hon'ble Supreme Court in **Naryanan Rajendran and another Vs. Lekshmy Sarojini and others, 2009 (2) RCR (civil) 286** and **Santosh Hazari Vs. Purshottam Tiwari, 2001 (3) SCC 179.**

No other argument was raised.

Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that the present appeal is misconceived, bereft of merit and without any substance. Thus, it must fail. No case for interference has been made out.

Resultantly, with the abovesaid observations made, instant regular second appeal stands dismissed, however, with no order as to costs.

1.5.2017
Ak Sharma

(RAMESHWAR SINGH MALIK)
JUDGE

Whether speaking/reasoned Yes/No
Whether reportable: Yes/No