

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

289

RSA-1759-2016(O&M)

Date of Decision:29.08.2017

**Lekh Raj (since deceased) through
his LR Satish Kumar**

.....Appellant

Versus

**Dalip Singh (since deceased) through
his LRs and others**

.....Respondents

CORAM: HON'BLE MR.JUSTICE RAMESHWAR SINGH MALIK.

**Present: Mr.K.S.Cheema, Advocate,
for the appellant.**

RAMESHWAR SINGH MALIK, J.(Oral)

Defendant No.1 is in regular second appeal against the impugned judgment of reversal dated 24.09.2015 passed by the learned Additional District Judge, whereby first appeal of the plaintiff was allowed, decreeing his suit for possession by way of partition of the suit property.

Brief facts of the case, as noticed by the learned first appellate court in para 2 of its impugned judgment, are that the case of the plaintiff was that the property in dispute was previously owned and possessed by Mangat Ram who was father of the defendants. Mangat Ram had since died and after his death, the suit property was inherited by the defendants in equal shares. The plaintiff purchased ½ share of the suit property from defendant No.2 vide sale deed dated 3.2.2004 for a sale consideration of ₹one lac. The plaintiff was also put in possession of ½ share of the suit property. The plaintiff was already in possession of shop shown in green

colour in the site plan attached with the plaint even prior to the execution of the sale deed dated 3.2.2004. The plaintiff had taken the shop on rent from the father of the defendants vide rent-deed dated 16.7.1976. Due to jointness of the suit property, there remained constant dispute between the parties as defendant No.1 was in possession of more than his share of the suit property. The plaintiff requested the defendants to separate his share by way of partition but to no avail.

Defendants were served in the suit. They appeared and filed their contesting written statement, raising more than one preliminary objections. Replication was filed by the plaintiff. On completion of pleadings of the parties, the learned trial Court framed the following issues:-

- “1. Whether the plaintiff is entitled to possession by way of partition of the property as detailed in the head note of the plaint?OPP*
- 2. Whether the plaintiff is entitled to permanent injunction as prayed for?OPP*
- 3. Whether the suit of the plaintiff is not maintainable?OPD*
- 4. Whether the sale deed dated 3.2.2004 is null and void, as defendant No.2 is neither owner nor has any right in the suit land?OPD*
- 5. Whether Lekh Raj was absolute owner in possession of the suit land on the basis of Will dated 10.9.76 executed by his father Mangat Ram?OPD*
- 6. Whether the suit is not properly valued for the purpose of court fee and jurisdiction?OPD*
- 7. Whether the site plan filed by plaintiff is wrong and incorrect?OPD*
- 8. Relief.”*

With a view to substantiate their respective stands taken in their

pleadings, both the parties produced their documentary as well as oral

evidence. After hearing the learned counsel for the parties and going through the evidence brought on record, learned trial court came to the conclusion that the plaintiff has failed to prove his case. Accordingly, suit for possession by way of partition filed by the plaintiff was dismissed by the learned trial court vide its judgment and decree dated 05.07.2013. Feeling aggrieved, plaintiff filed his first appeal which came to be allowed by the learned Additional District Judge vide his impugned judgment and decree dated 24.09.2015. Suit of the plaintiff was decreed. Hence, this regular second appeal, at the hands of unsuccessful defendant No.1 through his LR Satish Kumar.

Heard learned counsel for the appellant.

The case of the plaintiff-respondent was based on sale-deed dated 03.02.2004 , whereby he purchased ½ share in the suit property from defendant No.2. Defendant No.2 was none else but real brother of defendant No.1-appellant herein. Deriving his title on the strength of sale-deed dated 03.02.2004, plaintiff filed the present suit for possession by way of partition of the undivided suit property which was a residential house. Sale-deed was proved on record as Ex.P1. Defendant No.1-appellant set-up the Will dated 10.08.1976 Ex.D1 allegedly suffered by his father Late Sh.Mangat Ram to the exclusion of defendant No.2.

However, the learned trial court failed to appreciate the documentary as well as oral evidence in the correct perspective while dismissing the suit of the plaintiff. Since the Will Ex.D1 was found surrounded by more than one suspicious circumstances and defendant No.1-appellant was propounder thereof, who failed to dispel all the suspicious circumstances surrounding the Will, learned first appellate court was well

within its jurisdiction to pass the impugned judgment and decree, setting aside the erroneous findings recorded by the learned trial court. Thus, the impugned judgment and decree passed by the learned first appellate court deserve to be upheld.

Issue No.5 was framed regarding the Will in question and onus was rightly put on defendant No.1-appellant. However, the appellant failed to discharge his onus on issue No.5. He could not bring on record cogent and convincing evidence so as to prove the Will Ex.D1 to be a genuine document. In fact, execution of the Will in question was not proved. There were more than one suspicious circumstances surrounding the Will which could not be dispelled by the appellant while leading his evidence.

Although, the Will was claimed to be dated 10.08.1976 but defendant No.1-appellant never disclosed the said fact to anybody including his brother defendant No.2 Sh.Hem Raj. In fact, the Will in question did not see the light of the day till filing of the present suit by the plaintiff. Under these undisputed circumstances, it can be safely concluded that the learned first appellate court committed no error of law, while passing the impugned judgment and decree and the same deserve to be upheld, for this reason also.

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 this Court:-

Ramchandra Rambux Vs. Champabai and others, 1965 AIR (SC) 354

Om Prakash and others Vs. Shiv Kumar and others, 2007 (5) RCR (civil) 542

Apoline D' Souza Vs. John D' Souza, 2007 (7) SCC 225
Bharpur Singh and others Vs. Shamsher Singh, 2009 (3) SCC 687

Kartar Kaur etc. Vs. Gurdeep Kaur etc. 2010 (5) RCR (civil) 279.

Before arriving at its judicious conclusion, the learned first appellate court has rightly examined, considered and appreciated true facts of the case as well as evidence available on record, in the correct perspective. Relevant and cogent findings recorded by the learned Additional District Judge in para 18 to 24 of his impugned judgment, which deserve to be noticed here, read as under:-

“The entire controversy in this case revolves around the fact as to whether Mangat Ram father of the defendants executed Will dated 10.8.1976 in favour of defendant No.1 or not. The onus to prove the execution of the Will was on defendant No.1 and in order to discharge this onus, the defendants have examined DW-2 Naresh Kumar whose father Rachhpal Singh is one of the attesting witnesses of the Will. This witness has deposed that his father has died and the Will dated 10.08.1976 bears the signatures of his father in English. DW-2 Dalip Singh has further stated that Hem Raj owns a separate house in Hajipur.

The defendants have further examined Yashpal son of Gurbax Lal as DW-3 who has also deposed that his father Gurbax Lal has died and the Will Ex.D1 bears the signatures of his father Gurbax Lal in Hindi. In addition to this, Satish Kumar son of Lekh Raj deceased (defendant No.1) has also appeared as DW-4 and has stated that his grandfather executed a Will dated 10.8.1976 in favour of his father as his father used to serve and look after his grandfather Mangat Ram. He has further testified that defendant No.2 owns a separate house at Hajipur.

The defendants have further examined Shanti Devi as DW-1 (daughter of Mangat Ram who is a sister of the defendants) who has also deposed that a Will was executed by her father in favour of defendant No.1 and further that

her father had helped defendant No.1 Hem Raj for purchasing of plot of 5 Marlas where he is residing.

The perusal of the evidence led by the defendants to prove the execution of the Will reveals that the defendants have examined Naresh Kumar son of Rachhpal Singh and Yashpal son of Gurbax Lal who have simply proved on record that the Will Ex.D1 bears signatures of their respective fathers, namely, Rachhpal Singh and Gurbax Lal as attesting witnesses of the Will and apart from that there is absolutely no evidence with regard to the execution of the Will on the file.

Let us examine the suspicious circumstances which surround the will, as pointed out by the counsel for the plaintiff. Firstly, the Will though executed on 10.8.1976 did not see the light of the day till the filing of the present suit. There is no evidence on record as to exactly when Mangat Ram died but in his cross-examination, DW-4 Satish Kumar has stated that his grandfather died before his birth and further that he was 30 years old. It means that Mangat Ram died prior to the year 1982. Lekh Raj in whose favour the Will is said to have been executed died after the year 2005 i.e., during the pendency of the present from. From 1982 to 2005, the said Will was not disclosed by Lekh Raj to defendant No.2 or to anybody nor it was produced before any authority. This constitutes a very strong suspicious circumstance about the Will Ex.D1 which the defendants have not been able to explain legitimately.

The perusal of the Will Ex.D1 reveals that there is a recital in the Will that the other son, namely, Hem Raj has been given a plot in Killa Colony and another house has been purchased for him in the city. However, the aforesaid recital regarding giving one plot and a house in the city having been given to defendant No.2 has not been proved on record by the defendants. In this regard, DW-4 Satish Kumar has simply stated that defendant No.2 owns a house

at Hajipur but he has not stated anything with regard to the fact that this house was purchased by Mangat Ram for defendant No.2. Similarly, DW-1 Shanti Devi has claimed in her statement that her father had purchased a plot for defendant Hem Raj from the Panchayat, Hajipur and it was a five Marlas plot. However, the description of the said plot does not match with the description of the properties given in the Will. On the contrary, defendant No.2 has proved on record certified copy of a sale-deed Ex.RE/1 vide which defendant No.2 purchased a plot whereby he purchased a house from one Kishan Chand son of Ditta Ram on 22.8.1980. Had the said house been purchased by defendant No.2 with the help of his father Mangat Ram, even then the recital in the Will Ex.D1 would not have been correct as the Will was executed in the year 1976. Thus, the recitals in the Will regarding giving a house and a plot to defendant No.2 by Mangat Ram also create suspicion about the genuineness of the Will.

Thirdly, the signatures of Mangat Ram on the Will have not been got compared with any other document which might have been executed by Mangat Ram during his life time. If the attesting witnesses of the Will had died, the execution of the Will could definitely have been proved on record by way of comparison of the signatures of the testator with some other document executed by Mangat Ram such as sale-deed, rent-deed or any other document during his life time. Since no attempt has been made by the defendants to prove any such document with which the handwriting or signatures of Mangat Ram could be compared, on this ground also, an adverse inference has to be drawn against the defendants as they have not been diligent enough to prove the execution of the Will Ex.D1. It would be quite arduous to believe that no such document was in possession of the defendants.”

could not point out any patent illegality or perversity in the impugned judgment and decree passed by the learned first appellate court. He was also unable to refer to any question of law much less substantial question of law, which is *sine qua non* for entertaining any 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 judgments of the Hon'ble Supreme Court in **Naryanan Rajendran and another Versus Lekshmy Sarojini and others, 2009 (2) RCR (Civil) 286** and **Santosh Hazari Versus 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 wholly misconceived, bereft of merit and without any substance, thus, it must fail. No case for interference has been made out.

Resultantly, with the above-said observations made, the present regular second appeal stands dismissed, however, with no order as to costs.

August 29, 2017
seema

(**RAMESHWAR SINGH MALIK**)
JUDGE

Whether speaking/reasoned:	Yes/No
Whether Reportable:	Yes/No