

RSA No. 1990 of 2017 (O&M)

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

**RSA No. 1990 of 2017 (O&M)
Date of Decision: 7.4.2017**

Raj Kumari

.....Appellant

Vs.

Ramesh Kumar @ Kuki and others

.....Respondents

CORAM : HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

Present : Mr. Ajay Pal Singh Rehan, Advocate
for the appellant.

RAMESHWAR SINGH MALIK J. (ORAL)

Unsuccessful defendant is in regular second appeal, against the impugned judgment and decree dated 28.10.2016 passed by the learned Additional District Judge, whereby first appeal of the defendant-appellant was dismissed and the impugned judgment and decree dated 6.1.2015 of the learned trial court, decreeing the suit for declaration, were upheld.

Brief facts of the case, as noticed by learned first appellate court in para 2 of its impugned judgment, are that Bihari Lal was father of plaintiffs and defendant No.1. He was father-in-law of defendant No.2 and grandfather of defendant Nos. 3 and 4. Sh. Madan Lal son of Bihari Lal had since died. Defendant No.2 was widow and defendant No.3 and 4 were daughters of Madan Lal. Smt. Goma Devi was another daughter of Bihari Lal. She was married with Mr. Shiv Parshad and out of said marriage, no child was born to Smt. Goma Devi. Smt. Goma Devi and Sh. Shiv Parshad had since died. It was further averred that wife of Bihari Lal and mother of

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present plaintiffs died prior to the death of Bihari Lal. Bihari Lal died in the year 1981. As such, at the present plaintiffs and defendants are the legal heirs of Bihari Lal. It was further averred that plaintiffs No.1 to 4 inherited the estate of Bihari Lal to the extent of 4/6th share, while defendant No.1 inherited 1/6th share of estate of Bihari Lal. Sh. Bihari Lal, during his life time, did not execute any Will in favour of any person.

After the death of Bihari Lal, his estate devolved upon his legal heirs by way of natural succession. Bihari Lal purchased plot underneath the suit property vide registered sale deed. After purchasing the plot, Bihari Lal raised construction over the plot. The suit property was in possession of tenants under the plaintiffs and the defendants. Plaintiffs were receiving their share of rent from the tenants. It was averred that plaintiffs and defendants were deemed to be in joint possession of the suit property. It was further averred that neither the plaintiffs nor defendant were in actual possession of any portion of the suit property and the entire suit property was in possession of the tenants, thus, for all intents and purposes, the suit was deemed to be in joint possession of plaintiffs and defendants. Plaintiffs were joint owners in possession to the extent of 4/6th share of the suit property.

It was averred that defendants were joint owners in possession to the extent of 2/6th share of the suit property. The defendants had no right to alienate the suit property in favour of any other person more than their shares. It was further averred that defendant had started threatening that they would alienate more than their share in favour of some other persons. It was averred that in the written statement filed by defendants No. 1 to 4, they pleaded that defendant No.1 had executed a sale deed dated 22.11.2010 in favour of Narinder Kaur and Manpreet Kaur. The said sale deed was wrong,

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illegal void and ineffective on the rights of the plaintiffs. Defendant No.1 had only 1/6th share in the entire house and as such, she was not competent to alienate more than 1/6th share. Plaintiffs continued to be the owners to the extent of 4/6th share of the suit property. It was further averred that about a month ago, Narinder Kaur and Manpreet Kaur forcibly dispossessed the plaintiffs from the suit property and at present, they are in possession of the entire property. Plaintiffs being co-owners to the extent of 4/6th share were entitled to a decree of joint possession in their favour and against the defendant.

Having been served, defendants No.1 to 4, including present appellant, appeared and filed their joint written statement, raising more than one preliminary objections. Defendants No. 5 and 6 filed their separate written statement, claiming themselves to be bonafide purchasers of the suit property. Replications to the written statements were filed by the plaintiffs. On completion of pleadings of the parties, learned trial court framed the following issues:-

- 1. Whether the plaintiffs are entitled for decree of declaration as prayed for? OPP*
- 2. Whether the plaintiffs are entitled to the consequential relief of permanent injunction as prayed for? OPP*
- 3. Whether the plaintiffs are entitled for decree of joint possession as prayed for? OPP*
- 4. Whether the present suit is bad for non joinder of necessary parties? OPD*
- 5. Whether the present suit is barred by limitation? OPD*
- 6. Whether the instant suit is bad for non joinder of necessary parties? OPD*
- 7. Relief.”*

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With a view to prove their pleaded case, 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 plaintiffs have duly proved their case by leading cogent and convincing evidence. The Will set up by defendant No.1-appellant was found surrounded by suspicious circumstances. Accordingly, their suit for declaration to the effect that they were co-sharers to the extent of their respective shares in the suit property left behind by their father-Late Sh. Bihari Lal, was decreed, vide impugned judgment and decree dated 6.1.2015. Feeling aggrieved, two first appeals were filed by the defendants. Civil Appeal No. 15 of 29.1.2015 was filed by one set of defendants and Civil Appeal No.38 of 2.2.2015 was filed by another set of defendants. However, both the appeals came to be dismissed by the learned first appellate court, vide its common impugned judgment and decree dated 28.10.2016. Hence this regular second appeal at the hands of defendant No.1.

Heard learned counsel for the appellants.

It is a matter of record that entire case of the appellant was revolving around Will dated 5.6.1981 allegedly executed by late Sh. Bihari Lal-father of the appellant. Relationship between the parties is not in dispute. Plaintiffs were sons of late Sh. Bihari Lal. Fifth son of late Sh. Bihar Lal was late Sh. Madan Lal, who was husband of defendant No.2 and father of defendants No. 3 and 4. It is also a matter of record that defendant No.1-appellant was the propounder of the Will. Plaintiffs were claiming their interest in the suit property on the basis of natural inheritance.

Will in question was dated 5.6.1981 (Ex. D10), whereas late Sh. Bihari Lal expired on 7.6.1981. Both the learned courts below have

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recorded their concurrent findings of facts to the effect that the Will in question was surrounded by suspicious circumstances and defendant No.1 being propounder of the Will could not dispel the suspicious circumstances. 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.

When confronted with the abovesaid factual as well as legal aspect of the matter to point out any relevant material in favour of the appellant, learned counsel for the appellant had no answer and rightly so, it being a matter of record. It is the settled proposition of law that onus would always be on the propounder of the Will to prove it by dispelling all the suspicious circumstances. A bare combined reading of the impugned judgments and decrees would make it crystal clear that propounder of the Will has miserably failed to dispel the suspicious circumstances surrounding the Will. Under these peculiar facts and circumstances of the case, it can be safely concluded that 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.

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. Shamsheer Singh, 2009 (3)
SCC 687

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

Before arriving at a judicious conclusion, learned first appellate court re-considered the factual as well as legal aspect of the matter and appreciated the same in correct perspective. Relevant findings recorded by learned first appellate court in para 17 and 18 of its impugned judgment, which deserve to be noticed here, read as under:-

“The perusal of the record shows that whole claim of defendants was based on the alleged will dated 5.6.1981 and the original will was not produced on record by defendant No.1. The application of defendants No. 5 and 6 was allowed to lead secondary evidence to prove that said will subject to prove existence and execution as well of that Will. So now the first question arises here is that whether defendant Nos.5 and 6 have succeeded to prove the existence of will in question. Defendants No. 5 and 6 took onus to prove the execution of said will alongwith its existence. They examined DW3 clerk of MC Ferozepur for establishing the existence as well as execution of will in question. Said DW3 placed on file the photocopy of alleged will attested by concerned official of Nagar council Ferozepur as Ex. D7. This document Ex.D7 alongwith other documents Ex.D3 to Ex.D12 have been objected by the counsel for the plaintiffs and contended that the said witness DW3 who is the clerk of Municipal Committee is not competent to prove all these documents. During cross-examination, he has stated on

29.7.10, he was not working with Municipal Committee Ferozepur. He also stated that original will is not in their record. From the perusal of testimony of DW3 and the document Ex.D7, it is apparent the said witness is not competent to prove the existence of original will. The only record including application Ex. D3 order, Ex.D4, Ex.D5 and copy of affidavit Ex.D6 are not sufficient to establish that any will was executed by said Bihari Lal in favour of defendant No.1 Raj Kumari on 5.6.81. The perusal of Ex.D4 which is the order dated 13.8.2010 shows that Raj Kumari who is defendant No.1 produced the Will in question dated 5.6.81 and thereupon public notice was ordered to be issued by the concerned official. But that official has not been examined in the court to prove that he has seen that original will and further there is no document on file to reflect that Bihari Lal had executed any will in favour of defendant No.1 at any point of time. Therefore, the existence of the Will in question could not have been established on record by defendants No. 5 to 6. Moreover as per the provisions of Section 63 of Indian Succession Act and Section 68 of Indian Evidence Act at least one attesting witness of the will is required to be examined for proving the execution of will but in the present case no such effort was ever made by the defendants. Even defendant No.1 did not endeavor to establish the execution of said will and to prove her

pleadings raised by her in her written statement. The property in question stood in name of Bihari Lal predecessor in interest of plaintiffs and defendants No.1 to 4. The plaintiffs are claiming their interest in property in dispute on the basis of natural inheritance. It is undisputed fact in the present case that the property in dispute is self acquired property of said Bihari Lal and owned by him. On this account, plaintiffs being legal heirs of Bihari Lal who expired on 7.6.1981 also derived interest in the property in dispute on the basis of succession. The only hurdle in deriving interest in said property by plaintiff by way of natural succession is the execution of said will but as discussed above, the execution of will has not been proved on record by any of defendants even not by the propounder of will who is defendant No.1 and was bound to prove the execution of will in question but she did not bring even iota of evidence on record in this respect and during proceedings of this suit, at this stage, defendant evidence she decided not to contest it and as such has been ordered to be proceeded against ex parte.

There are some other circumstances also which create suspicion on alleged factum of execution of will. Firstly, the alleged will is said to be executed in 1981 but till the filing of suit it has not seen the light of day and even at the time of filing written statement and thereafter, in the proceedings in the instant suit,

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defendant No.1 did not produce the same in the court. Secondly, defendant No.1 managed to sell the property in dispute to defendants No. 5 and 6 during the pendency of the instant suit vide sale deed dated 22.11.2010. The plaintiffs who are sons of deceased Bihari Lal, defendant No.1 who is daughter of Bihari Lal and legal heirs of Madan Lal deceased son of Bihari Lal-defendants No.2 to 4 all are entitled to receive their interest in the property in dispute. Therefore, it is held that the plaintiffs and defendant No.1 are co-owners in the house in question to the extent of 1/6th share each and defendant No.2 to 4 are co-owners in the said house to the extent of 1/6th share jointly being widow and sons of deceased Madan Lal son of Bihari Lal.”

In the case in hand, the Will in question was not at all a genuine Will. Bequeathing the suit property by late Sh. Bihari Lal in favour of his daughter alone to the exclusion of his sons, itself was a suspicious circumstance. Further, appellant-defendant No.1 managed to sell the suit property to defendants No.5 and 6 during pendency of suit, vide sale deed dated 22.11.2010, which would also show her malafide intention right from day one. In this view of the matter, it is unhesitatingly held the learned courts below were well justified in recording their concurrent findings of facts and the suit of the plaintiffs was rightly decreed.

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

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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.

7.4.2017
Ak Sharma

(RAMESHWAR SINGH MALIK)
JUDGE

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