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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-2023-1993 (O&M)
Date of decision : 20.02.2018

Dalip Kaur

... Appellant(s)

Versus

Smt. Shero @ Munni (deceased through LRs)

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Ankit Midha, Advocate
for the respondent.

AMIT RAWAL, J. (ORAL)

The appellant-defendant is aggrieved of the judgment and decree rendered by the lower Appellate Court, whereby the gift deed dated 06.10.1969 executed by Zora Singh in favour of Dalip Kaur has been set aside, resulting into, setting aside of the mutation regarding half share of land in favour of Zora Singh.

It would be apt to give preface of the matter before adverting to the rival contention of learned counsel for the parties.

The respondent-plaintiff, sister of Zora Singh, instituted the suit on the premise that she was the owner of the suit property measuring 38 kanals 5 marals by challenging the registered gift bearing No.1155 dated 06.10.1969, mutation No.1677 dated 26.03.1987 and mutation of inheritance No.1683 dated 26.03.1987, to be illegal, null and void on the premise that Zora Singh died on 29.01.1986, as bachelor and left behind the plaintiff as his only sister, but the defendant in collusion with the revenue

officials wrongly alleged herself to be widow of Zora Singh and got sanctioned mutation of inheritance No.1683 dated 26.03.1987 regarding $\frac{1}{2}$ share of the land in dispute in her name, whereas the defendant was legally wedded wife of Balbir Singh son of Mehar Singh of Village Bhagu, District Bathinda and the said marriage still persisted.

The aforementioned suit was contested by Dalip Kaur on the ground that Zora Singh was the owner in possession of land in dispute and had executed a registered gift deed in favour of her regarding half share of the land on the premise that she was legally wedded wife of Zora Singh and after death, being widow, was entitled to inherit remaining half share of the land on the death of Zora Singh. Mutation of inheritance was also supported. Since the parties were at variance, the trial Court framed the following issues:-

“1. Whether the plaintiff inherited the suit property from Jora Singh deceased and its its owner: OPP.

1-A Whether the defendant was married to Jora Singh, through legal marriage and is entitled to inherit his estate: OPD.

2. Whether mutations Nos.1683 and 1677 dated 26.07.1987 are illegal and void: OPP.

3. Whether Jora Singh executed the gift deed dated 16.10.1969, in favour of the defendant regarding $\frac{1}{2}$ share share in the suit property: OPP.

4. Whether plaintiff is entitled to the injunction prayed for: OPP.

5. Relief.”

The trial Court on the basis of the preponderance of evidence upheld the gift deed, but did not accord the status qua to be wife of Zora Singh and as a result thereof, the suit was partly decreed i.e. mutation

regarding half share of the land was upheld. The aforementioned judgment and decree dated 21.12.1990 rendered by the trial Court was assailed by both the parties by filing two appeals one bearing Civil Appeal No.19 by Dalip Kaur, on issue No.1 and second bearing Civil Appeal No.20 by the plaintiff on issue No.3. The lower Appellate Court decreed the suit and set aside the judgment and decree. It is, in this background of the matter, the appellant-Dalip Kaur, is in present regular second appeal.

The case set up by the appellant as per the memorandum of appeal is that the lower Appellate Court has committed illegality and perversity in setting aside the gift deed by holding that the same was not attested by two witnesses, in essence, there was no compliance of the provisions of Section 68 of the Indian Evidence Act. Both the attesting witnesses of the gift deed had died, but the Will was a registered document, which carries a presumption of truth, even the scribe, namely, Vidhya Sagar, was alive, who appeared and acknowledged to have scribed the Will. The lower Appellate Court was also swayed away with the fact that the scribe to the cross-examination feigned ignorance about the knowledge of the donor. The scribe was not required to be personally known to the witnesses or as well as to the executants, thus, the findings on issue No.3 with regard to the gift deed are required to be set aside.

Mr. Ankit Midha, learned counsel appearing on behalf of the respondent submits that the the present appeal is not maintainable as two appeals were are required to be filed. In the absence of the challenge to the findings rendered in the appeal No.20, the appellant-defendant had given up issue No.3.

He further submits that the findings of the lower Appellate

Court are perfectly legal and justified as it is based upon the appreciation of provisions of Sections 122 and 123 of the Transfer of Property Act. Both the witnesses have not come forward. At least relative of the witnesses should have come forward acknowledging the signatures of their ancestral. The scribe had not withstood to the cross-examination as he feigned ignorance about knowledge of the witnesses and as well as the donor, therefore, presumption qua registered documents had specifically been rebutted, thus, urges this Court for upholding the findings under challenge.

I have heard the learned counsel for the respondent and appraised the paper book.

Before arriving at a finding on merits, I deal with the objection raised by Mr. Ankit Midha, Advocate, qua maintainability of the appeal. There is no dispute to the fact that two appeals, as indicated above, were filed. I am of the view that the appellant had challenged the findings rendered in Civil Appeal No.20 i.e. on issue No.3, whereby the appeal preferred by the plaintiff qua findings on the aforementioned issue No.3 rendered against the plaintiff, therefore, the appeal is maintainable, for, the appellant had given up the claim with regard to the according the status of the wife, for which, issue No.1-A was framed. Accordingly, the objection of the learned counsel for the respondent qua maintainability of the appeal is hereby rejected.

As far as the merit is concerned, I am of the view that findings of the lower Appellate Court are not only perverse but atrocious, for, it has not taken into consideration the provisions of Section 68 of the Indian Evidence Act. No doubt both the witnesses of the gift deed dated 06.10.1969 had died, but the fact of the matter is that the scribe, namely,

Vidhya Sagar had appeared and had acknowledged to have written the same. The gift deed is also registered document, which carries a presumption of truth. No doubt the appellant has not examined any witness from the office of the Registrar or the Registrar, but the fact of the matter is that equally so, the respondent-plaintiff could have also summoned the witness, if they had a suspicion that the gift deed was not actually registered and had been executed on account of misrepresentation or some fraud having played upon Zora Singh. Once the registered Will is found to be proved by the trial Court and in my view, taking into consideration the provisions of Section 3 of the Transfer of Property Act by the lower Appellate Court, is not correct appreciation of law. The scribe is not supposed to have personal knowledge about the witnesses or as far as the executant, this view of mine is supported by *ratio decidendi* culled out by the Hon'ble Supreme Court in **“Ved Mitra Verma V/s Dharam Deo Verma” 2014 (4) RCR (Civil) 568.** The mutation is not in respect of the entire land of Zora Singh, but inheritance with regard to the half share, in essence, half share has also been gone to the respondent's side, thus, there is equal distribution and equity also does not lie in favour of the respondent-plaintiff.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the *ratio decidendi* culled out by five learned Judges of the Hon'ble Supreme Court in **“Pankajakshi (dead) through LRs and others V/s. Chandrika and others AIR 2016 SC 1213”**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed

under Section 100 of Code of Civil Procedure and decision thereof could be without framing substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **“Kulwant Kaur and others V/s. Gurdial Singh Mann (dead) by LRs and others” 2001(4) SCC 262**, on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in **“Pankajakshi 's case** (supra) reads thus:-

*“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of **Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]** cannot be sustained and is thus overruled.” [at paras 27 - 29] ”*

27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the

Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

For the foregoing reasons, the judgment and decree of the lower Appellate Court qua issue No.3 is set aside and findings of the trial Court on issue No.3 is restored. The present regular second appeal is allowed.

20.02.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

✓
Whether speaking/reasoned Yes/ No
✓
Whether Reportable Yes/ No