

Sr. No. 354

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

**RSA No. 1921 of 1991
Decided on: 21.03.2018**

Bhagwan Sahai

.....Appellant

versus

Smt. Birma Devi

.....Respondent

Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr. Adarsh Jain, Advocate
for the appellant.

Mr. Amit Jain, Advocate
for the respondent.

Rajbir Sehrawat, J.(Oral)

This is an appeal filed by the defendant in the suit challenging the concurrent judgment and decrees passed by the Courts below; whereby the injunction was passed against the appellant.

For the convenience, the parties herein would be referred to as the plaintiff and the defendant, as they were described in the original suit.

Brief facts of this case are that the plaintiff had filed a suit claiming that Ram Sarup, the father of the plaintiff and the defendant and husband of Smt. Nathia Devi; was owner in possession of the suit properties; described in para No. 2 and 3 of the plaint. Ram Sarup died on 15.06.1976 and the properties were inherited by Smt. Nathia Devi, the plaintiff and the defendant; in equal shares each taking 1/3rd share. Later on Smt. Nathia Devi executed a Will dated 01.07.1978 in favour of the plaintiff. Smt. Nathia Devi died on 15.06.1982. Hence the share of Smt.

Nathia Devi also came to plaintiff. The plaintiff became owner in possession of the suit property to the extent of 2/3rd share. It was further pleaded that the suit properties were still joint. However, the defendant is bent upon alienating the suit property to the strangers without any lawful rights. Hence an injunction was sought that the defendant be restraint from alienating the land to the extent of 2/3rd share or in alternate a decree for partition be passed.

On being put to notice, defendant filed the written statement by taking routine preliminary objections. On merit, it was alleged that the defendant is the exclusive owner in possession of the suit property since he is the only son of the deceased Ram Sarup. The plaintiff has no right, title or interest in the suit property. It was further denied that Ram Sarup was owner in possession of suit property; while admitting that he died on 15.06.1976. Regarding the Will in favour of the plaintiff, it was pleaded that Will is forged and fabricated one. Still further it was claimed that Smt. Nathia Devi was not competent to Will away any part of the suit properties. Accordingly, the prayer was made that suit be dismissed.

On the basis of the pleadings of the parties, the following issues were framed:-

- “1. Whether the plaintiff is co-owner in possession to the extent of 2/3 share in the suit property?OPP*
- 2. Whether the plaintiff is entitled to seek partition of the suit property, if so, to what effect?OPP*
- 3. Whether the suit is not maintainable as alleged?OPD*
- 4. Whether the plaintiff has got no locus standi to file the present suit?OPD*
- 5. Whether Smt. Nathia executed a valid will on 1-*

7-78 in favour of plaintiff as alleged?OPP

6. *Relief.”*

The parties led their respective evidence.

After hearing the parties and perusing the record, the Trial Court decreed the suit filed by the plaintiff, although, not to the extent of $\frac{2}{3}$ rd share but to the extent of $\frac{5}{9}$ th share. While decreeing the suit, the Trial Court recorded the finding that suit property in the hand of Ram Sarup, the father of the parties, was ancestral property. Admittedly he died on 15.06.1976, i.e., after enforcement of the Hindu Succession Act, 1956. Since Ram Sarup had left behind his wife alongwith his son, who is defendant in the suit, therefore, for determining the inheritance a notional partition is to be assumed in terms of Section 6 Proviso; explanation No.1 of the Hindu Succession Act, 1956. Hence the wife would also be entitled to have share at par with the son of the deceased. Accordingly, the Trial Court held that under the notional partition the wife Smt. Nathia Devi shall be entitled to one share, the son would be entitled to one share and the third share shall be considered to be the property of Ram Sarup; which shall go by inheritance under Hindu Succession Act amongst the Class-I heirs left behind by deceased Ram Sarup. Hence the Trial Court concluded that wife Smt. Nathia Devi would become owner of $\frac{4}{9}$ th share($\frac{1}{3}$ rd + $\frac{1}{9}$ th). Likewise the son would also get $\frac{4}{9}$ th share; while the daughter, the plaintiff would get $\frac{1}{9}$ th share, being the $\frac{1}{3}$ rd share out of $\frac{1}{3}$ rd share of deceased Ram Sarup, which is to go by inheritance and not by survivorship.

While dealing with the Will claimed by the plaintiff, the Trial Court held that the execution of the Will has been duly proved by examining the attesting witness and no suspicious circumstances surrounding the Will has been found by the Court. Accordingly, the Will in

favour of the plaintiff was upheld. Therefore, the Trial Court held that share of Smt. Nathia Devi shall also go to the daughter, the plaintiff as per the Will. Hence the plaintiff would become owner of $5/9^{\text{th}}$ share ($4/9^{\text{th}} + 1/9^{\text{th}}$). Accordingly, the Trial Court held that share of the plaintiff comes to $5/9^{\text{th}}$ share instead of $2/3^{\text{rd}}$ share as claimed by her. Hence an injunction was passed against the defendant restraining him from alienating the suit land qua $5/9^{\text{th}}$ share of the plaintiff. Aggrieved against this judgment and decree, the defendant had filed an appeal before the lower Appellate Court.

However, the lower Appellate Court also dismissed the appeal filed by the defendant. The lower Appellate Court upheld the finding recorded by the Trial Court qua the validity of the Will of Smt. Nathia Devi; claimed by the plaintiff in her favour. Still further the lower Appellate Court also upheld the finding of the Trial Court regarding the share of the plaintiff. Hence the appeal was dismissed by the lower Appellate Court.

After hearing the learned counsel for the parties and perusing the record, this Court does not find any illegality or perversity in the findings, the judgments and the decrees passed by the learned Courts below. Both the Courts below have rightly held the share of the plaintiff to be $5/9^{\text{th}}$ leaving $4/9^{\text{th}}$ share with the defendant. It has been proved on record that the suit property was ancestral property in the hands of Ram Sarup. He expired on 15.06.1976, i.e., after enforcement of the Hindu Succession Act, 1956. Accordingly, for working out the inheritance of the deceased; a notional partition has to be assumed immediately before the death of the deceased Ram Sarup. As per Section 6 of the Hindu Succession Act, 1956 wife is entitled to one share in such a notional partition. Therefore, deceased Ram Sarup, his wife Smt. Nathia Devi and his son who is the defendant herein,

all three would be entitled to $1/3^{\text{rd}}$ share each. On the date of death of Ram Sarup; his $1/3^{\text{rd}}$ share is to be inherited by three class-I heirs left behind by him. Hence all the three would equally get $1/3^{\text{rd}}$ share of Ram Sarup out of total suit land. Hence each of the three legal heirs of Ram Sarup would get $1/9^{\text{th}}$ share. Since Smt. Nathia Devi was also entitled to $1/3^{\text{rd}}$ share out of the total holding on the basis of notional partition, therefore, her share in the entire estate would become $4/9^{\text{th}}$ ($1/3^{\text{rd}} + 1/9^{\text{th}}$) share. Similarly, the son, the defendant in the suit also become owner of $4/9^{\text{th}}$ ($1/3^{\text{rd}} + 1/9^{\text{th}}$) share in the entire estate. The daughter, the plaintiff would become owner of $1/9^{\text{th}}$ share out of the total suit land in her own right. Since Smt. Nathia Devi executed a Will in favour of the plaintiff, therefore, the share of Smt. Nathia Devi shall also come to the plaintiff on the death of Smt. Nathia Devi. Hence if the Will is accepted then the plaintiff becomes owner of suit property to the extent of $5/9^{\text{th}}$ share ($4/9^{\text{th}} + 1/9^{\text{th}}$).

So far as the Will is concerned, it is clear from the record that the attesting witness of the Will has been duly examined by the plaintiff; beside the scribe of the Will. The attesting witness has deposed fully supporting the Will. All the ingredients required to be proved under the law of Evidence has been duly deposed proved by the witness. Nothing adverse could be extracted in the testimony of these witnesses through their cross-examination. Hence the Will has been duly proved as per the law.

Since the Will is also held to be valid, therefore, the plaintiff would be owner in possession of the suit property to the extent of $5/9^{\text{th}}$ share as calculated in the foregoing paragraphs. The Courts below have granted injunction against the defendants only qua this much share. The share legally coming to the defendant; as per the law; has not been put under any

restraint order. Hence the share of the defendant has been left intact.

In view of the above, finding no illegality or perversity in the judgment and decree passed by the Courts below, the same are upheld. The present appeal is dismissed.

21st March, 2018
Shivani Kaushik

[RAJBIR SEHRAWAT]
JUDGE

<i>Whether speaking/reasoned</i>	<i>Yes</i>
<i>Whether Reportable</i>	<i>Yes</i>