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

**RSA No.2107 of 2006 (O&M)
Decided on: 06.03.2018**

Ranjit Singh and others**.....Appellants**

versus

Kartari Devi (deceased) through LRs**.....Respondents****Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT**

Present: Mr. Arun Jain, Senior Advocate with
Mr. Amit Jain, Advocate
for the appellants.

Mr. Jagdish Manchanda, Advocate
for the respondent.

Rajbir Sehrawat, J.(Oral)**CM-2072-C & 2054-C of 2018**

Since there is already sufficient material on the record for just decision of the case, therefore, the applications moved by the learned counsel for the appellants are dismissed.

RSA No. 2107 of 2006 (O&M)

1. This is an appeal filed by the defendant against the judgment and decree of reversal passed by the lower Appellate Court; whereby while reversing the judgment and decree passed by the Trial Court, the suit filed by the defendant was ordered to be decreed.
2. For convenience, the parties would be referred herein as the plaintiff and defendants; as they were referred in the original suit.
3. The brief facts of this case are that one Kartara was the owner of the suit property. He had three brothers and one sister. Kartara died unmarried and issueless. One of the brother, Gopala had five sons. The other brothers of

Kartara had also expired. Kartara had executed a Will dated 15.01.1980 in favour of the five sons of Gopala. Thereafter, the testator expired on 14.04.1980. After the death of Kartara, the mutation regarding his properties was entered in the name of five sons of Gopala. The sister of Kartara, namely Kartari Devi, filed the suit on 04.01.2001 challenging the mutation dated 11.09.1982 qua the properties of Kartara in favour of five sons of Gopala. Hence, Kartari Devi, sister of Kartara is the plaintiff in this case and nephews of Kartara, i.e. the sons of his brother Gopala, are the defendants in the present case.

4. In the plaint, the plaintiff has averred that the mutation entered in the name of the defendants, is illegal, null and void and was entered by the revenue authorities without any notice. It is further averred by her that she was not aware about the mutation because the defendants used to give her the share of the agricultural produce and represented to her that she should not bother about the entries in the revenue records. However, in the year 2000, she wanted to obtain loan by mortgaging her share in the suit property. At that time, she found that she had been excluded from the inheritance from her brother Kartara. Hence, she challenged the mutation.

5. Upon notice, the defendants appeared and filed their joint written statement by taking routine preliminary objections regarding *locus standi*, maintainability of suit and regarding limitation. It is claimed that the plaintiff was having full knowledge about mutation No. 536 dated 11.09.1982 which was sanctioned in her presence and she was very much a consenting party in the said transaction. On merit, it is pleaded that the plaintiff is not a legal heir of the deceased Kartara according to Hindu Succession Act; since only brother have a right to inherit the property left by his issueless brother. It is

defendants and the mutation on the basis of the same has been duly sanctioned in favour of the defendants. No payment or any share of the agricultural produce was ever given to the plaintiff because she had no right in the suit land.

6. Plaintiff filed replication to the written statement. She reiterated the contents of the plaint and denied the contents of the written statement. After considering the respective pleadings of the parties, the trial Court framed the following issues:-

1. *“Whether the plaintiff is entitled to a decree for declaration as prayed for?*
2. *Whether the plaintiff has no locus-standi to file and maintain the present suit?*
3. *Whether the suit is not maintainable in its present form?*
4. *Whether the plaintiff has no cause of action to file and maintain the present suit?*
5. *Whether the suit is time barred?*
6. *Whether the plaintiff is estopped by her own act and conduct from filing the present suit?*
7. *Whether the suit is not properly valued for the purposes of court fee and jurisdiction?*
8. *Relief.”*

7. Parties led their evidence.

8. After hearing learned counsel for the parties and perusing the evidence recorded in file, the learned Trial Court held that, admittedly, the mutation in question has been sanctioned by the revenue authorities on the basis of a Will; and the factum of production of the Will before the authorities at the time of sanction of this mutation has been mentioned in the revenue records itself. The plaintiff has not challenged the execution of the Will or the authenticity of the Will in favour of the defendants. The challenge of the plaintiff in the suit is limited to the mutation in favour of the defendants.

Since there was no challenge to the execution or authenticity of the Will,

therefore, the defendants were not required even to lead evidence or to prove the Will in question. Hence, the plaintiff is not entitled to any declaration that the mutation is illegal, null and void. Aggrieved against this judgment and decree, the plaintiff filed the appeal before lower Appellate Court.

9. The lower Appellate Court reversed the judgment and decree passed by the Trial Court and ordered that the suit filed by the plaintiff to be decreed. While decreeing the suit, the lower Appellate Court held that the parties are governed by the Hindu Succession Act. As per Section 8 of the Hindu Succession Act, the properties of a Hindu male are required to be devolved on the legal heirs of the deceased. Since the defendants had claimed a testamentary transaction to exclude the natural succession, therefore, it was for the defendants to plead and prove the Will in their favour. Since the defendants have not led any evidence to prove the Will, therefore, it shall be assumed that no Will was even executed by the said Kartara in favour of the defendants. While controverting the inference drawn by the Trial Court, the lower Appellate Court has recorded that since the impugned mutation was sanctioned on the basis of the Will, therefore, challenge to mutation amounts to challenge to the Will as well. Accordingly, the judgment and decree passed by the Trial Court was reversed. Aggrieved against the judgment and decree passed by the lower Appellate Court, the present appeal has been filed by the defendants.

10. While arguing the case, learned counsel for the appellants has submitted that the judgment and decree passed by the lower Appellate Court is perverse and is beyond the pleadings of the parties. It is submitted by the learned counsel that the Will in favour of the defendants has not even been questioned by the plaintiff in her plaint. Since there were no averments in the

required to assert the execution or the authenticity of the Will as such. Accordingly, keeping in view the pleadings of the parties, the Court had framed issues. As per the issues framed by the Court, the execution or authenticity of the Will was not a fact in issue between the parties. Hence, the lower Appellate Court has gone wrong in law in assuming a burden of proof upon the defendants to, *suo moto*, come forward and to plead and prove the execution and validity of the Will. Secondly, learned counsel for the appellants has submitted that the Will was executed way back on 15.01.1980. The present suit has been filed only on 04.01.2001. Hence, the suit filed by the plaintiff is hopelessly time barred. Accordingly, the prayer for reversal of the judgment and decree passed by the lower Appellate Court is made by the learned counsel for the appellants.

11. Controverting the argument raised by the learned counsel for the appellants, the learned counsel for the respondent has submitted that since the mutation which was based on a Will itself has been challenged, therefore, it would tantamount to challenge to the Will as well. Still further, learned counsel for the respondent submits that the property of a male Hindu is to devolve upon the legal heirs of the deceased in accordance with Section 8 of Hindu Succession Act. Hence, the property should have come, proportionately, to her as per the law of succession. Regarding the point of limitation, learned counsel for the respondent has submitted that the respondent came to know about the mutation only in the year 2000. Hence, the suit is not barred by limitation. Learned counsel for the respondent further submitted that otherwise also; for challenging the mutation by way of assertion of the title, there is no limitation prescribed by the Limitation Act. Learned counsel for the respondent relied upon the judgment of this Court

others; 2005(3) RCR(Civil) 628.

12. Having considered the arguments raised by the learned counsel for the parties and perusing the record with their able assistance, this Court is of the considered opinion that the arguments raised by the learned counsel for the appellants/defendants deserve to be sustained. Admittedly, the mutation was sanctioned in the year 1982 and in the revenue records itself it is so mentioned that the mutation was being sanctioned on the basis of the Will executed by deceased Kartara and that the Will was produced before the revenue authorities. Once the Will is the basis of sanction of the mutation which the plaintiff was challenging; the plaintiff was under duty to challenge the Will as well. Unless the Will itself is challenged by the plaintiff, the mutation only cannot be set aside. A bare perusal of the plaint filed by the plaintiff shows that there is not even a single line questioning the execution or the validity of the Will of the deceased Kartara in favour of the defendants. Neither any issue is framed by the Court regarding the execution or validity of the Will of the deceased Kartara. Rather pleadings in plaint reflect her acquiescing to the Will in favour of defendants. In view of the above situation, it is not the bounden duty upon the defendants to lead evidence regarding the execution of the Will or to prove the Will by examining the witness as per Section 63 of the Indian Succession Act and Section 68 of Indian Evidence Act. The findings recorded by the lower Appellate Court in this regard are totally perverse and are liable to be reversed.

13. Argument of learned counsel for the respondent, as was sought to be pressed into the service before the lower Appellate Court as well, that the properties of Hindu male devolve upon his legal heirs as per Section 8 of the Hindu Succession Act; is also not worth sustaining. A bare perusal of Section

male. In the present case, the admitted position between the parties is that the mutation in question is not regarding the properties of an 'intestate' Hindu. Rather the mutation is specifically based upon a testamentary transaction of 'Will' claimed to have been executed by deceased Kartara. Hence, the applicability of Section 8 of Hindu Succession Act, *per se*, cannot be presumed in the case. Had the plaintiff challenged the Will so as to dinude the mutation of its very basis and had the defendant failed to prove the execution and authenticity of the Will, only then the provisions of Section 8 of the Hindu Succession Act would have been operative. Hence, the claim of the plaintiff regarding challenge to the mutation is not well founded. Hence, the same has to be declined.

14. The another aspect of the case is that the mutation in question is dated 11.09.1982. The present suit has been filed only on 04.01.2001. On the face of it, the suit is time barred, this being a suit for declaration. To cover up the limitation, the plaintiff has tried to claim that she came to know about the mutation only in the year 2000; when she intended to take loan and she contacted the revenue officials in this regard. However, no such evidence has been led by the plaintiff to substantiate her claim regarding having no knowledge of the mutation prior to the year 2000. Otherwise also, the bare pleadings raised by the plaintiff in the suit show that she was aware of the entry of mutation entered in favour of her nephews, the defendant, because it has been pleaded by her that earlier the defendants were giving her the share of the agricultural produce and were assuring her that she need not bother about the revenue entries. This reflects that the plaintiff was very much aware of the entry of mutation. Either she was convinced of the validity and legality of the mutation based on 'Will' or she had acceded to the factum of the

agricultural produce, if at all she was being given by the defendants. In either case, the plaintiff cannot avoid the consequences of limitation; in view of the facts of the present case.

15. Learned counsel for the respondent has relied upon the judgment rendered in the case of ***Gurcharan Singh's case(supra)***. There is no dispute regarding the proposition of the law laid down in the judgment. However, that judgment is distinguishable on the facts of the present case. That judgment is restricted to challenge to the entries of the mutation on the basis that the fraudulent mutation based on false pedigree table which does not confer a title and there is no limitation for filing a suit for declaration regarding asserting the title of the person. It is settled law that there is no limitation for challenging an entry of mutation which is not based on a recognized transaction of transfer of title and also for asserting the title by a person. In such case limitation starts when there is a threat to the title of such person. When the title of a person is threatened by a recognized mode of transfer of title; testamentary or non-testamentary; then the person whose title is sought to be threatened is required to question the said recognized transaction of transfer of title within period of prescribed limitation. In that situation, the limitation would start running from the date of transaction of transfer threatening the title. In the present case, as is reflected even in the revenue record, a recognized transaction of transfer of title; through a testamentary mode; is dated 15.01.1980. Hence, the limitation would start running from this date itself unless the plaintiff was able to assert and prove the exemption from or extension of the limitation. Nothing of that sort has been attempted by the plaintiff. Therefore, the suit filed by the plaintiff is also held to be time barred. Although, it is right that the issue as recorded by the

however, that does not mean that the plaintiff can avoid the consequences of the limitation. Section 3 of the Limitation Act cast a bounden duty upon the Court to take into consideration the point of limitation even if the same is not raised by the parties if the same is apparent on the fact of it . Otherwise also, learned counsel for the appellants has rightly submitted that although before the Trial Court, this point was not pressed in view of the fact that the suit was being dismissed on other preliminary points only, however, before the lower Appellate Court this point was duly agitated by the appellants. However, the same was wrongly and illegally rejected by the lower Appellate Court. This Court finds itself in agreement with the submission made by the learned counsel for the appellants. Hence, the suit filed by the plaintiff is held to be time barred.

16. No other argument was raised by the learned counsel for the parties.

17. In view of the above, the judgment and decree passed by the lower Appellate Court are held to be perverse and non-sustainable. The same are set aside. The present appeal is allowed. The suit filed by the plaintiff/respondent herein is ordered to be dismissed.

6th March, 2018

shabha

[RAJBIR SEHRAWAT]

JUDGE

Whether speaking/reasoned - *Yes*

Whether reportable - *Yes*