

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

RSA No.496 of 2009 (O&M)

Date of Decision:.04.12.2018

Sanjiv Kumar

...Appellant(s)

Versus

Siri Chand and others

...Respondent(s)

RSA No.365 of 2009 (O&M)

Date of Decision:.04.12.2018

Sultan

...Appellant(s)

Versus

Siri Chand and others

...Respondent(s)

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Jai Vir Yadav, Advocate for the appellant in
RSA No.496 of 2009.
Mr.Brijender Kaushik, Advocate for the appellant in
RSA No.365 of 2009.
Mr.Ajay Jain, Advocate for respondents No.1 to 8 in
both the appeals.
Mr.R.A.Sheoran, Advocate for respondent No.9 in
RSA No.496 of 2009 and for respondent No.10 in
RSA No.365 of 2009.

ANIL KSHETARPAL, J.

By this judgment, RSA Nos.365 and 496 of 2009 shall stand disposed of, as both these appeals are arising from one suit and two first appeals disposed of by the learned first appellate court by a common judgment. One appeal has been filed by defendant No.1 through her legal heirs and second appeal has been filed by Sultan-defendant No.3.

In the considered opinion of this Court, following substantial questions of law arise for determination:-

- (i) Whether documentary evidence is required to be preferred in comparison to the oral evidence while deciding the litigation between the parties?

- (ii) Whether a defendant is required to file counter claim before he can be declared owner of the share which comes to him as per the provisions of The Hindu Succession Act, 1956?
- (iii) Whether a judgment passed by the first appellate court without analysing/discussing the report submitted by the learned trial court which was called by the first appellate court on additional issues having been framed, can be sustained?
- iv) Whether an attesting witness of a registered testament can be permitted to defeat the rights of the beneficiary by denying attestation of the registered testament particularly when the testament has been proved by examining the second attesting witness, Scribe as well as registering authority?
- v) Whether a Will can be proved by leading other evidence when one of the attesting witness denies attestation?

Although normally in second appeal the court is not required to re-appreciate the entire evidence, however, this Court finds that the judgments passed by the courts below are result of total non-appreciation of documentary evidence, hence, while exercising the powers of second appeal, the court has decided to reappreciate the evidence.

Two basic issues are required to be decided:-

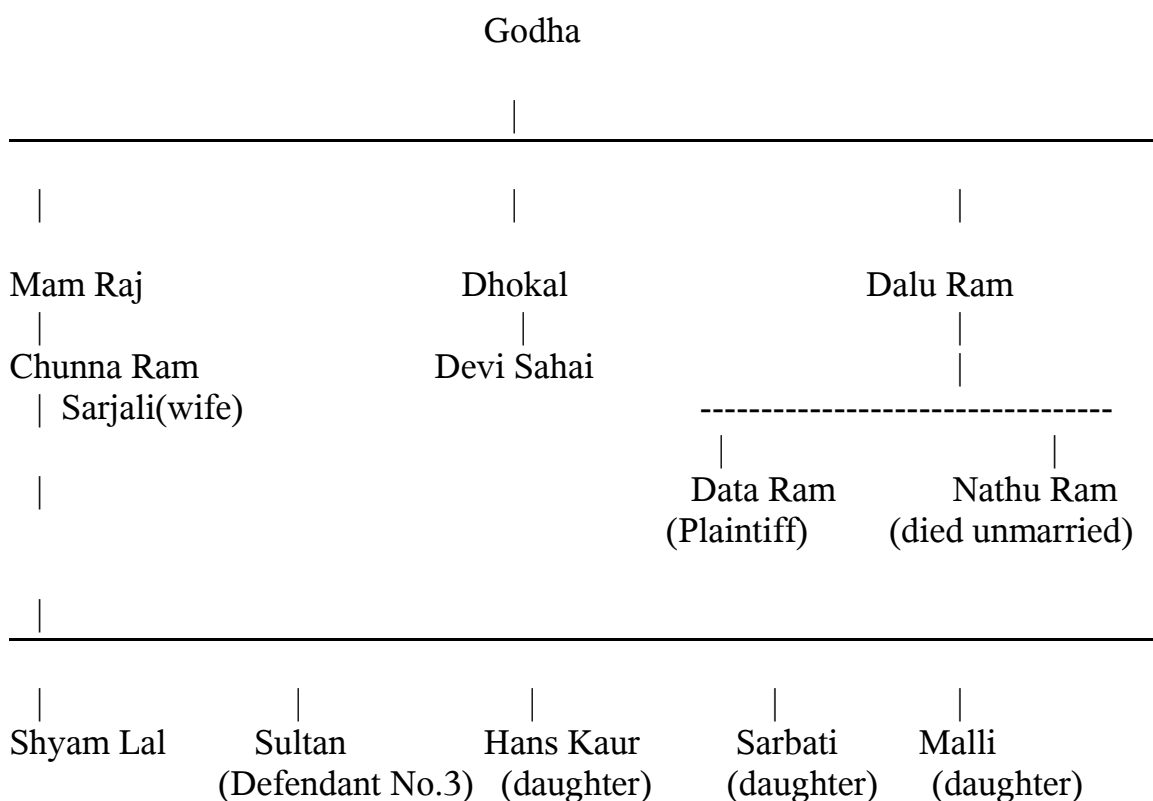
- (a) Whether defendant No.1-Late Smt.Budhi Devi was the daughter of Devi Sahai whose property is in dispute?
- (b) Whether Devi Sahai executed a valid registered testament bequeathing his property in favour of his only daughter Budhi Devi?

FACTS

Late Shri Data Ram filed the present suit on 25.9.1986, claiming that he is sole successor of the property left behind by late Shri

Devi Sahai, who was alleged to have died unmarried and issue less on

10.8.1986. The plaintiff claims that his father and father of Late Shri Devi Sahai were brothers and, therefore, he is entitled to the property. The plaintiff has also challenged validity of the alleged registered testament, executed by late Shri Devi Sahai in favour of Smt.Budhi Devi, alleged daughter of Sh. Devi Sahai. According to the case set up by the plaintiff, Smt.Budhi Devi is daughter of Chunna Ram and Smt.Sarjali. Late Shri Chunna Ram was son of Mamraj, who was brother of Dhokal (father of Devi Sahai). Hence, it is claimed that she has no right in the property of late Shri Devi Sahai. Although, there is some dispute about interse relationship, however, folowing pedigree table to the extent it is undisputed would facilitate to understand the controversy involved:-



(Plaintiff Data Ram claims that Smt. Budhi Devi-the defendant appellant is the daughter of Chunna Ram and Devi Sahai died unmarried, whereas Smt. Budhi Devi claims that she is the only daughter of Devi Sahai and in fact Devi Sahai married twice.)

On the other hand, the suit was contested by Smt. Budhi Devi, wherein she claimed to be daughter of Devi Sahai. It was claimed that Late Shri Devi Sahai had married twice. It was pleaded that on the death of

Mamraj, his widow had entered into a Kareva marriage (customary marriage) with Dhokal and Devi Sahai was born from the aforesaid marriage. It was further pleaded that Devi Sahai was initially married with Smt. Sarjali Devi and defendant No.1 Budhi Devi was born. Smt. Sarjali is also said to have died. Since cousin of Devi Sahai Late Shri Chunna Ram had also died, therefore, Devi Sahai married with Sarjali Devi, the then widow of Chunna Ram. Incidentally names of both the wives were same.

It was pleaded by defendant No.1 that in fact Data Ram, plaintiff, in collusion with Shyam Lal son of Chunna Ram, Madu @ Maru Ram, Lambardar, an attesting witness of the testament and Sarpanch of the Village have constituted a gang and making an effort to usurp the property left behind by Late Shri Devi Sahai, her father. It is further pleaded that she was the only daughter, rather the only child of Devi Sahai. She even after her marriage used to mostly reside with Late Shri Devi Sahai and serve him as her husband was serving in armed forces. It is claimed that the plaintiff did not had sufficient resources and he used to take loan from Devi Sahai and defendant No.1 Budhi Devi has already served a notice calling upon the plaintiff to return the loan amount before the institution of the suit.

A separate written statement was filed by Sultan son of Late Shri Chunna Ram, who was impleaded as defendant No.3 and he stated that Smt.Budhi Devi is not the daughter of Chunna Ram but daughter of Devi Sahai.

In the present suit, Sanwal Ram as well as Madu @ Maru Ram, attesting witnesses, were also impleaded as defendants No. 4 and 5.

Defendant No.5 filed written statement and supported the case of the plaintiff and denied having attested any testament.

The plaintiff in order to prove his case produced on file various documents. A copy of extract from service record of Meer Singh, husband of Budhi Devi, who was employed in the army, wherein she was recorded as daughter of Chunna Ram with date of birth as 20.5.1955. However, when official from the Army was examined as PW-1 Nain Subedar Mohinder Singh, he admitted that all the papers in file are loose and detachable, any paper can be removed or inserted and there is no page numbering of the papers. It may be noticed that there is further communication from the Army Authorities dated 28.11.1987 that the previous information was supplied on the basis of certificate issued by the Sarpanch of the Village, which now stands cancelled.

Apart therefrom, Kindred roll of Meer Singh was produced, which was having lot of cuttings and interpolations. In the aforesaid kindred roll, name of Budhi Devi has been depicted to be daughter of Shri Chunna Ram. Besides this, an affidavit of Shyam Lal son of Chunna Ram has been produced that Budhi Devi is his sister. The plaintiff also relied upon a report of Mr.V.K.Rastaugi, Fingerprint and Handwriting Expert and a report of Forensic Science Laboratory, submitted in a criminal case, which was registered on the allegation that the testament of Devi Sahai as put forth by defendant No.1 is forged. A copy of the judgment passed by the Judicial Magistrate in the aforesaid criminal case has also been produced, convicting Sanwal Ram.

The learned trial court has relied upon a report Ex.DW8/A submitted by the Director, Forensic Bureau, Madhuban, a Government Laboratory to conclude that Devi Sahai had not thumb marked the registered Will. It may be noticed that on careful perusal of the report, it is

apparent that alleged thumb impression of Devi Sahai on Acquaintance Roll, which was allegedly thumb marked by Devi Sahai for getting compensation for crop loss, was compared with the thumb impression on the Will. There is no evidence available on record that at Acquaintance Roll, Devi Sahai had thumb marked. As regards report with regard to thumb impression of Madu @ Maru Ram, an attesting witness of the Will, the report has been submitted that thumb impression of Madu @ Maru Ram on the Will do not tally. First of all, the report as submitted does not discuss as to on what basis the Laboratory or the Expert came to conclusion. The report is extracted as under:-

“(a) The disputed print marked Q1 on the document mentioned in para II above is comaprable and different from the left thumb prints of Maru Ram on his sample papers SI to S3 dated 23.12.86 as the ridge characteristics details of the case print do not tally with the said sample papers. Life size photograph of Q1 enclosed.

(b) The disputed prints marked Q2 and Q2/1 on the documents mentioned in para II above both are comparable and different from the admitted print marked as S4 of Devi Sahai as the type of pattern of the former prints (loops) do not taly with the latter print (whorl). Life size photographs Q2, Q2/1 and S4 are enclosed.

Still further, Jai Narain, an official who compared the thumb impression in the Government Laboratory at Madhuban, has appeared as PW-8 in the civil court. He when confronted, could not tell whether Mark D10/A is thumb impression of the left hand or the right hand. He further admitted that he did not make any query regarding whether thumb impression of Devi Sahai on the Acquaintance Roll was of the left hand or of the right hand. On careful reading of cross-examination, it is apparent

that the report submitted by the Government Fingerprint Bureau, cannot be made the basis to hold that Madu @ Maru Ram had not thumb marked the Will or Devi Sahai had not executed the registered Will. On the analyse of the report and evidence of the Expert, it is concluded as under:-

PW-8 Jai Narain Expert- [S4 Specimen TI of Devi Sahai on Acquaintance Roll

does not tally [Q2/1 TI of Devi Sahai on Will

does not tally [S1, S2, S3 TI of Madu Ram

[Q1 TI of Madu Ram on Will

- I Acquaintance Roll (S4) not produced original in court. Despite deferring the evidence of witness in cross-plaintiff did not summon original.*
- II. Acquaintance Roll not proved to bear thumb impression of Devi Sahai-cannot be called as admitted or specimen thumb impression.*
- III. PW8 did not see original Acquaintance Roll-only saw photos.*
- IV. Photographer Sher Singh not called in witness box.*
- V. Even negatives thereof are not on judicial record. PW8 states that negatives are with Sher Singh-Not summoned. PW8 could not deny tempering or replacement of photo or negatives doubtful.*
- VI. PW8 even could not tell Acquaintance Roll of which date & of which Deptt.*
- VII. PW8 cannot tell the type of thumb impression of Devi Sahai on the will.*
- VIII. In report, No reason, No detail, No type, No pattern, No ridge characteristics of thumb impressions compared has been discussed.*
- IX. Similarly Report & Statement of PW8 nowhere show from where S1, 2, 3 of Madu @ Maru Ram were obtained?*
- X. PW8 states S1, 2, 3 are identified by Madu @ Maru Ram and Data Ram.*

XI. Madu @ Maru Ram as DW1 nowhere states about his specimen why thumb impression not obtained in Court.

On the other hand, defendants had produced on file Ex.D1 dated 28.8.1986, report of death prepared by the then Sarpanch of the village as Devi Sahai admittedly died on 10.8.1986. In the aforesaid report, Smt.Budhi Devi, daughter of Devi Sahai, has been recorded as the person who has given information of the death. It was clearly mentioned therein that Devi Sahai was married. Ex.D3 is a Daily Diary Report of Patwari (Revenue official) of the area dated 6.10.1987 which records change of possession. In place of Smt.Budhi Devi daughter of Devi Sahai in favour of names of Shyam Lal son of Chunna Ram and Data Ram son of Dalu Ram have been recorded to be in possession and this report is witnessed/attested by the Sarpanch Chhittar Ram, Madu @ Maru Ram, Lambardar, Ramji Lal, Panch and Chowkidar. In this report Smt.Budhi Devi is mentioned as a daughter of Late Shri Devi Sahai. Ex.D6 is a certificate issued by the Military Authorities, certifying that Smt.Budhi Devi is daughter of Devi Sahai son of Dhokal Ram. This certificate was issued by Military Authorities after carrying out investigation. Ex.D7 is a mutation entered at the time of death of Chunna Ram in the year 1958, wherein names of all the children left behind by Chunna have been mentioned-Shyam Lal and Sultan two sons, whereas Smt. Sanjali, the widow and Hans Kaur, Saraswati and Malli daughters of late Sh.Chunna Ram. Name of Smt. Budhi Devi, nowhere figures as a daughter of Late Shri Chunna Ram. Exhibit DW7/A is a nomination form, filed by Shri Devi Sahai in his bank, nominating Smt.Budhi Devi being his daughter as his nominee. This nomination form is filled on 17.6.1986. Ex.D7/B is letter dated 15.12.1986 of the Head

Office addressed to the Branch Manager, Gurgaon Gramin Bank, directing

the Manager to pay the entire amount to Smt.Budhi Devi. D7/C is a form filled in by Smt.Budhi Devi, claiming the amount in which the name of her mother is recorded as Sarjali and the aforesaid form dated 13.12.1986 is duly attested by the then Sarpanch.

Ex.D8 is a copy of pedigree table prepared by the revenue authorities in the year 1980-81 which clearly proves that on the death of Chunna Ram, Smt. Sarjali, his widow, entered into a Kareva Marriage with Devi Sahai. Late Sh.Chunna had left behind Smt.Sarjali (widow), Shyam Lal and Sultan (two sons), Hans Kaur, Saraswati @ Sarbati and Malli (three daughters).

Ex.DW11/A is a registered testament of Late Shri Devi Sahai, whereas Ex.DW12/A is a notice got issued by Smt.Budhi Devi against to Data Ram, calling upon him to refund of the loan amount which was borrowed by Data Ram on 9.6.1987. Ex.DW15/A is a copy of ration card, wherein Devi Sahai and Sarjali are recorded as husband and wife. Ex.DW17/A is a report of Fingerprint and Handwriting Expert, who has compared the thumb impressions of Devi Sahai from the bank record and has given a detailed report that thumb impressions of Devi Sahai match with the standard thumb impressions from the bank record. It may be noticed that the original specimen signatures sheet of the Bank on which the standard thumb impressions of Devi Sahai were taken, has also been produced. The defendant has also produced a copy of list of proprietors filed under the signatures of Madu @ Maru Ram, Lambardar in respect of *Shamlat Deh* land, wherein Smt.Budhi Devi daughter of Devi Sahai is mentioned as one of the proprietors dated 13.6.2003. The defendant has also produced on file a communication from Military Authorities Mark

'DA' dated 28.11.1987, whereby earlier communication addressed to the Sarpanch, depicting Budhi Devi as daughter of Chunna was cancelled. Mark 'DB' is a record of Budhi Devi having gone to Garhmukteshwar, a religious place, where after cremating the dear one's, people visit for peace to the departed soul.

Now the stage is set for discussing oral evidence. The plaintiff has not appeared in evidence. Shubh Ram, son of the plaintiff, has appeared in evidence.

On the other hand, the defendants have examined Har Narain as DW-2 (neighbourer and co-villager), Gopala as DW-3 (co-villager), Sultan son of Late Shri Chunna Ram as DW-4, Budhi Devi herself as DW-5. Hans Kaur, daughter of Late Shri Chunna Ram, as DW-6, Devi Sahai, who is son of brother-in-law of Late Shri Devi Sahai (incidentally name of witness and the deceased whose property is in dispute are same) and hails from parental village of Sarjali (wife of Devi Sahai) as DW-7, Vijay Singh, who introduced Devi Sahai at the time of opening of an bank account in Gurgaon Gramin Bank as DW-10, Meer Singh as DW-20 (husband of Budhi Devi). Apart therefrom, defendants have also examined a Fingerprint and Handwriting Expert, who has compared the signatures/thumb impressions of both the attesting witnesses and give his detailed opinion. The defendants have also examined an bank official to prove the bank account opened and operated by late Shri Devi Sahai, a professional deed-writer, who had scribed the Will, Sub Registrar who had registered the Will of late Shri Devi Sahai and official from Food and Supply Department to prove the Ration Card issued in the year 1981, recording Devi Sahai and Sarjali as husband and wife.

The defendants have also examined Chhittar Singh son of Mangla Ram, who has proved entries in the Bahi Ex.DW18/P. Meer Singh, husband of Budhi Devi-defendant No.1, has again been examined as DW20.

The learned trial court decreed the suit filed by the plaintiff and recorded a finding that the testament in favour of Smt.Budhi Devi is not proved as thumb impression of Madu @ Maru Ram has not been proved on the testament and he had denied attestation of the testament. Thus, the suit filed by the plaintiff was decreed.

Two first appeals were filed and the learned first appellate court after examining the file and appreciating the evidence framed two additional issues vide order dated 10.2.2007 and called upon the trial court to submit a report after granting opportunity to the parties. The two additional issues are extracted as under:-

- (i) Whether Devi Sahai died as bachelor and issueless? OPP
- (ii) Whether Smt.Budhi Devi is daughter of Chunna Ram? If so, its effect. OPP.

The learned trial court after granting an opportunity of hearing to both the parties by an elaborate report, concluded that Devi Sahai was married and Budhi Devi was his daughter. It was further recorded that Budhi Devi was not daughter of late Shri Chunna Ram. The plaintiff filed a separate appeal against the report submitted by the learned trial court. The learned first appellate court decided all the three appeals arising from a single suit by a common judgment and upheld the findings of the learned trial court.

On careful examination of the judgment passed by the learned first appellate court, it is apparent that the learned first appellate court rather

than giving preference to the documentary evidence, which has been produced on file, have chosen to rely upon the oral evidence and after findings errors in the oral evidence produced by the defendants, while noticing that Madu @ Maru Ram has denied attestation of the testament as an attesting witness, dismissed the appeal.

In the considered view of this Court, the learned first appellate court has committed following errors:-

- (1) The evidence of bank official, who has been examined along with the record, wherein in the nomination form Shri Devi Sahai had specifically described Smt.Budhi Devi as his daughter has not been considered.
- (2) The learned first appellate court has not considered the reasons arrived at by the learned trial court, while submitting the report dated 15.4.2008 on the additional issues.
- (3) Separate appeal filed by Sultan has been dismissed on the ground that since Sultan had not filed any counter claim before the learned trial court, therefore, he has no right to claim the property even if he is related to late Shri Devi Sahai in equal degree.
- (4) Date of institution of the suit has been wrongly noticed by the learned first appellate court.
- (5) The judgment passed by the learned first appellate court is result of misreading of the evidence.

Now let us discuss first issue whether Smt.Budhi Devi is daughter of Chunna Ram or Devi Sahai?

It is a positive case of the plaintiff that Smt.Budhi Devi is the

daughter of Late Shri Chunna Ram. However, such plea of the plaintiff is incorrect because the defendant has produced on file a copy of mutation entered in the year 1958 on the death of Chunna Ram when there was no dispute between the parties. The aforesaid document Ex.D9 clearly proves that on the death of Chunna Ram in the year 1958 mutation was entered in the name of Class 1 legal heirs i.e. Sarjali Devi (widow), Shyam Lal and Sultan (two sons), Hans Kaur, Saraswati @ Sarbati and Malli (three daughters). This fact is further established from pedigree table Ex.D8 prepared by the revenue officials in the year 1980-81 which clearly supports the plea of the defendant that she is not daughter of Chunna Ram. It is further apparent from perusal of Ex.D8 that Smt.Sarjali had entered into a Kareva marriage with Devi Sahai as pleaded by defendant. From these two documents, it is clearly established that the plaintiff had filed the suit by asserting incorrect facts.

Now the stage is set for examining whether defendant No.1- Late Smt.Budhi Devi was daughter of Devi Sahai whose property is in dispute?

Ex.D1 dated 28.8.1996 is a report of death forwarded under the signatures of the then Sarpanch Chhittar Ram dated 28.8.1986, which records that the date of death of Devi Sahai is 10.8.1986, which is undisputed. His status has described as married and Smt.Budhi Devi is her daughter who has reported about the death. Even Ex.D3 dated 6.10.1987, which is a Daily Diary Report recorded by the revenue officials of the area, clearly records that Budhi Devi is daughter of Devi Sahai and this fact is certified by Madu @ Maru Ram, Lambardar (attesting witness of the Will) and Chhittar Ram, Sarpanch. Ex.D6 is a certificate issued by the Military

Authorities which clearly records that Budhi Devi is wife of Meer Singh, Subedar in the Army and she is daughter of Devi Sahai son of Dhokal Ram. Ex.DW7/A dated 17.6.1986 is a nomination form filled by Late Shri Devi Sahai in respect of a Saving Bank Account, wherein Devi Sahai has declared that Smt. Budhi Devi would be her nominee being her daughter after his death. Ex.DW7/B is a settlement of claim by the bank. Apart from it, Shri Madu (Maru) Ram in a different litigation has submitted a list of proprietors under his signatures in which Budhi Devi has been depicted as a daughter of Late Shri Devi Sahai.

No doubt, there is some variation/contradiction in the oral evidence, however, overwhelming documentary evidence which has been produced on the file and discussed above, clearly proves that the entire basis of the suit filed by the plaintiffs is false as she is not the daughter of Late Shri Chunna Ram, who died in the year 1958.

Now let us deal with second issue whether Devi Sahai had executed a registered testament in favour of his daughter Budhi Devi or not.

The testament Ex.DW11/A is a registered testament attested by two witnesses namely Madu @ Maru Ram and Sanwal Ram. Madu @ Maru Ram-defendant No.5 has denied his thumb impressions and has taken a stand that he never attested the testament, whereas Sanwal Ram, who appeared as DW-13, has proved due execution and registration of the Will by Devi Sahai. No doubt, Madu @ Maru Ram, who has appeared as DW-1 (as his own witness since he was impleaded as a defendant in the suit), has denied his thumb impression on the testament. The plaintiff has also made an attempt to place on record two reports of Fingerprint and Handwriting

Experts to prove that Madu @ Maru Ram had not thumb marked the testament but in the considered opinion of this Court, opinions of the Fingerprint and Handwriting Experts are only the opinions, which are only in the nature of evidence at the most and not binding on the court. Opinion to the converse has been given by Fingerprint and Handwriting Expert examined by the defendants. However, in the presence of direct evidence, the court should not normally rely upon opinions of experts. Reports containing opinion of the private experts have to be carefully examined by the court before basing its decision thereon.

In the present case, direct evidence is available as Sanwal Ram, second attesting witness, has been examined as DW-13, whereas professional document writer, who had scribed the testament, has appeared as DW-1 and proved entry of the Will in his register. He has also deposed that Madu @ Maru Ram had attested the Will. Apart therefrom, Naib Tehsildar-cum-Sub Registrar has been examined as DW14, who has stated that the Will was registered by him and Madu @ Maru Ram, Lambardar to whom he personally knew, had identified the testator-Devi Sahai. In cross-examination he had explained how he personally knew Madu Ram, as he was in regular contact with him on account of revenue work. He even went on to deny that Madu @ Maru Ram never appeared before him or any one else was produced before him as Madu @ Maru Ram.

The reports produced by the Fingerprint and Handwriting Experts prove that they were not able to examine whether thumb impressions were of right hand or left hand. Still further, the Government Expert compared the thumb impressions of Devi Sahai taking the thumb impressions of Devi Sahai on the acquaintance roll which was prepared at

the time of calculating crop damaged compensation to be standard thumb impression but no one has proved that the alleged thumb impressions were of Devi Sahai. Further, the documents Ex.DW1/A, which has been produced by the plaintiffs from the Army, has already been cancelled by the authorities. Official from the Army has appeared and stated that there is cutting and all the documents were lying detached/separated in the file.

In the considered view of this Court, the testament has been proved, in accordance with the provisions of Section 68 of the Evidence Act, 1872. It may be noted that Section 71 of the Evidence Act permits the propounder of the Will to prove the testament when attesting witness denies the execution. Section 71 of the Evidence Act is extracted as under:-

“71. Proof when attesting witness denies the execution- If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.”

In the present case, since one of the attesting witness has denied the execution, therefore, the testament has been proved by examining second attesting witness, Scribe of the Will and registration official, i.e. Sub Registrar himself.

Now the stage is set for considering the questions of law.

Question No.(i)

“Whether documentary evidence is required to be preferred in comparison to the oral evidence while deciding the litigation between the parties?”

This question does not require much elaboration as it is well settled that the documentary evidence is to be preferred as compared to oral evidence. Once the documentary evidence is coming from an authentic source, having almost unimpeachable credence, the court must prefer the

documentary evidence rather than relying upon the oral evidence.

Hence, question No.(i) is answered in favour of the appellant.

Question No.(ii)

Whether a defendant is required to file counter claim before he can be declared owner by natural succession?

As regards second question, it may be noted that in case of intestate succession, even if one of the person files the suit, all the persons who are related to the deceased in equal degree with the plaintiff and are entitled to succeed as per the provisions of The Hindu Succession Act, 1956, such suit file would enure to the benefit of all and not exclusively to the plaintiffs. The first appellate court was not justified in denying the relief to defendants on the ground that others have not filed any counter claim or a separate suit. The Court, while deciding a claim, has to decide the suit in accordance with law irrespective of fact that whether a party has filed a separate suit or counter claim or not.

Accordingly, question No.(ii) is answered.

Question No.(iii)

“Whether a judgment passed by the first appellate court without analyzing/discussing the report submitted by the learned trial court which was called the learned first appellate court on additional issues having been framed, can be sustained?

Once the learned first appellate court found that the learned trial court has failed to frame proper issues or failed to consider some material aspects of the case and sought a report from the learned trial court on the additional issues framed, which after recording evidence is submitted, the court thereafter cannot just ignore the report while deciding the appeal. The report so submitted becomes part of judgment passed by the trial court. The learned first appellate court is required to critically analyse

the report and after finding that such report to be erroneous by a process of reasoning can order for its reversal. However, the learned first appellate court is not justified in ignoring the report.

In the present case, it is established that for noticing that report submitted by the learned trial court was not even discussed by the learned first appellate court.

Hence, question No.(iii) is also answered in favour of the appellant-Budhi Devi.

Questions No. (iv) and (v).

Whether an attesting witness of a registered testament can be permitted to defeat the rights of the beneficiary by denying attestation of the registered testament particularly when the testament has been proved by examining the second attesting witness, Scribe as well as registering authority?

&

Whether a Will can be proved by leading other evidence when attesting witness denies attestation?

The fate of a registered document can not be left at the mercy of the attesting witness. The mere fact that attesting witness(es) to a document have repudiated their signatures or thumb impressions does not invalidate the document, if it can be proved by evidence of a reliable character that they have given false testimony. As per requirement of Section 68 of the Evidence Act, a document is required to be proved by examining at least one attesting witness who satisfies the requirement of attestation of the document by both the attesting witnesses, if there be an attesting witness alive subject to the process of court and capable of giving evidence. Of course, proviso to Section 68 of the Evidence Act provide that it shall not be necessary to call an attesting witness to prove the execution of any document except the testament which has been registered in accordance

with the provisions of Indian Registration Act, 1908 unless its execution by the person by whom it purports to have been executed specifically denies its execution. Section 69 of the Evidence Act deals with the situation when no such attesting witness can be found. However, Section 71 of the Evidence Act extracted above clearly provides that if an attesting witness denies the execution, the document can be proved by other evidence. Section 71 clearly provides an opportunity to the propounder to prove the document/testament as the case may be in case attesting witness or witnesses denies its attestation. No doubt, this provision can be invoked only if attesting witness denies its attestation of the document, however, the legislature has provided a window to the propounder of a document to prove a document by leading other evidence in case attesting witness or witnesses denies its attestation. An attesting witness can not be allowed to hijack the succession by denying attestation of a testamentary document by him particularly when it is registered.

Accordingly, questions No.(iv) and (v) are also answered in favour of the appellant-Budhi Devi.

It is found that Smt.Budhi Devi is the only daughter of late Shri Devi Sahai, who also executed a registered testament in her favour. Hence, RSA No.496 of 2009 is allowed and consequently, RSA No.365 of 2009 filed by Sultan is dismissed.

Let a copy of this judgment be forwarded to the concerned Presiding Officers of the learned trial court as well as to the learned first appellate court.

04.12.2018
mks

(ANIL KSHETARPAL)
JUDGE

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