

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

RSA No.559 of 2011 (O&M)
Date of decision : 21.12.2018

Vinay Kumar Goel and another

...Appellants

Versus

Mahesh Chand and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Mr. Pawan Kumar, Sr. Advocate with
Mr. Rohit Kumar, Advocate for the appellants.

Mr. Sudhir Paruthi, Advocate for respondent Nos.1 to 6.

ANIL KSHETARPAL, J.

Arguments were heard. Judgment was reserved. The judgment is being released.

Defendant Nos.1 and 3 are in the Regular Second Appeal against concurrent findings of fact arrived at by both the Courts below.

Plaintiffs-respondents i.e. Mahesh Chand Goyal and Sarla Devi filed a suit for declaration that the properties mentioned in the suit have come to their share pursuant to an agreement dated 21.06.1983 arrived at between the family members which was in the form of family settlement. Apart from the property situated at City Kalka, another property situated at Parwanoo was also included.

Defendant No.1 contested the suit and pleaded that Smt. Neelam

her sister was adopted by Hari Chand and Tarawati wife of Hari Chand had executed a Will in favour of her adopted daughter. It was further pleaded that shop No.3, Goel Market, Parwanoo was purchased by Smt. Tarawati from her own funds.

Learned trial Court on appreciation of the evidence decreed the suit filed by the plaintiffs and held that the Will of Tarawati as set up by the defendants is surrounded by suspicious circumstances. It was further found that the property at Parwanoo was self-acquired property of Smt. Tarawati, widow of Hari Chand.

Only defendant No.1 (appellant No.1 herein) filed first appeal. Learned First Appellate Court has noted that the learned counsel for the appellants did not make any submission with regard to the validity of Will dated 26.06.2000 or adoption in favour of proforma respondent No.8 (appellant No.2 herein). In other words, the findings of the learned trial Court with regard to validity of the Will and adoption having not been proved, were not challenged before the First Appellate Court. The First Appellate Court has recorded as under:-

“This appeal was not argued on behalf of the appellant with regard to the aspect of Will dated 26.6.2000 and adoption in favour of proforma respondent No.8.”

Learned First Appellate Court after re-appreciating the evidence dismissed the appeal and held that property of Hari Chand as well as Tarawati would be inherited according to the natural succession.

This Court has heard learned counsel for the parties at length and with their able assistance gone through the judgments passed by both

the Courts below and the record.

Learned counsel for the appellants has submitted that the Will has been proved on examination of one of the attesting witness namely Gian Chand. He further submitted that once the decree passed by the learned First Appellate Court was under challenge, then it is open to him to argue the appeal to establish validity of the Will. He further submitted that the relief of possession has not been sought qua the property situated at City Parwanoo and, therefore, suit was liable to be dismissed.

On the other hand, learned counsel for the respondents has pointed out that before the First Appellate Court, neither defendant No.3-Neelam filed any appeal nor Vinay Kumar challenged the findings of the trial Court with regard to adoption and validity of the Will, hence, he is debarred from making the submission at the stage of second appeal particularly when it was given up before the First Appellate Court.

This Court has considered the submissions.

As noted above, once the appellants in first appeal has chosen to abandon his relief on the basis of Will dated 26.06.2000 and adoption in favour of defendant No.3-Neelam, he cannot be permitted now to raise this argument in second appeal. Still further, Neelam as noted above did not file any first appeal.

As regard argument of learned counsel that relief of possession with regard to shop at Parwanoo has not been sought, this Court finds that the no doubt, the plaintiffs have not specifically prayed for relief of possession but the pleadings or the prayer made has to be read in a manner which advances the cause of justice not to scuttle it. The head note of the

plaint is extracted as under:-

“Suit for declaration to the effect that the plaintiffs and defendant No.2 are the owners of House No.577 to 581, lower Bazar, Kalka and shop No.3, Goel Market, Parwanoo (HP) with a consequential relief of mandatory injunction directing the defendant No.1 to deliver the possession of property No.577 to 581, Lower Bazar, Kalka on the basis of oral and documentary evidence under Order Rule 1 of CPC.”

Still further, on this aspect of the matter neither any issue had been framed before the Courts below nor attention of the Court was drawn to any argument/submission made by learned counsel appearing for the defendants before the Courts. Hence, the Court does not find any substance in the arguments.

Keeping in view the aforesaid discussion, there is no ground to interfere with the judgments passed by the Courts below.

Appeal on behalf of Neelam Rani is held to be not maintainable since she did not file the first appeal.

Hence, the present Regular Second Appeal is dismissed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

21.12.2018

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No