

In the High Court of Punjab and Haryana at Chandigarh

**RSA No. 3812 of 2013(O&M)
Date of Decision: 31.08.2018**

Som Dutt @ Som Nath @ Soma

---Appellant

versus

Mahi Pal and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

**Present: Mr. Vijay Kajla, Advocate
for Mr. Kulwant Singh, Advocate
for the appellant**

**Mr. Sandeep Goyal, Advocate,
for the respondents**

Rekha Mittal, J.

Challenge in the present appeal has been directed against concurrent findings recorded by the courts whereby suit for declaration that the appellant-plaintiff is owner in possession of land measuring 21 kanal 7 marlas i.e. half share of total land measuring 42 kanal 14 marlas, detailed in para 1 of the plaint situated within the revenue estate of village Malikpur, Sub Tehsil Siwan District Kaithal and the defendants-respondents have no right, title or interest in the suit land, the alleged Will dated 11.6.1998 executed by Smt. Sukhma Devi and mutation No. 1969 in favour of the defendants is illegal, null and void, has been partly allowed.

The facts relevant for disposal of present appeal are that the

entire land measuring 42 kanal 14 marlas was owned by Jug Lal son of Sh. Matu son of Harnam alias Harna resident of village Malikpur who died on 21.5.1983. Jug Lal was married with Sukhma Devi but no child was born from their wedlock. Jug Lal and Sukhma Devi kept the appellant as their heir, treated him as their son and performed his marriage. The appellant is the son of Ram Chander, brother-in-law of Jug Lal. It is further averred that Jug Lal executed Will dated 15.4.1982 whereby he bequeathed half share of his entire estate in favour of the plaintiff and life interest of remaining half share in favour of Sukhma Devi. It was stipulated in the Will that after death of Sukhma Devi, her half share will devolve upon the appellant-plaintiff. Sukhma Devi died in January 2005.

Defendants-respondents started claiming share of Sukhma Devi on the basis of Will dated 11.6.1998 and got mutation No. 1969 sanctioned in their favour on 18.2.2005. Sukhma Devi was not competent to execute the Will as she had only life interest in the suit land.

The respondents-defendants filed the written statement and, in turn, raised preliminary objections inter alia locus standi to file the suit and maintainability of the suit. They have admitted that Jug Lal was owner in possession of land measuring 42 kanal 14 marlas; marriage of Jug Lal with Sukhma and no child being born out of their wedlock. The appellant was adopted as son by Jug Lal with the consent of his wife when he was 2-3 years old and he was transferred from the family of his father Ram Chander alias Golu to the family of Jug Lal and was left with no connection with family of Ram Chander. They also admitted that Jug Lal executed Will in favour of the appellant and Sukhma Devi but denied any stipulation in the Will that the appellant would acquire right in the property after death of

Sukhma Devi. Sukhma Devi executed a Will in favour of the respondents-defendants.

The appellant filed replication, reiterated his stand taken in the plaint and denied averments of the written statement contrary to the averments taken up in the plaint.

The controversy between the parties led to framing of following issues:-

1. Whether Jug Lal executed valid Will dated 15.4.1982 in favour of the plaintiff, whereby $\frac{1}{2}$ share was given to him and qua remaining half life interest were devolved upon Sukhma Devi and the plaintiff is now owner in possession of the suit property for which declaration is liable to be issued as prayed for?OPP
2. If issue No. 1 is decided in favour of the plaintiff then whether plaintiff is entitled to the relief of permanent injunction as prayed for?OPP
3. Whether the Will dated 11.6.1998 executed by Sukhma in favour of defendants No. 1 to 3 is illegal, so also the mutation No. 1969 got sanctioned on the basis of that Will?OPP
4. Whether the suit of the plaintiff is not maintainable?OPD
5. Whether the plaintiff has no locus standi to file the present suit?OPD
6. Whether the suit is bad for concealment of true and material facts ?OPD
7. Relief.

To prove his case, appellant examined Gopi Chand Deed Writer PW1, Jarnail Singh PW2 and Sadhu Ram PW4 and himself appeared in the witness box. The respondents examined Ramesh Chand, Deed writer DW1 and Bansi Lal, Naib Tehsildar DW3. One of the respondents Mahi Pal also appeared in the witness box.

The trial court accepted the Will propounded by the respondents-defendants purported to be executed by Smt. Sukhma Devi in view of findings on issues No. 1 to 3 taken up jointly, suit filed by the appellant was partly decreed and the respondents were restrained from interfering in possession of the appellant except in due course of law i.e. by way of partition.

The appeal preferred by the appellant did not find favour with the Additional District Judge, Kaithal whereby findings of the trial court were affirmed in regard to suit of the appellant being partly decreed, as noticed hereinbefore.

Counsel for the appellant would argue that there is no dispute between the parties that appellant became owner to the extent of half share in land left behind by Jug Lal on the basis of Will dated 15.4.1982, admittedly executed by Sh. Jug Lal in favour of the appellant and Sukhma Devi, his wife. It is argued with vehemence that in the Will left behind by Sh. Jug Lal, there is a recital that after death of his wife, Som Dutt would be the sole heir/claimant. According to counsel, as Jug Lal has mentioned in the Will that after death of his wife, Som Dutt would be sole heir/claimant, it can safely be inferred that Sukhma Devi was allowed limited estate qua the half share of land given to her, therefore, Sukhma Devi was not competent to alienate the suit land either by way of transfer deed or

testamentary succession.

Another submission made by counsel is that as the respondents-defendants have failed to prove the Will Ex. D1 purported to be executed by Smt. Sukhma, in accordance with law, the courts have committed a grave error rather illegality by accepting the Will Ex. D1 and holding the respondents to have become co-owners in land measuring 42 kanal 14 marlas left behind by Sh. Jug Lal.

Counsel representing the respondents has supported findings of the courts accepting the Will dated 11.6.1998 propounded by the respondents-defendants. It is argued that the appellant has failed to adduce even an iota of evidence to establish that the Will Ex. D1 does not bear thumb impressions of Smt. Sukhma Devi much less the same being the result of fraud or shrouded by suspicious circumstances. He has also supported findings of the courts whereby plea of the appellant that Smt. Sukhma Devi was given limited estate by way of Will executed by Sh. Jug Lal, exhibited on record has been negated

The two questions that call for determination are:-

1. Whether Smt. Sukhma Devi was given limited rights in the suit property by way of Will dated 15.4.1982?
2. Whether the respondents-defendants have been able to prove the Will dated 11.6.1998, in compliance with the provisions of Evidence Act and that the same is valid and genuine.

To answer the first question, it is pertinent to examine and analyze the relevant recitals in the Will dated 15.4.1982 in Hindi but translated in English, reads as follows:-

“ After my death, my wife Sukhma Devi and Som Dutt son of

Ram Chander village Songal Tehsil Kaithal at present resident of village Malikpur Tehsil Guhla would be equally entitled to estate left behind by me. Besides them, no one else shall have any concern or connection with estate left behind by me. After my wife, Som Dutt alone will be the heir. This is my first and last Will.”

A careful reading and on due consideration of the aforesaid recitals do not lead to an inference much less conclusion that Smt. Sukhma Devi was not given absolute rights in the suit land or she did not have the authority to deal with the property as per her desire or alienate the same. In this view of the matter, findings recorded by the Courts negating plea of the appellant that Sukhma was given limited estate by her husband are liable to be affirmed and ordered accordingly.

This brings the Court to the second question whether the respondents (propounders of the Will) have been able to prove the Will, in accordance with the provisions of Section 68 or 69 of the Indian Evidence Act (in short “the Act”). In the case at hand, provisions of Section 68 of the Act are relevant as both the attesting witnesses of the Will were available for examination before the Court. Indisputably, the respondents did not examine either of the attesting witnesses by raising a plea that they have been won over by the contesting party. Counsel for the respondents has failed to point out materials on record on the basis whereof this contention of the respondents can be accepted when otherwise in law, they cannot escape their obligation to examine at least one of the attesting witnesses who is available for being brought before the court. If such a contention of the respondents is accepted, it would make the provisions of Section 68 of

the Act redundant and negatory because a party can safely take a plea that both the witnesses have been won over by the contesting party. Assuming that the witnesses were not prepared to appear in the witness box at the behest of the respondents, they could well be summoned through process of the Court and in case they were not willing to support cause of the respondents, they were at liberty to invoke the relevant provisions of the Act to get them declared as hostile and thereafter put questions in the form of cross examination. In view of the above, as the respondents have not examined either of the attesting witnesses, thus, failed to prove the Will in consonance with the provisions of Section 68 of the Act, the respondents cannot be heard to say that they have become owner of the suit land previously owned by Smt. Sukhma Devi on the basis of testamentary succession.

The courts below have committed a grave error rather perversity by upholding plea of the respondents that they have become co-owners to the extent of half share in land measuring 42 kanal 14 marlas on the basis of Will executed by Smt. Sukhma Devi. The Appellate Court has held in para 19 of the judgment that in situation where the attesting witnesses are not coming forward to prove the Will, the Will can be proved by the statement of the Registrar. Further held that reliance in this regard can be given to the law laid down by Hon'ble the Punjab and Haryana High Court in cases Ram Saran vs. Deep Kumar and others, 2007(2) Latest Judicial Reports 411, Lila Dhar vs. Smt. Badho and another, 1993 PLJ 801 and the Division Bench judgment of Hon'ble Punjab and Haryana High court Kartar Kaur and another vs. Bhagwan Kaur and others, 1993(1) PLR

99. The Appellate Court for the undisclosed reasons did not advert to the facts involved in the referred authorities and the ratio of the judgments. I have gone through the three judgments relied upon by the Appellate Court, wherein either both the attesting witnesses were examined or at least one attesting witness was examined. In view of peculiar facts and circumstances of the cases, findings have been recorded in respect of the Will, subject matter of dispute in those cases. However, in none of the judgments, it has been held by this Court that even if no attesting witness is examined by raising a plea that they have been won over by the contesting party, the Will can be stated to be proved merely because the registering authority has been examined to prove registration of the Will. This fact alone is sufficient to show that findings of the Appellate Court smacks of something fishy and totally unwarranted. That being so, it can be safely held that the Appellate Court which is the final court of fact has grossly faulted by affirming findings of the trial court in respect of the Will, set up by the respondents.

Since the Will propounded by the respondents is not proved in accordance with law, this Court need not to go into the question, whether Will is valid or otherwise. As a natural corollary, land left behind by Smt. Sukhma Devi would be inherited by her heirs in accordance with the provisions of the Hindu Succession Act, 1956.

In view of what has been discussed hereinbefore, the appeal is partly allowed in the aforesaid terms. The judgments and decrees passed by the Courts are set aside. Mutation No. 1969 in favour of the respondents-defendants on the basis of Will dated 11.6.1998 is set aside. Land measuring 21 kanal 7 marlas left behind by Smt. Sukhma Devi widow of Jug Lal

would be inherited by her heirs, in accordance with the provisions of the
Hindu Succession Act, 1956.

(Rekha Mittal)
Judge

31.8.2018
PARAMJIT

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No