

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

RSA No.1424 of 2015 (O&M)

Date of decision : 14.12.2018

Gurpal Kaur and others

...Appellants

Versus

Saroj Rani @ Saroj Bala

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Kanwal Goyal, Advocate for the appellants.

Mr. Jasdeep Singh, Advocate for the respondent.

ANIL KSHETARPAL, J. (ORAL)

The plaintiffs-appellants are in the Regular Second Appeal against the findings of the Courts below.

In the present case, the plaintiffs are wife-Gurpal Kaur and two children of Charan Singh. It has been found by the Courts below that Charan Singh had divorced plaintiff No.1-Gurpal Kaur.

Defendant claims that she got married with Charan Singh on 23.07.2005 and Charan Singh executed a registered Will in her favour on 21.03.2006.

Learned First Appellate Court has found that the registered Will has not been proved. However, the First Appellate Court records strange reasons to dismiss the appeal filed by the plaintiffs. The reasons as recorded by the learned First Appellate Court are as under:-

“13. On the other hand, the defendant/respondent claims that

the deceased Charan Singh had executed a registered and valid Will dated 21.3.2006 in her favour. However, she has not proved the said Will, but perusal of the record shows that the plaintiffs/appellants have not challenged the said Will till today in any court of law and in view of the settled law that the plaintiff has to stand on his own legs and he cannot take the benefit of the weaknesses of the defendant/respondent no findings need be recorded on this aspect.. Perusal of the record further shows that the plaintiffs/appellants have not led any evidence to prove the Will purported to have been executed by Charan Singh in favour of defendant/respondent dated 21.9.2006 is illegal, null and void. Through the present suit, the plaintiffs have not claimed the relief of declaration and a suit simplicitor for possession without seeking the relief of declaration is not maintainable as such, and it has been rightly so held by the learned lower court.

14. From the perusal of the record, it is also proved on record that Gurpal Kaur was not wife of Charan Singh when she filed the suit before the learned lower court on 6.10.2009. From the certified copy of order dated 21.9.2002 Ex. D5, it is evident that she had taken the decree of divorce with mutual consent from her husband Charan Singh on 21.9.2002 and all these facts were concealed at the time of filing the suit and as such, the plaintiffs/appellants are not entitled to any relief from the court and the same were rightly declined to the plaintiffs/appellants by the learned lower court.”

It may be noted that even if Gurpal Kaur is divorced wife, plaintiff Nos.2 and 3 who are children of Charan Singh from Gurpal Kaur would remain children and in absence of evidence to prove the Will, the property has to go by way of natural succession.

Both the Courts have found that the defendant is a married wife, therefore, the property would go as per Section 8 of the Hindu Succession Act,

1956 in absence of evidence to establish the correctness of the Will. No doubt, the defendant has examined the Scribe and official from the Registry Authority, however, neither Section 68 or Section 69 of the Indian Evidence Act, 1872 has been complied with.

As regards the finding of the Court that relief of possession has not been sought for, it may be noted that once plaintiff Nos.2 and 3 and defendant are found to be joint owners to the extent of 1/3rd share each, therefore, the suit filed by the plaintiffs without seeking possession would be maintainable because every co-owner is deemed to be in possession of the property. Still further, learned counsel for the appellants has drawn attention of the Court to the prayer made in the suit in which prayer for possession has been made. Learned counsel for the respondent does not dispute this position.

Keeping in view the aforesaid facts, the judgments and decrees passed by the Courts below are set aside. There shall be a decree for joint possession qua the disputed property left behind by Charan Singh to the extent of 2/3rd share in favour of plaintiff Nos.2 and 3/appellant Nos.2 and 3 herein.

In view of the above, the present Regular Second Appeal is partly allowed.

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

14.12.2018

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No