

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

**R.S.A No.3564 of 2016(O&M)
Date of decision :13.08.2018**

Ravi Kumar

..... Appellant

Versus

Som Nath and others

..... Respondents

CORAM : HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. Munish Puri, Advocate
for the applicant-appellant.

LISA GILL,J

CM-9329-C of 2018.

Heard.

Keeping in view the averments in the application duly supported by an affidavit as well as arguments addressed, delay of 15 days in re-filing of this appeal is condoned.

Application is disposed of.

RSA No. 3564 of 2016.

Present appeal has been filed against the judgment and decree dated 28.08.2009 passed by the learned Civil Judge (Jr. Division), Pathankot, whereby the suit filed by the appellant-plaintiff was decreed partly only, as well as judgment and decree dated 07.07.2015, passed by

the learned District Judge, Pathankot, whereby his appeal has been dismissed.

Brief facts necessary for the adjudication of the case are that appellant-plaintiff filed a suit for partition by metes and bounds and for delivery of exclusive possession of the portion falling to his share in respect to the property detailed in the plaint i.e. one residential house and a double storey shop. The plaintiff-appellant claimed that Om Parkash son of Shri Sahib Dyal was the owner of the property as detailed in the plaint. Om Parkash was a tenant of the Municipal Council, Pathankot in respect to the shop in question. A double storey structure had been raised by Om Parkash at his own expenses. Om Parkash was married to Pushpa Devi, who predeceased him in the year 1996. Four sons were born out of their wedlock, namely the present appellant-plaintiff besides Som Nath, Jiwan Kumar and Vipan Kumar i.e. respondents no.1 to 3 as well as two daughters namely Veena Kumari and Sudha respondents no.4 and 5. Om Parkash passed away on 29.11.1999. Appellant and respondents no.1 to 5, it was averred inherited his estate in equal shares and were owners in joint possession of the same. Respondents no.1 and 2 set up an illegal Will dated 01.10.1999 in their favour, which was a fabricated and fraudulent document. Om Parkash, five (05) months prior to his death remained seriously ill and was confined to bed. Therefore, he was not in a position to execute a will. Notice dated 25.01.2000 under Section 49 of the Punjab Municipal Act was served upon respondent no.6 i.e. Municipal Council, Pathankot for transferring the tenancy rights in favour of all the sons of Om Parkash. Suit properties were averred to be joint. As

the defendants had refused to admit the claim of the plaintiff, the present suit was filed. Earlier suit filed by the appellant-plaintiff for declaration and injunction against the respondents was dismissed in default on 21.09.2006. It was claimed that separate application for restoration of the same was moved. However, right to seek partition was a recurring right. The present suit being independent thereof was thus filed.

Respondents no.1 and 2 filed a written statement contesting the said suit. It was submitted that Om Parkash executed Will dated 01.10.1999 making equitable arrangements of the property for all the legal heirs. A specific portion, it was stated had already been given to the appellant-plaintiff as well as respondents no.1 to 3. All of them were in separate possession of the property which had fallen to their share as per the will dated 01.10.1999. Therefore, it was prayed that the suit be dismissed.

From the pleadings of the parties, the following issues were framed:-

1. Whether plaintiff is entitled to possession by way of partition of suit property?OPP
2. Whether the present suit barred u/o 2 Rule 2 CPC?OPP
3. Whether the earlier suit of the plaintiff has been dismissed u/o 9 Rule 8 CPC?OPD
4. Whether the plaintiff is estopped by the act and conduct from filing the present suit?OPD
5. Whether the plaintiff had wrongly impleaded defendant no.6 in this suit?OPD
6. Whether the suit is not maintainable?OPD
7. Whether deceased Om Parkash has executed a registered Will dated 01.10.1999 regarding the suit property, if so and fact?OPD
8. Relief.

Evidence was led by both the parties.

Learned trial Court while upholding the will dated 01.10.1999 held that the plaintiff-appellant is entitled to only one fourth share of the house in question by way of partition. Claim qua the shop was declined.

Appeal was preferred by the appellant-plaintiff against the partial dismissal of his suit. The said appeal was dismissed by the learned Additional District Judge, Pathankot, vide impugned judgement and decree dated 07.07.2015.

Aggrieved therefrom, the present appeal has been filed.

Sole argument raised by learned counsel for the appellant is that the will in question has not been duly proved by the evidence on record. Reference is made to cross-examination of DW-2-Sansar Chand, one of the attesting witnesses of the will dated 01.10.1999. In this view of the matter, it is submitted that the impugned judgments and decrees be set aside to the extent that the will in question is held to be valid and proved. Consequently, the suit of the appellant-plaintiff be decreed throughout.

I have heard learned counsel for the appellant and have gone through the file with his able assistance.

Relationship between the parties is not in dispute. In order to prove the will, DW-2-Sansar Chand, one of the attesting witnesses was examined. DW-2, deposed that Om Parkash was known to him. will dated 01.10.1999 was got scribed by Om Parkash from J.S.Banga, Advocate. The contents of the same were read over to Om Parkash by the scribe in the presence of second attesting witness-Chaman Singh-Lambardar. DW-2 deposed that Om Parkash executed and signed the will

in his presence as well as in presence of Chaman Singh Lambardar. DW-1-Parshotma Devi, Registration Clerk of the Office of Sub-Registrar, Pathankot, deposed that Will Ex.D-1 was presented for registration in the office of the Registrar by its testator. The said Will was registered vide endorsement Ex.D-2 and Ex.D-3 by the Sub-Registrar, Pathankot. Moreover, a perusal of the will reveals that there is an equal distribution of the assets of the deceased amongst his four sons. House of Om Parkash was distributed in equal shares between all the four sons i.e. one portion to the appellant-plaintiff and respondent no.3 and second portion to respondents no.1 and 2. In regard to the daughters, it was specifically mentioned that they were married in a befitting manner with appropriate amount being spent on their marriages.

In respect to the shop in question, admittedly the said shop was under tenancy of the testator. Tenancy rights were bequeathed to respondents no.1 and 2 which is the major bone of contention. It is rightly observed by the learned Courts below that the act of the testator in this regard was natural because the said shop was being run by him alongwith respondents no.1 and 2. The plaintiff-appellant in his cross-examination admitted that his father was a tenant in the double storey shop under the Municipal Council, Pathankot and accordingly the shop was occupied by respondents no.1 and 2. It is further admitted by the appellant that all the brothers are separate in mess and residence and were in separate possession of the rooms and kitchen of the house.

Learned Courts below have rightly held that Will dated 01.10.1999 stands proved as per evidence on record. I have gone through

the evidence of DW-2. Wholesome perusal of the testimony of DW-2-Sansar Chand in-fact cements the case of the defendants against the plaintiff-appellant. It is not in dispute that the earlier suit for declaration filed by the appellant-plaintiff challenging the will in question was dismissed under Order 9 Rule 8 CPC. PW-1, the appellant-plaintiff in his cross-examination admitted the filing of the earlier suit challenging the said will dated 01.10.1999 executed by his father. He stated that there was no compromise between the parties, the suit was dismissed due to his non appearance on 21.09.2006 and he never filed any application for restoration of the said suit, though, in his affidavit Ex.PW1/A, submitted in the present proceedings, the appellant mentioned that he filed an application for restoration of the said suit taking the ground of his illness. Another argument raised by learned counsel for the appellant is that Om Parkash was not in a sound disposing mind at the relevant time. Therefore, the will in question is invalid. However, there is no evidence on record that Om Parkash was suffering from any kind of ailment, physical or mental five months prior to his death so as to have rendered him unable to execute the will in question.

In this view of the matter, both the learned Courts below have rightly upheld the will Ex.D-1 to be valid and duly executed by its testator-Om Parkash. The appellant-plaintiff, himself admitted that he along with his brothers are already in separate possession of the rooms and kitchen of the house as per will dated 01.10.1999. Therefore, it is rightly held by the learned District Judge, Pathankot that the suit for partition cannot be decreed.

No other argument has been raised.

Learned counsel for the appellant-plaintiff is unable to point out any question of law much less substantial question of law which may be involved for consideration in this regular second appeal.

Keeping in view the facts and circumstances as discussed above, present appeal is dismissed with no order as to cost.

13.08.2018

s.khan

**(LISA GILL)
JUDGE**

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No