

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH

RSA No.2619 of 2017 (O&M)

Date of Decision.20.02.2018

Daya Kaur

.....Appellant

Vs

Kuldeep Kaur

.....Respondent

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Rajeev Gupta, Advocate
for the appellant.

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AMIT RAWAL J.(ORAL)

The appellant is in regular second appeal against the concurrent finding of fact whereby the suit at the instance of the respondent-plaintiff, who was none else but her sister, claiming separate possession of the suit property owned by common ancestor i.e. father, Lal Singh in equal share, has been decreed by both the Courts below.

The respondent-plaintiff instituted the aforementioned suit for claiming separate possession by way of partition on the premise that house and *bara* was owned by Lal Singh son of Bakhtour Singh i.e. father of the plaintiff and defendant and for injunction restraining the defendant from selling, alienating any part of the property and from changing the nature of the suit property. Since Lal Singh died intestate, the property devolved upon both the parties i.e. the appellant-defendant and respondent-plaintiff, being Class I heirs and was in joint ownership of both the parties. The plaintiff requested the defendant for partition of the property but the same was refused and in this context, the suit aforementioned was filed.

Upon notice of the suit, the appellant-defendant besides taking

the customary pleas of maintainability, locus standi etc. stated that Lal

Singh during his life time had left a written agreement dated 02.11.2000 bequeathing the property in favour of the appellant-defendant. The aforementioned document was executed in the presence of Gram Panchayat of village Mote Majra, therefore, the plaintiff did not have any right in the property. The respondent-plaintiff stepped into the witness box as PW-1, Jaspal Singh as PW2 and Hakam Singh as PW3. She also produced on record copy of jamabandi for the year 2007-2008 as Mark-D in which property was reflected in the name of Lal Singh, much less, death certificate of Amar Kaur as Mark-A. On the other hand, appellant-defendant tendered into evidence her affidavit, card of bhog ceremony of Lal Singh, Ex.D1, electricity bill Ex.D2, marriage card of Harvinder Kaur Ex.D3, electricity bills Ex.D4 to D6, Bill receipt Ex.D7, copy of voter card of Daya Kaur Ex.D8 and Lachhman Singh Ex.D9, copy of jamabandi for the year 2007-08 Ex.D11 and copy of death certificate of Lal Singh Mark DC. The trial Court on the basis of preponderance of evidence decreed the suit by discarding the agreement, emphatically, relied upon by the defendant as the same remained unproved. The appeal preferred against the aforementioned judgment and decree as noticed above, was also dismissed.

Mr. Rajeev Gupta, learned counsel appearing on behalf of the appellant in support of grounds of appeal has raised two arguments viz;

(i) the advalorem court fee was not paid despite the fact that specific objection was taken in the written statement. The Court, thus, failed to frame the issues in this regard. The legal issue can always be taken up at any stage of the suit but the same was not dealt with, therefore, there was abdication and illegality. Similarly the view of the lower Appellate Court.

(ii) The plaintiff in cross-examination admitted the existence of agreement dated 2.11.2000, therefore, there was no occasion to prove the document i.e. thumb impression of Lal Singh or examine the witnesses. There is misreading and misdirection by both the Courts below, resulting into illegality and perversity.

I have heard learned counsel for the appellant and appraised the paper book. In my view, there is no force and merit in the submissions of Mr. Gupta. On going through the aforementioned findings, it is seen that the appellant-defendant has not even argued with regard to the deficiency in court fee as agitated. If at all, factum of court fee was in the mind of the defendant and alive to the situation, the same could have been assailed in the memorandum of appeal preferred before the first Appellate Court. None of the grounds of memorandum of appeal preferred before the lower Appellate Court being part of the regular second appeal deal with the aforementioned point. For all intents and purposes, the appellant-defendant forfeited the right with regard to raising argument qua deficiency of court fee in the absence of pleadings. Even otherwise, it is between the court and the plaintiff to see whether the plaintiff had paid the court fee, which can always be looked into at any stage of the matter.

As regards the admission of the document in cross-examination of the plaintiff, in my view, the onus to prove the document was upon the defendant. It was incumbent upon the defendant to prove the thumb impression of Lal Singh, which was denied in the plaint and as well as in replication. Perhaps the defendant was afraid that the truth may not surface.

In my view, the reliance upon the document is nothing but an act of

aggrandizement. The judgment and decrees passed by the Courts below are based upon equity, hence both the parties i.e. daughters of Lal Singh had been given half share in his estate.

In view of the aforementioned, I do not find any illegality and perversity in the judgments and decrees passed by the Courts below, much less, no substantial question of law arises for determination. No ground for interference is made out. Resultantly, the second appeal stands dismissed.

(AMIT RAWAL)
JUDGE

February 20, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No