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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-2169-2018 (O&M)
Date of decision : 25.04.2018

Pyari

... Appellant(s)

Versus

Sunita @ Sanehlata and others

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Manish Mehta, Advocate
for the appellant.

AMIT RAWAL, J. (ORAL)

CM-5911-C-2018

For the reasons stated in the application, which is duly supported by an affidavit, the application is allowed and the delay of 23 days in re-filing the appeal is condoned.

RSA-2169-2018

The appellant-defendant No.1 is aggrieved of the concurrent findings of fact, whereby the suit for declaration with consequential relief of permanent injunction has been decreed by the trial Court vide judgment and decree dated 28.11.2014 and affirmed by the lower Appellate Court vide judgment and decree dated 13.11.2017.

Succinctly, the facts as enumerated from the pleadings of the parties to the suit are that the respondents-plaintiffs instituted the suit on the premise that Kishan Lal was their common ancestor, whereas Sarwan widow of Kishan Lal, who is grandmother of plaintiff No.1 and mother-in-

law of plaintiff No.2 beside mother of defendant Nos.1 to 3, was the owner of the land comprising in khewat No.258, Khatoni No.322 kita 23 measuring 115 kanals 0 marla to the extent of 4/45th share, khewat No.311 khatoni No.379, 380 kita 10 measuring 57 kanals 7 marals as per jamabandi for the year 2003-04 situated at Sehlang, Tehsil and District Mohindergarh. Sarwan obtained 1/45th share of land compromised in khewat No.155 khatoni No.155, khatoni No.223, 226 presently khewat Nos.258, 179 Khatoni No.256, 256/1 presently khewat Nos.311 to the extent of 1/720 share form the father of the plaintiff No.1 and husband of plaintiff No.2, namely, Satyavir son of Krishan Lal, who expired on 25.09.1986. Mutation bearing No.2415, in this regard, was sanctioned. The appellant-defendant No.1 was married and residing at her in laws' house. Kishan Lal was survived by a son Satyavir, who expired on 25.09.1986 and the plaintiffs are the daughter and widow of Satyavir. Plaintiff No.2 lost her mental balance and members of her parental house brought her to their village. After treatment, plaintiff No.2 started looking after her land by visiting village Sehlang and defendant No.1 by taking advantage of old age of Sarwan got executed Will No.126 dated 05.07.2007 in her favour. She expired on 22.03.2008. The aforesaid Will was fraudulently executed on the pretext of giving her treatment and taking undue advantage of her old age.

In response to the notice, appellant-defendant No.1 appeared and contested the suit by taking the preliminary objection of maintainability, locus standi etc., and holding that it was the appellant-defendant No.1, who was looking after Sarwan Devi, but the factum of Kishan Lal having a son Satyavir was admitted. The Will was stated to have been disclosed to the plaintiffs and they did not challenge, in such circumstances, the suit was

liable to be dismissed.

Since the parties are at variance, the trial Court framed the following issues:-

- 1. Whether Smt. Sarwan widow of Shri Krishan Pal executed legal and valid will dated 05.07.2007 in favour of defendant No.1 ? OPD*
- 2. Whether will dated 05.07.2007 and mutation No.3243 sanctioned on the basis thereof is illegal, null and void and not binding on the rights of the plaintiff? OPP*
- 3. Whether the plaintiff and the defendants No.2 and 3 are owners in possession of suit property to the extent of their share as detailed in the head note of the plain? OPP*
- 4. Whether the plaintiff is entitled to the relief of declaration is prayed for? OPP*
- 5. Whether the plaintiff is entitled for the relief of permanent injunction as prayed for? OPP*
- 6. Whether suit of the plaintiff is not maintainable in the present form? OPD*
- 7. Whether the plaintiff is estopped from her own act and conduct to file the present suit? OPD*

The respondents-plaintiffs in support of their case examined PW-1 Satish, PW-2 Fateh Singh Lamberdar, PW-3 Sunita @ Sanehlata and tendered in evidence the documents Ex.P-1 to Ex.P-5, whereas the defendant No.1 examined Ramanand Lamberdar, who tendered his sworn affidavit Ex.DW1/A and appeared herself as DW-2 and tendered in evidence certain documents Ex.DW-1/A and Mark DA.

The trial Court on the basis of the preponderance of evidence decreed the suit on the premise that the propounder of the Will i.e. defendant, did not place on record the original Will nor moved any

application seeking permission for secondary evidence and the appeal preferred thereto before the lower Appellate Court was also met with the same fate.

Learned counsel appearing on behalf of the appellant-defendant No.1 submitted that the Will was produced in the office of Registrar, which was registered, therefore, there could not have the objection in the ground for want of primary evidence. It could have been looked into secondary evidence without moving any application. DW1-Ramanand Lamberdar, had deposed as per the provisions of Section 68 of the Indian Evidence Act and Section 63(c) of the Indian Succession Act. Both the Courts below have erred in not framing the proper issue as burden of proving the Will was on the plaintiffs for laying the challenge to the Will. Sarwan Devi was absolute owner in possession of the land according to the revenue record and she was served by the appellant-defendant No.1. The property belonged to her was bequeathed on account of her own volition and consent vide sale deed dated 05.07.2007. All these factors have not been looked into by the Courts below, therefore, there is a gross illegality and perversity, thus, urges this Court for setting aside the concurrent findings of fact.

I have heard the learned counsel for the appellant-defendant No.1 and appraised the paper book and of the view that there is no merit and force in the submissions of Mr. Mehta, for, during the course of the hearing, counsel for the appellant read out the statement of Ramanand Lamberdar DW-1, on reading of the statement in open Court, it is found that there was no compliance of the provisions of Section 63(c) of the Indian Succession Act that both the attesting witnesses had affixed the signatures/thumb-impression on the asking of the testator. It is an essential requirement of

law in view of the ratio decidendi culled out by Hon'ble Supreme Court in

“Janki Narayan Bhoir V/s Narayan Namdeo Kadam” 2003 (1) RCR

(Civil) 409. For the sake of brevity, the paragraph Nos.8 and 9 of the judgment rendered in “Janki's case (supra) are produced hereinbelow:-

“8. To say will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e., (a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.

9. It is thus clear that one of the requirements of due execution of will is its attestation by two or more witnesses which is mandatory.”

Be that as it may, there is no force in the argument of Mr. Mehta, as the onus to prove the Will is always on the propounder. The original Will has not seen the light of the day depriving the plaintiffs to get the signatures or thumb-impressions of the testator examined. The certified copy of the Will brought on record from the office of Registrar could not be

a primary evidence as there was no request for proving the Will by way of secondary evidence. In my view, the appellant-defendant No.1 miserably failed to discharge the onus viz-a-viz genuineness and authenticity of the Will. In the absence of the Will, the estate of Sarwan Devi was devolved upon by way of natural succession. This is what the import of the judgments and decrees of the Courts below, under challenge.

No ground is made out for interference, much less, no substantial question of law arises for determination, accordingly, the present regular second appeal is dismissed.

25.04.2018 Yogesh Sharma	(AMIT RAWAL) JUDGE
	✓
Whether speaking/reasoned	Yes/ No
	✓
Whether Reportable	Yes/ No