

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

**RSA-4955-2018 (O&M)
Date of Decision: 30.08.2018**

Jitender Kumar & another

... Appellants

Versus

Jasbir Singh & others

... Respondents

CORAM:- HON'BLE MR. JUSTICE TEJINDER SINGH DHINDSA.

Present:- Mr. Sunil Dahiya, Advocate for the appellants.

...

TEJINDER SINGH DHINDSA, J.

Plaintiff/appellants are in second appeal before this Court having remained unsuccessful in both the Courts below.

Brief facts of the case are that the plaintiffs filed a suit seeking declaration to the effect that they along with defendants No.5 to 10 were the owners in possession to the extent of 7/11th share and defendants No.1 to 4 were owners in possession of 4/11th share in the suit land. The Will dated 24.10.2005 allegedly executed by Nafe Singh in favour of defendants No.1 to 4 was null and void and not binding upon the rights of the plaintiffs. Relief of permanent injunction was also sought restraining defendants No.1 to 4 from alienating the suit land in favour of any person and ousting the plaintiffs from joint possession of the suit land. It was averred in the plaint that mother of the plaintiffs, Smt. Mukhtiari/defendant No.10 was earlier married to Sumer Singh S/o Chet Ram and who died in the year 1970. Thereafter, Smt. Mukhtiari contracted a *karewa* marriage with Nafe Singh i.e. real brother of Sumer Singh. Out of such wedlock, the plaintiffs and defendant No.8 were born. Nafre Singh was stated to be the owner in possession to the extent of 1/5th share in the suit

land. Plaintiffs and defendants No.1 to 8 were accordingly entitled to the extent of 1/11th share each in the property of deceased Nafe Singh. However, defendants No.1 to 4 started asserting their exclusive title of the suit land on the basis of Will dated 24.10.2005 allegedly executed by deceased Nafe Singh in their favour. Lately, defendants No.1 to 4 were taking steps to alienate the suit property in favour of the 3rd party and under such circumstances, the suit was instituted.

Defendants No.1 to 4 contested the suit by filing a joint written statement taking a stand that plaintiffs and defendant No.8 were not the children of Nafe Singh and Smt. Mukhtiari. It was denied that a *karewa* marriage took place between Mukhtiari and Nafe Singh. Plaintiffs had earlier filed a suit titled as 'Parmod and another Vs. Nafe Singh' and wherein deceased Nafe Singh had categorically pleaded that the plaintiffs were not his sons. It was stated that Nafe Singh had executed the Will dated 24.10.2005 in their favour in lieu of services rendered. Such Will was duly attested, executed and registered in the office of Sub Registrar, Bahadurgarh.

Insofar as defendants No.5 to 7 and 9 were concerned, a statement was suffered on their behalf before the trial Court that the written statement filed on behalf of defendants No.1 to 4 be read as their written statement as well. Defendants No.10 and 8 did not join proceedings and were proceeded ex parte.

On the pleadings of the parties, the following issues were framed by the trial Court:

- “1. Whether the plaintiffs are entitled to a decree for declaration as well as permanent injunction on the grounds as mentioned in the plaint? OPP*
- 2. Whether the suit of the plaintiffs is not maintainable in the*

present form? OPD

3. Whether the plaintiffs have no cause of action to file the present suit? OPD

4. Relief.”

Suit filed by the plaintiffs was dismissed by the trial Court on 19.02.2016 and even a civil appeal preferred by them has met the same fate vide judgment dated 02.04.2018 passed by learned Additional District Judge, Jhajjar.

Counsel for the appellants has submitted that the Courts below have held that at the time of *karewa* marriage which is a recognized customary marriage amongst agriculturist Jat community in the region of Haryana and Punjab in the year 1971 between Nafe Singh and Smt. Mukhtiari, the first wife of Nafe Singh i.e. Smt. Sarbati was alive and thus the *karewa* marriage was void in view of the provisions of Hindu Marriage Act, 1956. It is argued that the Courts below have however erred in taking a view that the children born out of such marriage cannot be equated with other legitimate children of Nafe Singh despite such children having been given the status of legitimate children under Section 16(1) and (2) of the Act and thereby to be treated at par with other legitimate children. Further argued that the Courts below have completely overlooked the suspicious circumstances surrounding the Will dated 24.10.2005. It is contended that a grave error has been committed by considering the scribe as the attesting witness to the Will. Dharampal, DW4, who was stated to be the scribe in his cross-examination had admitted that he was present in the capacity of a deed writer only and was not an attesting witness to the Will. Meaning thereby the testimony of the scribe was inadmissible and irrelevant qua the proof of due attestation and execution of the Will. Furthermore, Courts below have proceeded merely on a presumption to

hold that the testator/Nafe Singh was in sound and disposing state of mind at the time of execution of the said Will. Will dated 24.10.2005 bears the thumb impression of Nafe Singh whereas it is argued that he used to put his signatures in English language only. Yet another submission raised is that the defendants had examined only one attesting witness, namely, Sh. Surat Singh, DW3 and his deposition would clearly establish that he was a complete stranger to the testator. DW3 is stated to be a tutored and planted attesting witness by the beneficiaries. Further urged that it was imperative for the defendants/respondents to have examined the second attesting witness of the Will and which has not been done inspite of such second attesting witness being alive and available.

Having heard counsel for the appellants at length and having perused the pleadings on record, this Court is of the considered view that there is no merit in the appeal and the same deserves to be dismissed.

It is a case where the appellants herein do not dispute the fact that Sumer Singh expired in the year 1970. The trial Court upon due appreciation of evidence in the nature of voter list Ex.PW1/A and Ex.PW1/B, school certificates Ex.PW2/A to Ex.PW2/I as also the ration card along with other documents available with the Food and Supply Department Ex.PW4/A to Ex.PW4/E has taken a view that Smt. Mukhtiari had contracted a *karewa* form of marriage with Nafe Singh and that plaintiffs/appellants as also defendant No.8 were born to Smt. Mukhtiari from Nafe Singh. In this regard, even the deposition of PW3 cousin brother of Smt. Mukhtiari was relied upon. However, it has gone uncontroverted that Smt. Mukhtiari was widow at the time of *karewa* marriage but Nafe Singh was having a living spouse i.e. Smt. Sarbati defendant No.9 and as such marriage between deceased Nafe Singh and

Mukhtiari was not recognized under the provisions of the Hindu Marriage Act. The Courts below have rightfully held that once the marriage of Nafe Singh and Mukhtiari is not a legal and valid marriage, Smt. Mukhtiari had no right in the properties of Nafe Singh and plaintiffs and defendant No.8 born to Mukhtiari from Nafe Singh could not be placed on equal footings with defendants No.1 to 4 who were born to Smt. Sarbati from the first and valid marriage of Nafe Singh. The Courts below have followed the dictum laid down by the Apex Court in **Bharatha Matha & another Vs. R. Vijaya Renganathan & others, 2010 (3) CCC 167 (SC) and Jinia Keotin Vs. Kumar Sitaram (2003) 1 SCC 730** to hold that the children born out of the void marriage were not entitled to claim inheritance of the ancestral coparcenary property and were entitled to claim a share only in the self acquired property of their father.

Insofar as genuineness and validity of the Will dated 24.10.2005 Ex.DW3/B is concerned, the onus was on the defendants/respondents to prove due attestation and execution thereof as per mandate of the Indian Succession Act, 1925 and the Indian Evidence Act, 1872. The Will Ex.DW3/B was attested by two witnesses. One of the attesting witness, namely, Sh. Surat Singh, Numbardar was examined as DW3 and who deposed that the deed writer, namely, Dharampal had prepared the Will as per directions of Nafe Singh. Contents of the Will were read over to the testator as well as to the attesting witnesses and admitting the same to be correct, Nafe Singh had appended his thumb impressions thereupon and thereafter attesting witnesses had appended their respective thumb impressions on the Will as well. Even the deed writer, namely, Dharampal was examined and who tendered a copy of the register Ex.DW4/A wherein he had obtained the signatures of deceased Nafe Singh.

Certificate of Sub Registrar, Bahadurgarh reflected that Nafe Singh had presented the Will Ex.DW3/B for registration. Report of expert Ex.DW1/B pertaining to comparison of the disputed thumb impressions of Nafe Singh on the Will with the standard thumb impressions on a registered sale deed mark 'B' taken from the office of Sub Registrar, Bahadurgarh further proved that the thumb impressions appended on the Will Ex.DW3/B was the L.T.I. of Nafe Singh. No infirmity is found in the concurrent view taken by the Courts below as regards the Will in question having been proved in accordance with law.

Still further the appellants had claimed themselves to be in joint possession of the suit land. However, their own witness, namely, Dharampal PW3 admitted in his cross examination that suit land was under the exclusive cultivating possession of defendants No.1 to 4. No evidence in the shape of revenue entries/khasra girdawaries had been adduced on record to establish that the appellants were in cultivating possession of any portion of the suit land.

The impugned judgments are based on cogent and valid reasoning and upon due appreciation of evidence.

There is no merit in the appeal and the same is dismissed.

30.08.2018

harjeet

(TEJINDER SINGH DHINDSA)

JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No