

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

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Date of decision: 16.01.2019

1. RSA No.4859 of 2002 (O&M)

Vimla Saini

..... Appellant

Versus

Sushila Sharma and another

..... Respondents

2. RSA No.1434 of 2003 (O&M)

Sushila Sharma

..... Appellant

Versus

Sudesh Kumar and another

..... Respondents

3. COCP No.175 of 2008 (O&M)

Vimla Saini

..... Petitioner

Versus

Sudesh Kumar and another

..... Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Yash Pal Sharma, Advocate, for
Mr. Amar Ashok Pathak, Advocate
for the appellant (in RSA-4859-2002).
for the petitioner (in COCP-175-2008).

Mr. G.C. Dhuriwala, Advocate
for the appellant (in RSA No.1434 of 2003).
for respondent No.1 (in RSA-4859-2002).

Mr. Piyush Kant Jain, Advocate
for respondent No.1 (in RSA-1434-2003 & COCP-175-2008).

ANIL KSHETARPAL, J. (ORAL)

Vide this judgment, RSA No.4859 of 2002, RSA No.1434 of

2003 and COCP No.175 of 2008 shall stand disposed of as both the appeals

and contempt petition is arising out of one suit. Two regular second appeals have been filed by the plaintiff and defendant No.1.

Dispute in the present case is with respect to the estate of Smt. Chander Kanta who was mother of the parties to the litigation. Smt. Chander Kanta had one son and two daughters. These daughters are appellants before this Court. Smt. Chander Kanta is alleged to have executed a registered Will in favour of his only son-Sudesh Kumar dated 12.12.1978. Smt. Chander Kanta died in the year 1992. The Will was attested by two witnesses late Sh. Mohan Singh, Nambardar and late Sh. Satnam Singh, Sarpanch. By the time, the dispute arose. Both the witnesses had died. Sh. Manohar Lal, Assistant Registrar who registered the Will has been examined as DW-1 whereas Nirmal Singh, brother of attesting witness Satnam Singh has been examined as DW-7 who has identified the signatures of his brother-Satnam Singh. Gurdev Singh who is resident of the same village has appeared as DW-8 and identified signatures of Satnam Singh as well as Mohan Singh on the registered Will. He has stated that he had also purchased the land and Mohan Singh and Satnam Singh had signed on the sale deed which was executed in his favour as marginal witnesses. Still further, Sukhdev Chander has been examined as DW-2 who was working as an Assistant to the scribe late Sh. Ajit Singh. He has proved the entry in the register of the scribe and has also stated that he identifies his handwriting.

Learned First Appellate Court after appreciating the evidence has held that the Will stands proved in accordance with Section 69 of the Evidence Act. The Court has further held that the execution of the Will is also proved in accordance with Section 63(c) of the Indian Succession Act,

1925.

Learned counsel appearing for the appellant has made the following submissions:-

1. The reasons given by the trial Court have not been discussed by the First Appellate Court while reversing the judgment.
2. The Will which is Ex.D-1 on the record has not been signed by the testator at the end of the page on which it is scribed but she has signed on left hand margin, therefore, the Will is suspicious.
3. The wife of Sudesh Kumar namely Harbans Kaur had also set up a Will dated 09.12.1989 and therefore, the Will dated 12.12.1978 stands superseded. He submitted that Harbans Kaur had filed a suit but the same was got dismissed for non-prosecution.
4. He has stated that none of the witnesses has stated that they had seen Smt. Chander Kanta signing the Will and therefore, the Will is not proved.
5. That date of death of the witnesses has not been proved. He has further submitted that no witness except attesting witness could prove the testament.

On the other hand, learned counsel for the respondent has supported the judgment passed by the learned First Appellate Court.

This Court has heard learned counsel for the parties at length and with their able assistance gone through the judgments passed by the Courts below and the record.

The first argument of learned counsel for the appellant is

factually incorrect. Learned First Appellate Court in para 19 has noticed four reasons which were given by the trial Court. Thereafter, each reason for dismissal of the suit has been discussed, analyzed and thereafter, reversed by giving cogent reasons. Reference in this regard can be made to Paras 19, 20, 21 and 22 of the judgment of the First Appellate Court.

Next argument of learned counsel is also wrong because the Will is a registered document. The Will is on one page and it goes upto end of the page on which it has been written. Both the attesting witnesses as well as testator have signed the Will on left hand margin. Still further, the testator when appeared for getting the Will registered, she signed on the reverse of the page on which the Will has been executed. In such circumstances, the Will cannot be said to be suffering from any suspicion on this Court. The Will has been executed in favour of Sudesh Kumar with whom she was residing in America. Both the daughters had been married and residing separately. It has further come in evidence that during life time also, late Smt. Chander Kanta appointed Sudesh Kumar as her Power of Attorney holder dated 27.03.1963 with respect to the entire property. Still further, no evidence has come on record that this Power of Attorney was ever misused by Sudesh Kumar or it was cancelled or the relationship between the son and the mother had ever gone strained.

Next argument of learned counsel is also without any substance because Harbans Kaur no doubt filed a suit on the basis of Will dated 09.12.1989 but the execution of the Will dated 09.12.1989 has never been proved. The Will is required to be proved in accordance with Section 68 or Section 69 of the Evidence Act. In absence of any evidence, trial Court committed an error in relying upon the Will dated 09.12.1989 to hold that

Smt. Chander Kanta had superseded the Will dated 12.12.1978.

Next argument of learned counsel is that none of the witness has stated that he has seen Chander Kanta, the testator signing the Will. Hence, the Will is not proved. The argument of learned counsel is not correct in law. Section 68 of the Evidence Act provide that the Will can be proved by examining at least one attesting witness who is able to prove attestation of the Will by both the witnesses. Section 69 provide that if both the witnesses are dead or not available, then the Will can be proved in accordance with Section 69 of the Evidence Act. It is not mandatory that some one must be examined who must state that he has seen Chander Kanta signing the Will. At the time of execution of the Will, scribe, attesting witnesses and the testator are normally available. In this case, the testator as well as attesting witnesses were dead when the case came up for evidence. In the present case, even the scribe has died. In such a situation, the provision has been made under Section 69 of the Evidence Act to prove the Will. In the present case, it is not the argument of learned counsel that the Will is not proved in accordance with Section 69 of the Evidence Act.

Next argument of learned counsel is that date of death of the witnesses has not been proved. The argument is factually incorrect. Ex.DW-6/1 is a death certificate of Satnam Singh whereas DW-X/1 is the death certificate of Mohan Singh, the second attesting witness.

Last argument of learned counsel is also equally misconceived as in absence of attesting witnesses, the Will can be proved in accordance with Section 69 of the Evidence Act, 1872 provide that signatures/handwriting of the attesting witness and that of the testator is to be proved. The signatures of the testator has been proved by examining

handwriting expert whereas signatures of both the attesting witnesses have been proved by examining Nirmal Singh, brother of late Sh. Satnam Singh (attesting witness) and Gurdev Singh.

Although, defendant is not in appeal, however, this Court has noticed that First Appellate Court has erred while recording a finding that the suit filed by the plaintiff is not barred under Order 2 Rule 2 and Order 23 Rule 1(4) of the Code of Civil Procedure. In the considered view of this Court, the finding on bar to Order 23 Rule 1(4) of CPC is erroneous. Order 41 Rule 33 enables the Court to pass a judgment in accordance with law irrespective of fact that whether the respondent has filed an appeal or not. It is established on the file that the plaintiff-appellant Vimla Saini had filed a civil suit No.139/94 on 30.04.1994 claiming same property. The mutation of the land in favour of Sudesh Kumar was challenged. It was claimed in the suit that the plaintiff-Vimla Saini be declared joint owner in joint possession of the property left by late Smt. Chander Kanta. In Para 8, it was pleaded that cause of action to file the suit has arisen on defendant having refused to admit the claim of the plaintiff few days back. A copy of the plaint is Ex.D-1. The suit was dismissed as withdrawn vide order dated 02.05.1994 Ex.D1/A on the record. In the present suit, the plaintiff is claiming same relief and the cause of action pleaded is that the defendants have refused to admit the claim and cause of action has been arising in her favour from the last six months. In the considered view of this Court, once Smt. Chander Kanta died in the year 1992 and Smt. Vimla Saini had filed a suit claiming share in the property of Smt. Chander Kanta and had withdrawn the same, second suit filed by the plaintiff was not maintainable under Order 23 Rule 1(4) of the Code of Civil Procedure.

Still further, once the plaintiff had withdrawn the first suit on 02.05.1994 without permission to file fresh one, second suit was barred under Order 23 Rule 1(4) of the Code of Civil Procedure. Learned First Appellate Court erred in reversing the judgment of the trial Court on this account.

Learned First Appellate Court wrongly held that in the subsequent suit, the possession has also been sought which is not factually correct. The relief claimed is only for joint possession. In any case, even if the relief of possession is sought, no relief could be granted because all the parties in absence of Will would have become co-sharers and therefore, the only relief of joint possession can be maintained and partition of the agriculture land is possible only through the revenue Courts.

For the reasons recorded above, the judgment of the Learned First Appellate Court is upheld.

Learned counsel for the appellant has submitted that he has instructions not to press this contempt petition. Accordingly, both the appeals as well as contempt petition (COCP No.175 of 2008) are dismissed with cost of Rs.2,00,000/-.

All the pending miscellaneous applications, in both the appeals and in contempt petition shall stand disposed of, in view of the above-said judgment.

16.01.2019
Dinesh Bansal

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned Yes / No

Whether Reportable Yes / No