

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

**Date of decision: 9.12.2019**

1.

**RSA No.4700 of 1999(O&M)**

Sanwal (since deceased) through his LRs .....Appellant

VERSUS

Kanhu Ram (since deceased) through his LRs and others

.....Respondents

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2.

**RSA No.840 of 2000(O&M)**

Sanwal (since deceased) through his LRs .....Appellant

VERSUS

Kanhu Ram (since deceased) through his LRs and others

.....Respondents

**CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL**

Present: Mr. Mani Ram Verma, Advocate for  
Mr. Nipun Verma, Advocate for the appellant.

Mr. Surinder Gandhi, Advocate for the respondents.

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**REKHA MITTAL, J.**

This order will dispose of RSA Nos.4700 of 1999 and 840 of 2000 as identical questions of law and fact are involved for adjudication.

For facility of reference, facts are taken from RSA No.4700 of 1999.

Sanwal son of Smt. Patori has claimed inheritance to land measuring 31 kanals 16 marlas, detailed in para 2 of the plaint on the basis of testamentary succession i.e. Will dated 06.08.1979 purported to be executed by Smt. Patori. He also claimed permanent injunction in respect

of the aforesaid land on the premise that he is owner in possession of the suit land and Kanhu Ram, his brother is threatening to take forcible possession of the same.

Another suit, subject matter of RSA No.840 of 2000 was filed by Kanhu and another seeking inheritance to share of Patori to the extent of 1/5<sup>th</sup> in land measuring 57 kanal 5 marlas, comprised in khasra numbers detailed in headnote of the plaint and land measuring 31 kanal 16 marlas.

The two questions that arise for adjudication are :-

- (1) Whether Sanwal became owner in possession of land measuring 31 kanal 16 marlas and 1/5<sup>th</sup> share of Patori in land measuring 57 kanal 5 marlas on the basis of Will dated 06.08.1979?
- (2) Whether Sanwal is in exclusive possession of land measuring 31 kanal 16 marlas and entitle to permanent injunction against his forcible dispossession from that land at the behest of Kanhu Ram, his brother?

Counsel for the appellant would argue that the Courts have wrongly discarded Will dated 06.08.1979 when otherwise the persons claiming right to suit property on the basis of natural succession have failed to adduce even an iota of evidence to substantiate their plea that aforesaid Will is the result of forgery/fraud. It is further argued that the appellant examined one of the attesting witnesses of the Will namely Omkar PW-3 and he has admitted his presence in Tehsil Loharu where Patori and Chhotu were also present. It is further submitted that mere fact that Omkar did not support cause of the appellant in its entirety and refused to depose the true and correct facts, he cannot be permitted to hold

propounder of the Will to ransom. For this purpose, reference has been made to judgment of this Court **Lila Dhar Vs. Smt. Badho, 1994 (1) RRR 221.**

It is further argued that disputed Will is a registered document and attestation made by the Registering Authority merits to be accepted as correct. Scribe of the Will namely Chandersain PW-4 was examined and he has proved execution of the Will by Patori and attestation thereof by Devi Chand (Lambardar) and Omkar, attesting witnesses of the Will. It is argued with vehemence that taking into consideration the evidence on record coupled with failure of siblings of the appellant to adduce any evidence that the Will is the result of fraud/forgery, findings of the Courts rejecting the Will are not well based and liable to be set aside. In support of his contention, he has relied upon Division Bench judgment of Kerala High Court **Joseph Vs. K.V. Ippunny and others, 2007(4) RCR (Civil) 831** and judgment of this Court **Kartar Kaur Vs. Bhagwan Kaur, 1993 PLJ 63.**

With regard to possession of Sanwal in respect of land measuring 31 kanal 16 marlas, it is argued that as per copies of jamabandis produced on record Smt. Patori (since deceased) is recorded to be in possession of the said land. The witnesses examined by the appellant and respondent- Kanhu Ram have admitted that the appellant was residing with Smt. Patori and the same is an evidence that after death of Patori, appellant came in physical possession of the said land. The plea of appellant in respect of his possession of said land finds corroboration from the statements of Chhotu PW-5, brother of the parties and the said statement made by Chhotu Ram is admittedly against interest of Chhotu Ram as he

would also become one of the co-sharers in land left behind by Patori in case findings of the Courts on the question of Will are affirmed. It is argued that Chandu DW-1 examined by respondent – Kanhu Ram has admitted in cross examination that Sanwal is in possession of disputed land subject matter of Civil Suit No.80 of 1989 filed by Sanwal against Kanhu Ram seeking permanent injunction.

Counsel representing the respondents, on the contrary, has supported consistent findings recorded by the Courts negating plea of the appellant that he has become exclusive owner of land left behind by Smt. Patori. It is vehemently argued that the appellant failed to adduce sufficient much less cogent and convincing evidence to prove the Will in consonance with the provisions of Section 63 of The Indian Succession Act, 1925 and 68 of the Evidence Act, 1872. He would further argue that original Will has not seen the light of day and there is no material on record that photocopy or even certified copy thereof can be admitted in evidence by way of secondary evidence. It is further argued that the Court has rightly held that since Kanhu Ram and other siblings of Sanwal Ram have become co-owners in the suit land left behind by Smt. Patori, Sanwal is not entitle to claim injunction against his co-owners.

I have heard counsel for the parties, perused the paper-book and records.

There cannot be dispute about settled position in law that if a litigant claims testamentary succession, he has to establish that the Will set up by him is a valid and genuine document, executed by the deceased in his/her sound disposing mind, in consonance with the provisions of the Indian Succession Act, 1925 and the Evidence Act, 1872. Equally true is

that the propounder has to dispel the suspicious circumstances, if any, surrounding the Will.

In the case at hand, the appellant has set up Will dated 06.08.1979 purported to be executed by Smt. Patori. Counsel for the appellant has failed to refute contention of the respondents that original Will has not been produced on record. He has also failed to point out if the appellant has produced any evidence to meet the requirements of any of the circumstances under which copy of a document can be admitted into evidence by way of secondary evidence, in view of the provisions of Section 65 of Evidence Act, 1872. Since the appellant failed to produce the original Will or cover his case under any of the contingencies envisaged in Section 65, Will set up by him is liable to be rejected on this score alone.

The appellant examined Omkar, one of the attesting witnesses of the Will. His testimony is not at all sufficient to prove execution of the Will by Smt. Patori or attestation thereof by the attesting witnesses either in presence of Patori or after acknowledging attestation by Patori. Omkar was not declared hostile at the behest of the appellant, therefore, the appellant cannot be heard to say that Omkar turned hostile and for that reason he did not support cause of the appellant. Chandersain, scribe of the Will has candidly stated in his cross examination that he did not know the testator personally nor can he state that who the woman was who affixed thumb impression on the Will.

Chhotu Ram PW-5 is not attesting witness of the Will nor his presence has been recorded in any of the proceedings conducted at the time of alleged execution and registration of the Will. In the given scenario, it

can safely be held that the appellant has miserably failed to discharge the initial onus that Will propounded by him was executed by Smt. Patori or the same represents true expression of wish of the testator as to how her estate shall be dealt with after her departure from the world. The Will is a sacrosanct document. The propounder is required to adduce cogent and convincing evidence to satisfy conscience of the Court with regard to correctness/validity and genuineness of the testament. As the appellant miserably failed to prove the Will in accordance with law, I find no reason to differ with findings recorded by the Courts rejecting claim of the appellant that he is entitle to succeed to the estate of Smt. Patori to the exclusion of other class I heirs left behind by her. That being so, land left behind by Smt. Patori would be inherited by her heirs in accordance with the provisions of Hindu Succession Act, 1956.

This brings the Court to the second issue, if the appellant is proved to be in exclusive possession of land measuring 31 kanal 16 marlas, admittedly, left behind by Smt. Patori. Smt. Patori died on 01.03.1988. In the revenue record i.e. copies of jamabandis marked as exhibits, she is recorded to be in possession of the said land. However, the witnesses examined by the parties have admitted that appellant was residing with Smt. Patori during her lifetime. Chhotu Ram PW-5, one of the brothers of the parties appeared in the witness box and corroborated version of the appellant that he is in possession of the suit land for the past many years. Counsel for the respondents has failed to point out any facts elicited in cross examination of Chhotu Ram on the basis whereof his testimony can be discarded or his veracity is impeached. Not only this, Chandu DW-1 examined by the respondent- Kanhu clearly admitted in his cross

examination that land is in possession of Sanwal. After death of Patori, land left by her would certainly be occupied by somebody either from her family or a third party. Taking into consideration the materials on record coupled with failure of the respondent – Kanhu Ram to prove his possession of the said land measuring 31 kanal 16 marlas, the appellant being in possession is entitle to protect his possession against forcible dispossession at the behest of respondent- Kanhu Ram. The findings of the Court that no injunction can ever be granted against a co-owner with regard to possession are not legally sustainable because a co-owner in exclusive possession of joint land or a part thereof shall be entitle to protect his possession against interference by other co-owners except in due course of law or to say that the co-owners can dispossess another co-owner in exclusive possession by taking recourse to partition proceedings. In this view of the matter, findings of the Court rejecting claim of the appellant with regard to permanent injunction against his forcible dispossession at the behest of Kanhu Ram are the result of non-consideration of evidence on record and misconception of legal position, therefore, cannot be allowed to sustain being perverse. The appellant is granted permanent injunction restraining respondent – Kanhu Ram from interfering in his possession of land measuring 31 kanal 16 marlas except in due course of law.

In view of what has been discussed hereinbefore, the appeals stand disposed of with modification in the aforesaid terms. No order as to costs.

**DECEMBER 9, 2019**

‘D. Gulati’

Whether speaking/reasoned :

Whether reportable :

**(REKHA MITTAL)**

**JUDGE**

yes/no

yes/no