

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

RSA No.2913 of 2012 (O&M)

Date of decision: 03.09.2019

Sattar and others

... Appellants

Versus

Smt. Cheriya and others

... Respondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present : Mr. Zorawar Singh, Advocate for
Mr. NS Shekhawat, Advocate
for the appellants.

None for the respondents.

REKHA MITTAL, J. (Oral)

Challenge in the present appeal has been directed against judgment and decree dated 11.05.2012 passed by the District Judge, Fatehabad whereby appeal against judgment and decree dated 24.02.2010 passed by the Additional Civil Judge (Sr. Div.), Tohana (hereinafter referred to as 'the trial Court') was accepted, impugned judgment and decree was set aside and suit filed by respondent/plaintiff was decreed and she was declared owner in possession to the extent of 1/9th share of land measuring 51 kanal 7 marlas and get the revenue entries changed/corrected and mutation No.3854 sanctioned on the basis of Will on 29.03.2007 in favour of defendants No.1 to 4 was set aside.

The present *lis* pertains to inheritance to estate of Kishna son of Chhaju. There is no dispute that out of wedlock of Kishna with Phooli,

three sons namely Sattar, Balbir and Balwan defendants No.1 to 3 were born. Kishna performed second marriage with Cheriya (respondent No.1 herein) and out of her wedlock with Kishna, four daughters i.e. Anguri, Santro, Kitabo and Seva and one son namely Suresh were born. The respondent/plaintiff claimed right in the suit property being one of the class-I heirs of deceased Kishna. She challenged Will dated 11.09.2000 purported to be executed by Kishna in favour of defendants No.1 to 4 and mutation sanctioned on the basis of Will.

Order of notice of motion, reads as follows:-

Defendants are in second appeal against the judgment of reversal.

It is submitted by counsel for the appellants that one Chhaju was owner of the land in dispute. His only son Kishna was married to Phooli. Three sons were born from their union, who are the appellants before this Court. Later on, Kishna was married to Cheriya, who gave birth to one son and four daughters. Kishna executed a registered Will dated 11.9.2000 in favour of all the four sons but the said Will has been challenged by Cheriya on the ground that Kishna was not competent to execute the Will because the land in dispute was ancestral.

Counsel for the appellants has submitted that both the Courts below have found that the land in dispute was not ancestral, rather it was self acquired property of Kishna, who was competent to bequeath his property by way of Will. Secondly, it has also been found that there was no fraud played upon him by any one at the time of execution of Will. It is further submitted that only issue before the Courts below was with regard to competence of Kishna and the suspicious

circumstances in the execution of the Will which has been negated by both the Courts below but still the suit has been decreed on the ground that the original Will has not been produced by the defendants. It is further submitted that certified copy of the Will has been placed on record and has been duly proved through DW-2 Kewal Krishan, Registration Clerk of the office of Sub Registrar.

Notice of motion for 25.3.2014.

XX XX XX

Counsel for the appellants, in line, with the contention raised at the time of notice of motion would argue that since the respondent challenged the Will in question only qua competency of the deceased to execute the Will as the suit property was ancestral property in the hands of Kishna, findings recorded by the First Appellate Court rejecting the Will in question on the premise of its being not proved in accordance with law or the same was shrouded with suspicious circumstances cannot be allowed to sustain. It is further argued that the trial Court has rightly rejected plea of respondent/plaintiff and upheld the registered Will, certified copy whereof was proved on record by examining one of the officials of the registering authority. It is further argued that even scribe of the Will namely Surender DW3 was examined and the Will was attested by Om Parkash, Lambardar and Shamsheer Singh.

There is no representation on behalf of respondents, earlier being represented by counsel.

I have heard counsel for the appellants, perused copies of the documents supplied during course of hearing.

Perusal of averments raised in the plaint would reveal that the respondent/plaintiff challenged correctness of the Will in question in respect of capacity of the testator to alienate the suit land by way of testament as well as Will being got executed by defendants No.1 to 3 under pressure. Counsel for the appellants has not disputed that even if the trial Court had framed issue in respect of the Will, onus whereof was placed upon the respondent/plaintiff, it is the obligation of propounder of the Will to prove the same in accordance with law and dispel the suspicious circumstances, if any, surrounding the Will.

In the instant case, appellants did not examine any of the attesting witnesses of the Will nor there is evidence on record that none of the attesting witnesses was available for examination before the Court. The testimony of scribe cannot be treated as testimony of an attesting witness. This apart, Surender DW3 scribe of the Will in opening line of cross examination has deposed that he did not know the testator personally. The witness examined from the office of registering authority only produced certified copy of the Will and made a statement on the basis of records without having any knowledge with regard to execution and registration of the Will. In the given scenario, I find it difficult to differ with findings of the First Appellate Court that defendants No.1 to 4, beneficiaries under the Will have failed to prove the Will, in accordance with law, therefore, estate left behind by Kishna would be inherited by his legal heirs on the basis of natural succession and accordingly respondent No.1 being one of the

class-I heirs of the deceased out of nine would be entitle to 1/9th share in the suit land. In this view of the matter, I do not find an error much less illegality in the impugned judgment.

For the foregoing reasons, finding no merit, the appeal fails and is accordingly dismissed.

03.09.2019

ashok

(REKHA MITTAL)
JUDGE

Whether speaking/reasoned:
Whether reportable:

Yes / No
Yes / No