

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

RSA-3952-2015(O&M)

Date of decision:-20.5.2019

Maru Ram through his LRs and another

...Appellants

Versus

Banwari Lal through his LRs and another

...Respondents

CORAM: HON'BLE MR.JUSTICE H.S.MADAAN

Present: Mr.Akshay Bhan, Senior Advocate with
Mr.Santosh Sharma, Advocate
for the appellants.

Mr.M.L. Sarin, Senior Advocate with
Ms.Hemani Sarin, Advocate
for the respondents.

H.S. MADAAN, J.

Briefly stated, facts of the case are that plaintiff Sh.Maru Ram represented through his LRs i.e. sons Sh.Sadhu Ram and Sh.Naresh Kumar as well as Sh.Heera Ram - brother of Sh.Maru Ram, all residents of Mohalla Sarai Dushran, Narnaul District, Mahendergarh had brought a suit for declaration against defendants Sh.Banwari Lal, since deceased through his LRs Sh.Munna Lal and Sh.Rattan Lal – sons, Smt.Leela Devi

and Smt.Pista Devi – daughters, Smt.Bhagwati Dei – wife as well as Smt.Nirmala Devi – daughter of pre-deceased sister Smt.Basti that they are owners in possession to the extent of $\frac{1}{2}$ share i.e. 10 biswa each in the land comprised in khewat No.669 khatoni No.955 khasra No.2667//1/1(1-0) as per jamabandi for the year 1989-90 situated at Narnaul and are owners in possession to the extent of equal share in the land measuring 10 bigha 17 biswa comprised in khewat No.948 khatoni No.1358 khasra No.310//2 (2-15), 311//5-15 and 312//2-7 kita as per jamabandi for the year 2000-2001 and are owners in possession in equal share of a house measuring 419 Sq. yard by virtue of Will bearing No.75 dated 9.12.1988 and the mutation of inheritance of deceased Sh.Jhutha Ram bearing No.1119 dated 27.9.2001 and the mutation No.5365 dated 15.2.2001 are wrong, illegal, null and void and liable to be set aside and further plaintiffs are joint owners in possession of a tractor purchases by Jhutha Ram by virtue of bill No.455 dated 8.5.1999 on the basis of Will. In the suit the plaintiffs also craved for permanent injunction restraining the defendants from interfering, alienating or creating the charge over the property in question.

As per the version of the plaintiffs Sh.Jhutha Ram was owner in possession of the land measuring 10 biswas and 10 bighas 17 biswas as detailed in the plaint and in addition to that he was owning and possessing a house measuring 419 sq. yards and 8 Sq.feet by virtue of sale deed No.759 dated 11.1.1963; that he was also owning a tractor; that defendant No.1 – Sh.Banwari Lal son of Sh.Jhutha Ram was residing separately and he never looked after his father; that Sh.Jhutha Ram had arranged the

marriage of Smt. Basanti Devi mother of defendant No.2 and thereafter she had been residing in her matrimonial home; that Jhutha Ram was residing with the plaintiffs, who were looking after him; that pleased with their services Jhutha Ram executed a Will dated 9.12.1988 in favour of the plaintiffs vide which he bequeathed the suit property to the plaintiffs in equal shares; that Jhutha Ram died on 24.1.2001; that after his death the defendants in collusion with revenue officials got the mutation recorded of inheritance of Jhutha Ram on the basis of natural succession, concealing the existence of Will in favour of the plaintiffs, therefore, the mutations are illegal and liable to be set aside; that the plaintiffs had requested the defendants to admit their claim but they refused to do so, giving rise to a cause of action to the plaintiffs to file the suit.

On notice the defendants appeared and filed their written statement contesting the assertions in the plaint raising various preliminary objections; challenging the maintainability of the suit, locus standi of the plaintiffs to bring the same and any cause of action having arisen to them to file the suit. On merits, they stated that the property in question is the joint Hindu Family coparcenary property; that Jhutha Ram was running a dairy in his land and was selling milk; that Jhutha Ram alongwith his three sons were taking the land on batai basis; that they were living jointly; that the land measuring 10 bigha 17 biswa comprised in khewat No.948 khatoni No.1358 khasra No.310//2 (2-15), 311//5-15 and 312/12-7 kita was purchased from the income of joint pool. The remaining land was also purchased from the income of common pool; that at the time of purchasing the tractor, a loan in the sum of Rs.25,000/- was

taken from the Primary Co-operative Development Bank, Namaul; that since Jhutha Ram was the karta of the family, therefore, everything was purchased in his name, however, the same was used by all the family members of Jhutha Ram; that Jhutha Ram was residing with his family in his ancestral house and he had purchased a house by virtue of sale deed No.759 dated 11.6.1963; subsequently, a new house was constructed there. According to the answering defendants, they were not living separately from Jhutha Ram; that Jhutha Ram never executed the Will in favour of the plaintiffs; that Jhutha Ram was having age of 85-90 years and was unable to see and was also hard of hearing and his state of mind was not proper; that the Will was wrong, against law and as a result of fraud and misrepresentation; that Kurda Ram the witness of the Will never witnessed the same, however, he told with regard to the attestation of the power of attorney; that the Will was not read over before Registrar; that Kurda Ram also had filed an affidavit regarding non-execution of Will which was also attached with the written statement/counter claim; that the mutation in question was executed in the presence of plaintiff Maru Ram, who himself appeared before the revenue official, therefore no fault can be found with the same; that the parties are owners in possession in equal share of the property left by Jhutha Ram. The defendants had raised counter claim as per the assertions made in the written statement. In the end, they prayed for dismissal of the suit and acceptance of their counter claim.

Replication was filed by the plaintiff controverting the stand of the defendants in the written statement whereas reiterating their stand

in the plaint. From the pleadings of the parties, following issues were framed:

1. Whether the plaintiffs are exclusive owners in possession of the suit property, as pleaded in the plaint? OPP.
2. Whether deceased Jhutha Ram executed the valid Will dated 9.12.1988 in favour of the plaintiff, if so, to what effect?OPP.
3. Whether the plaintiffs are entitled for relief claimed in the suit? OPD.
4. Whether the Will is forged and fabricated as pleaded in the written statement?OPD.
5. Whether the plaintiffs have no cause of action to file the suit?OPD.
6. Whether the plaintiffs have no locus-standi to file the suit?OPD.
7. Relief.

In order to prove their case, the plaintiffs had examined PW1 Ashok Kumar, PW2 Hari Ram, PW3 Roshan Lal, PW4 Gopal Kishan, PW5 Ram Chander, Record Keeper, PW6 Ajit Singh, Registry Clerk, PW7 Rajbir Singh. Registration Clerk, PW8 Yad Ram, PW9 Kurda Ram, PW10 Gobind Ram and PW11 Shamsher Singh Malik, Expert besides tendering certain documents.

On the other hand, the defendants had examined DW1 Roshan Lal, DW2 Mahabir Prashad, DW3 Tara Chand, DW4 Nihal, DW5 Mohar Singh, DW6 Ashok Kashyap and DW7 Munna Lal besides tendering certain documents.

After hearing learned counsel for the parties, the trial Court

decided issues No.1 to 4 against the plaintiffs and in favour of the defendants, issues No.5 and 6 against the plaintiffs and in favour of the defendants. Resultantly, suit of the plaintiffs was dismissed whereas counter claim of the defendants was allowed declaring them as owners in possession of the property in question in view of the mutation of inheritance to the effect that the property of Jhutha Ram would devolve upon the legal heirs of Jhutha Ram in accordance with law with their share, which had been mentioned in para No.1 of the plaint and the property which has been mentioned in para No.1 & 2 of the scheduled Annexure attached with the written statement/counter claim. This was so done vide judgment and decree dated 1.3.2011

Feeling aggrieved by the said judgment and decree, the plaintiffs had filed an appeal in the Court of District Judge, Narnaul, who vide judgment and decree dated 26.3.2015 dismissed the same.

Still feeling dissatisfied by the judgments and decrees passed by the Courts below, the plaintiffs have knocked at the door of this Court by way of filing regular second appeal praying that the same be accepted, the impugned judgments and decrees passed by the Courts below be set aside.

On getting notice of regular second appeal, the respondents have appeared before this Court through counsel.

I have heard learned counsel for the parties besides going through the records.

The first and foremost argument advanced by learned Senior counsel for the appellants was that the execution of the Will was duly

proved on the record and it being a registered document, presumption of due execution was attached, however, the Will was wrongly discarded by the Courts below and findings returned by the Courts below are perverse based upon non-appreciation of evidence and furthermore the defendants had failed to prove that the property in hands of Jhutha Ram was ancestral property.

Whereas learned Senior counsel appearing for the respondents has vehemently defended the findings recorded by the Courts below stating that no fault can be found with the judgments passed by the trial Court and First Appellate Court; that the Will set up by the plaintiffs was rightly rejected and there is no reason to upset the judgments passed by Courts below by way of acceptance of the appeal.

After hearing the learned Senior counsel for the parties and going through the record, I do not find any reason to disagree with the verdict given by the Courts below rejecting the Will set up by the plaintiffs. Merely for the reason that the Will happened to be a registered document, does not mean that it is a legal and valid document, though on account of registration, presumption of due execution can be drawn. However, such presumption is rebuttable. Section 68 of the Evidence Act deals with proof of execution of document required by law to be attested. Of course Will is a document which is required to be attested under law. This section provides that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court

and capable of giving evidence. Therefore, the plaintiffs were required to examine an attesting witness of the Will i.e. PW9 Kurda Ram. But from his deposition it cannot be taken that Jhutha Ram while possessed of sound disposing mind had executed the Will in favour of the plaintiffs inasmuch as he had signed/thumb marked the Will in presence of the attesting witnesses and the attesting witnesses had signed/thumb marked the Will in his presence and that of each other as required by law, rather he had stated that he did not know whether Jhutha Ram had affixed the thumb impressions in his presence or not. He had admitted in his cross-examination that in fact power of attorney was executed in favour of Hari Ram and Maru Ram, further propounders of the Will were present at the time of execution of the Will and that Jhutha Ram was hard of hearing and was unable to see anything. In that way, the state of mind of Jhutha Ram was not fit. The Will cannot be said to be proved on the basis of such type of deposition of an attesting witness. With regard to second attesting witness of the Will - Shri Krishan, Lambardar, as he had died the plaintiffs had examined his son Gopal Krishan as PW4, but he refused to identify the signatures of his father. PW3 Roshan Lal, scribe of the Will had admitted in his cross-examination that he did not know Jhutha Ram personally and Kurda Ram was also not known to him personally, therefore his deposition does not help the plaintiffs much in proving due execution of the Will. The plaintiffs

had further examined PW7 Rajbir Singh, Registry Clerk but his deposition cannot be taken at par with that of the attesting witnesses more particularly when he had admitted in his cross examination that the executant and attesting witnesses were not known to him personally. There are several suspicious circumstances surrounding the Will, which have been noticed by the Courts below; first being that Smt.Sona Devi wife of Sh.Jhutha Ram, his son Sh.Banwari Lal and granddaughter Smt.Nirmala were alive but there is no mention in the Will about them much less giving any reason for depriving them from giving any share in his property by the testator; that in order to prove that the Will Ex.P1 carried thumb impressions of Sh/Jhutha Ram, the plaintiffs had examined PW11 Sh.Shamsher Singh Malik, Document Expert, however, he had deposed that he had compared the thumb impressions on registered Will of Sh.Jhutha Ram dated 9.12.1988 with the documents i.e. sale deed No.220 dated 24.5.1965 from where he had taken two thumb impressions of Sh.Jhutha Ram marked as S1 and S2, however, the sale deed Ex.P4 was found to carry only one thumb impression of Sh.Jhutha Ram, whereas the other was that of Sh.Krishan Dev, which renders his opinion and report to be doubtful. The document expert examined by the defendants i.e. DW6 Sh.Ashok Kashyap had given his opinion that comparison of thumb impressions could not be made since thumb impressions purported to be that of Jhutha Ram on the Will as well as

document Ex.P9 were blurred. The important fact to be taken note of is that plaintiff Sh.Maru Ram was present at the time of sanctioning of mutations, which were entered and sanctioned on the basis of natural succession but he did not say anything with regard to Sh.Jhutha Ram having executed any Will in favour of the plaintiffs asking for sanctioning of mutation on the basis of the Will. Therefore, keeping in view the totality of the circumstances, the Will set up by the plaintiffs was rightly rejected by the trial Court and such findings were affirmed by learned District Judge, Narnaul.

Learned District Judge, Narnaul giving proper reasoning has come to the conclusion that the property in question had been purchased by Sh.Jhutha Ram from the joint Hindu family funds, therefore, it had nature of joint Hindu family property, which could not have been bequeathed by virtue of Will.

Learned counsel for the appellants referred to certain authorities, first being **M.B. Ramesh (D) by LRs Versus K.M. Veeraje Urs (D) by LRs and others, 2013(2) RCR(Civil) 932**, wherein it was observed that a Will is required to be proved by examining one attesting witness at least as required under Section 68 of the Evidence Act. However, Section 71 provides that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. This authority does not help the case of the appellants much since in this

case the attesting witness of the Will Sh.Kurda Ram – PW9 had admitted his signatures on the Will though he stated that he did not know Shri Krishan, Lamardar and he does not know whether Sh.Jhutha Ram had affixed his thumb impressions on Will Ex.P1 or not since thumb impressions were already there and Sh.Jhutha Ram was not present there. Therefore, under the circumstances of the case the plaintiffs could not have possibly taken recourse to Section 71 for the purpose of proving execution of the Will.

Learned counsel for the appellants has also pressed into service authorities **Babu Singh and others Versus Ram Sahai @ Ram Singh, 2006(2) RCR(Civil) 140** and **Lila Dhar Versus Smt.Badho, 1994(1) RRR 221** but those do not find application to the present case due to different facts and circumstances and the context in which such observations had been made.

Learned counsel for the respondents has referred to authority **Manindra Chandra Lala Versus Mahaluxmi Bank Limited, AIR (32) 1945 Privy Council 105**, wherein it was observed that the finding that execution and attestation of the Will was proved is a pure finding of fact. Counsel for the respondents by referring this judgment submitted that the two Courts below in view of the evidence adduced by the parties have returned concurrent finding that the execution of the Will was not proved and such finding cannot be interfered with by this Court while hearing regular second appeal since its scope is quite limited. He has further referred to authority **Lalitaben Jayantilal Popat Vs. Pragnaben**

Jamnadas Kataria & Ors., AIR 2009 Supreme Court 1389 wherein referring to various suspicious circumstances, it was observed that when there are large number of suspicious circumstances, the execution of Will was not proved. Furthermore, counsel for the respondents pressed into service Deity Pattabhiramaswamy Versus S.Hanymayya and others, AIR 1959 Supreme Court 57, which dealt with scope of interference in second appeal. It was observed therein that the provisions of S.100 are clear and unambiguous. There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross the error may seem to be. Nor does the fact that the finding of the first Appellate Court is based upon some documentary evidence make it any the less a finding of fact. A Judge of the High Court, has therefore, no jurisdiction to interfere in second appeal with the findings of fact given by the first appellate Court based upon an appreciation of the relevant evidence. In Kashibai w/o Lachiram and another Versus Parwatibai w/o Lachiram and others, (1995) 6 Supreme Court Cases 213 while dealing with aspect of proof and due execution of Will, it was observed that when no witness had deposed that the alleged Will was signed by the deceased in his presence or that he had attested the document, the execution of Will not proved.

Learned counsel for the respondents also referred to authorities i.e. Bharpur Singh and others Versus Shamsher Singh (2009) 3 Supreme Court Cases 687, M.N. Aryamurthi and another Versus M.L.Subbaraya Setty (dead) by his legal representatives and others, AIR 1972 Supreme Court 1279 and Jagdish Chand Sharma

Versus Narain Singh Saini (dead) through Legal representatives and others, (2015) 8 Supreme Court Cases 615 in support of his contentions.

No substantial question of law arises in this appeal.

As regards the counter claim of the defendant, which has been allowed by the First Appellate Court that has not been challenged by the appellant-plaintiff by way of filing a separate appeal. Nevertheless it is found that it was rightly allowed.

Therefore, I do not find any merit in the present appeal and do not see any reason to disturb the legal, valid and well reasoned judgments passed by the Courts below.

The appeal stands dismissed accordingly.

20.5.2019
Brij

(H.S.MADAAN)
JUDGE

Whether reasoned/speaking : Yes/No

Whether reportable : Yes/No