

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

RSA-4802-2018

Date of Decision: November 25, 2019

Nirmala

...Appellant

Versus

Seema and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ARUN PALLI, JUDGE.

Present: Mr. B.R. Vohra, Advocate,
for the appellant.

ARUN PALLI, J. (ORAL)

Suit filed by the respondent Nos. 1 to 3 (plaintiffs) was decreed by the Trial Court, vide judgment and decree, dated 17.07.2014, and as the appeal preferred against the said decree failed, and was dismissed on 23.03.2018, appellant-defendant No. 1 is before this Court in Regular Second Appeal. Parties to the *lis*, hereinafter shall be referred to by their original positions in the suit.

Plaintiffs prayed for a declaration that Will, bearing No. 217, dated 20.03.2002, as also the Mutation No. 1883 that was sanctioned on the basis thereof, were null and void and plaintiffs were owners to the extent of 1/5th share in the suit property.

In brief, the case set out by the plaintiffs was that Nand Kishor was the owner in possession to the extent of 1/20th share, i.e. 1 Kanal 16 Marlas, out of total land measuring 35 Kanals 10 Marlas. He happened to be the father of the husband of plaintiff No. 1, grand father of plaintiff Nos. 2 and 3, father of defendant Nos. 1 to 3 and husband of defendant No. 4.

The suit land was a joint hindu property in the hands of late Nand Kishor, and post his death, plaintiffs had 1/5th share in the suit property. Thus, given the nature of the suit property, late Nand Kishor had limited rights to deal therewith and, thus, he had no authority to execute the Will, dated 20.03.2002, in favour of defendant No. 1 to the exclusion of the plaintiffs and defendant Nos. 2 to 4. In fact, husband of plaintiff No. 1 and father of plaintiff Nos. 2 and 3, namely, Manoj Tyagi, died on 05.07.2001 in a road accident. Owing to the death of his son, late Nand Kishor was in a state of shock and defendant No. 1 taking undue advantage of his illness, took him with herself for treatment. However, he was not taken to any hospital, but to the office of Sub Registrar, Ganaur, on 20.03.2002, where defendant No.1 got cancelled the Will bearing No. 183, dated 12.12.2000, and also got executed a fresh Will, dated 20.03.2002, in her favour. For, despite repeated requests defendants declined to have the Will, dated 20.03.2002, cancelled, thus, the suit.

In the joint written statement filed by defendant Nos. 1 to 2 and 4, the suit property was claimed to be the self acquired property of late Nand Kishor, therefore, he had every right to deal with it in the manner he liked. The Will, dated 20.03.2002, was alleged to be validly executed by the deceased in favour of defendant No. 1. Thus, the suit was liable to be dismissed.

In a separate written statement filed by defendant No. 3, she too claimed the suit property to be joint Hindu property, and therefore, late

Nand Kishor had no right to execute the Will in favour of defendant No. 1 excluding the plaintiffs and defendant Nos. 2 to 4.

Upon consideration of the matter in issue and the evidence on record, both the Courts concurrently concluded that although plaintiffs had claimed the suit property to be ancestral, however, they failed to lead any evidence to prove that suit land in the hands of late Nand Kishor was indeed ancestral in nature. Rather, the evidence on records showed that suit land was the self acquired property of deceased Nand Kishor. Thus, the plea set out by the plaintiffs as regards nature of the suit land remained unsubstantiated.

As indicated above, the Will, dated 20.03.2002, was propounded by defendant No. 1. And to prove her claim, she examined Ram Parkash, Deed Writer (DW-5), who deposed that said Will (Mark A/Ex. A) was scribed by him at the instance of Nand Kishor, in favour of his daughter Nirmala (defendant No. 1). The said Will was entered at Sr. No. 173, dated 20.03.2002, in his register. Likewise, even Rajinder Singh, Registration Clerk (DW-4), deposed that impugned Will was registered in the office of Sub Registrar, Ganaur, at Sr. No. 217/3 of 20.03.2002. The Will, dated 20.03.2002, was attested by two attesting witnesses, i.e. Rao Ishwar Singh, Advocate, and Krishan, son of Girdhari. Significantly, all what one of the attesting witnesses to the Will, namely, Rao Ishwar Singh (DW-3) deposed was that he affixed his signatures upon the said Will after reading its contents at the instance of the testator Nand Kishor. The other attesting witness to the Will was not examined. He failed

to depose if the testator had affixed his thumb impression upon the alleged Will in his presence. He also did not depose if he inquired from Nand Kishor whether he had thumb marked the Will. Therefore, the statement of the sole attesting witness to the alleged Will was not sufficient to prove the attestation as envisaged under Section 68 of the Indian Evidence Act. Although Nirmala (defendant No. 1) as also her mother Smt. Sona Devi (defendant No. 4) appeared as DW-1 and DW-2 respectively, but their testimonies were inconsequential as none was present at the time of execution of the alleged Will. Thus, the Will, dated 20.03.2002, remained unproved.

Plaintiffs too had claimed that late Nand Kishor had earlier executed a Will, dated 12.12.2000 (Ex. P-1), in favour of his grand son Dev Raj (plaintiff No. 2). Even the recitals in the Will, dated 20.03.2002, revealed that prior to its execution, Will, dated 12.12.2000 (Ex. P-1), was executed by Nand Kishor, in favour of plaintiff No. 2. Not just that, Nirmala (defendant No. 1) as also Sona Devi (defendant No. 4) conceded in their cross-examination that prior to the Will, dated 20.03.2002, late Nand Kishor had executed the Will, dated 12.12.2000 (Ex. P-1), in favour of Dev Raj (plaintiff No. 2). Not just that, Nirmala (DW-1) even admitted that the said Will was executed by Nand Kishor in favour of Dev Raj out of free volition. Plaintiffs had even examined Ram Parsad, Deed Writer, Court Complex, Ganaur (PW-5), attesting witness, namely, Krishan (PW-2) son of Girdhari, and Pawan Kumar (PW-4), son of other attesting witness. And analysis of their testimonies proved the execution of the Will, dated

12.12.2000 (Ex. P-1). However, as the plaintiffs themselves never chose to predicate their claim on the Will, dated 12.12.2000 (Ex. P-1), thus, the estate of late Nand Kishor was to devolve upon his heirs by natural succession. The deceased was succeeded by his widow, three daughters, widow and children of his pre-deceased son Manoj, plaintiffs were entitled to the 1/5th share in the suit property.

On being pointedly asked, learned counsel for the appellant could not refer to anything on record to show if the conclusions arrived at were either contrary to the record or suffered from any material illegality. Thus, no ground is made out to interfere with the concurrent findings recorded by both the Courts.

The appeal being devoid of merit is accordingly dismissed.

(ARUN PALLI)
JUDGE

November 25, 2019

Pk Kapoor

Whether Speaking/Reasoned: YES / NO

Whether Reportable: YES / NO