

RSA No.5322 of 2017(O&M)
Date of Decision: 14.05.2019

Versus

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Ms. Ashima Mor, Advocate
for the respondent.

RAJ MOHAN SINGH, J.

[1]. Defendant No.1 has preferred this regular second appeal against the concurrent judgments and decrees passed by the Courts below, decreeing the suit of the plaintiff for declaration and mandatory injunction.

[2]. Plaintiff filed a suit for declaration to the effect that he is entitled to ½ share of the estate left by Smt. Santosh Kumari who died on 20.08.2003. Plaintiff also sought mandatory injunction directing defendant No.1/appellant to refund ½ share of the plaintiff and 1/4th share of defendant No.2 out of

Rs.7,50,000/- along with interest. Plaintiff and defendants are real brothers. Smt. Santosh Kumari was their sister who was married to one Rajesh Kathuria. Rajesh Kathuria died issueless and his properties were inherited by Smt. Santosh Kumari. Santosh Kumari died intestate on 20.08.2013 and she was entitled to pensionary benefits as she was serving in DDA as LDC in Electricity Division No.2, Dawarka, Delhi. The service benefits of Santosh Kumari came out to be Rs.7,50,000/- approximately. She was also having an amount of Rs.9,50,000/- in the form of FDR and other saving accounts.

[3]. An application for grant of succession certificate of deceased Smt. Santosh Kumari was filed on 04.06.2004 which was allowed vide judgment dated 20.07.2007. Defendant No.1/appellant was authorized to collect dues of Smt. Santosh Kumari as her nominee. Nominee was only to collect the dues of the deceased for ongoing disbursement to the rightful claimants. Mother of the plaintiff and defendants namely Smt. Kaushalya Devi died on 23.02.2007. She executed registered Will dated 01.09.2006 in favour of the plaintiff. She bequeathed her share in favour of the plaintiff. Smt. Kaushalya Devi along with defendant No.2 Subhash Chander was residing with the plaintiff. Defendant No.2 was mentally infirm and he was residing in care and custody of the plaintiff since 1972. Defendant No.2

remained unmarried. After the death of Smt. Santosh Kumari, it was decided by the plaintiff and defendant No.1 that the plaintiff cannot look after Smt. Kaushalya Devi as well as Subhash Chander as the wife of the plaintiff was in service. Thereafter, Smt. Kaushalya Devi started residing with the plaintiff, whereas defendant No.2 started residing with defendant No.1. Defendant No.2 was serving in Punjab Roadways as Mechanic. Defendant No.1 kept defendant No.2 in order to grab his pensionary benefit as well as share which was devolved upon him from Smt. Kaushalya Devi (deceased). Defendant No.1 withdrew the amount of Rs.7,50,000/- being one of the legal heirs of deceased Santosh Kumari. The share of the plaintiff was denied despite demand made by him. With this background, the suit came to be filed.

[4]. Defendant No.1 contested the suit. Defendant No.1 being nominee of Smt. Santosh Kumari not denied the relationship of the parties, rather he pleaded that he being the nominee is only entitled to receive the self acquired property of deceased Smt. Santosh Kumari. Defendant No.2 died and factum of his death was pleaded by defendant No.1 in his written statement.

[5]. Both the parties went to trial on the following issues:-

“1. Whether the plaintiff is entitled to declaration to the

effect that he is entitled to ½ share of the estate of Smt. Santosh Kumari who died on 20.08.2003? OPP

2. Whether the plaintiff is entitled to mandatory injunction directing the defendant No.1 to refund ½ share of plaintiff and 1/4th share of defendant No.2? OPP

3. Whether the suit filed by the plaintiff is not maintainable in its present form? OPD

4. Whether the plaintiff has not come to the Court with clean hands and has suppressed the material facts from the Court? OPD

5. Whether suit of the plaintiff is barred by limitation? OPD

6. Whether the Civil Court has got no jurisdiction to entertain and try the present suit? OPD

7. Whether the plaintiff has not affixed the ad valorem Court fee? OPD

8. Relief.”

[6]. After appraisal of the evidence led by both the parties, trial Court decreed the suit thereby holding that the plaintiff is entitled to ½ share of the estate of Santosh Kumari and defendant No.1 was directed to pay one half share of the entire amount left by late Smt. Santosh Kumari along with interest @ 9% per annum to the plaintiff within a period of two months from the date of passing of judgment and decree i.e. 22.11.2013.

[7]. Feeling aggrieved against the aforesaid judgment and decree dated 22.11.2013 passed by Additional Civil Judge

(Senior Division), Ganaur, defendant No.1 went in appeal before the Lower Appellate Court.

[8]. Lower Appellate Court found that the plea of paying the half share amounting to Rs.3,75,000/- to the plaintiff was not proved even as per testimonies of DW 2 and DW 3. DW 2 Vidhya Bhushan Hasija in his affidavit supported the case of the defendants in the context of paying half share amounting to Rs.3,75,000/- to the plaintiff in his presence. Similarly, DW 3 Gulshan Kumar also supported the case of defendant No.1 by deposing that defendant No.1 being nominee of Smt. Santosh Kumari had withdrawn the amount of Rs.7,50,000/- and he has already paid the share of the plaintiff in his presence. Defendant No.1 has appeared as DW 1 and he has taken the same stand in the written statement filed by him. The testimonies of the aforesaid witnesses and recital in the written statement do not advance the case of defendant No.1 for want of any execution of any receipt in respect of alleged payment of half share to the plaintiff, nor the mode of payment has come forth. The alleged payment does not correspond to time, date and place of payment. Lower Appellate Court also discarded the stand of defendant No.1 in respect of alleged payment of Rs.3,75,000/- to the plaintiff.

[9]. A finding of fact recorded by the Courts below on

appreciation of evidence cannot be interfered with, particularly when there is no misreading of evidence on record, nor the findings recorded by the Courts below are found to be suffered with any perversity. The written statement filed by defendant No.1 is discrepant with regard to date, month and year of alleged payment. The testimonies of DW 2 Vidhya Bhushan Hasija and DW 3 Gulshan Kumar do not go further in order to establish the alleged payment in favour of the plaintiff with reference to any date, place and manner of payment. No receipt was executed, nor any evidence has come forth other than the aforesaid testimonies of DW 2 and DW 3.

[10]. In my considered opinion, the appreciation of evidence done by the Courts below cannot be re-appreciated in regular second appeal, particularly when no law point worth consideration is involved in the present case. This appeal is found to be totally devoid of merits and is accordingly dismissed. Since the main appeal has been dismissed on merits, therefore all the pending applications are accordingly disposed of.

14.05.2019

Prince

**(RAJ MOHAN SINGH)
JUDGE**

Whether reasoned/speaking Yes/No

Whether reportable Yes/No