

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.6348 of 2018 (O&M)

Date of Decision: 14.05.2019

Pardeep Kumar

.....Appellant

Vs.

Renu Kumari

.....Respondent

CORAM: HON'BLE MR.JUSTICE DR. RAVI RANJAN

Present:- Mr.Sandeep Saini, Advocate, for
Mr.Sukhdeep Parmar, Advocate for the appellant.

DR. RAVI RANJAN, J. (Oral Judgment)

Challenge has been made in this appeal to the judgment and decree dated 15.05.2018 passed by the Additional District Judge, Patiala in Civil Appeal/CSI No.572/2016/126/27.09.2016 by virtue of which he has dismissed the appeal and has affirmed the judgment and decree dated 08.09.2016 passed by Civil Judge (Junior Division), Nabha. The trial Court, by aforesaid judgment and decree, has decreed the suit filed by the plaintiff-respondent Renu Kumari.

Brief facts of this case which would be necessary for consideration of the *lis*, stand enumerated as under:

The plaintiff-respondent Renu Kumari filed a suit seeking declaration that she is exclusive owner in possession of the residential house measuring 51 Sq. Yards fully described at the foot of the plaint and also for direction to the defendant No.2 to enter her name in the municipal record in accordance with the registered Will dated 11.10.1989 executed by

Hans Raj (since deceased) her father, in her favour. It appears that the suit was initially filed impleading the general public as well as Municipal Committee, Nabha, through its Executing Officer only. However, subsequently, petition was filed by the defendant/appellant Pardeep Kumar under order 1 Rule 10 of the Code of Civil Procedure for impleading him as a party which was allowed. He filed written statement taking a stand that the deceased-Hans Raj was residing with him and he is owner in possession in the suit property in view of the family settlement made earlier under which the same was allotted in his favour. Let it also be noted that on notice having been issued to the defendants No.1 and 2, none had appeared and subsequently, the suit was dismissed as withdrawn so far as against respondent no.2 i.e. Municipal Committee is concerned.

The relationship between the parties is admitted as they are sister and brother. It is also admitted that the plaintiff's matrimonial house is at Rajpura. As per the defendant-appellant, she is residing there permanently and not in the suit property. The defendant-appellant also claimed in the written statement that Hans Raj used to reside with the defendant in the suit house and had never executed any Will in favour of the plaintiff and as such, the Will is false, forged and fabricated document prepared by the plaintiff for the purpose of grabbing the suit property of the defendant. Further case of the defendant-appellant is that he is in possession of the suit property as owner qua the oral family settlement made earlier which stands proved in the civil suit titled as **Pardeep Walia Vs. Rajat Walia etc.** and the plaintiff has concealed the aforesaid facts.

Other technical issues regarding maintainability of suit and lack of any

cause of action or locus standi etc. were also taken.

Upon consideration of rival pleadings, the trial Court framed following issues:

- 1) Whether plaintiff is entitled for declaration as well as mandatory injunction as prayed for ? OPP.
- 2) Whether suit of the plaintiff is neither maintainable nor competent in its present form? OPD.
- 3) Whether plaintiff has got no cause of action or locus standi to file the present suit? OPD.
- 4) Whether suit of plaintiff is false, frivolous and vexations? OPD.
- 5) Whether plaintiff has not come to the Court with clean hands ? OPD.
- 6) Whether plaintiff is estopped from filing the present suit by her own act and conduct? OPD
- 7) Relief.

In order to prove the issue No.1, the plaintiff Renu Kumari examined herself as PW-3 and brought on record the original Will dated 11.10.1989 executed by her father Hans Raj (Ex.P-1). To prove the Will, she examined PW-1 Harish Jindal, son of Mohinder Pal Jindal, the marginal witness of the Will in question. The PW-1 has identified the signature of his father on the Will. The scribe of the Will v.i.z. Rakesh Kumar deposed through his affidavit Ex.DW2/A and he identified his signature on the Will in question and certified copy of his Register bearing entry No.1154 dated 11.10.1989, however, he died before his cross-examination. To prove that both the attesting witnesses of the Will concerned have died already, the plaintiff brought on record their respective death certificates. The death certificate with respect to the scribe Rakesh Kumar, who died after the deposition in the form of affidavit but before cross-examination, has also been brought on record. PW-4

(Ex.PW2/B) of the suit property at the instance of plaintiff. PW-5 Jasbir Singh is Clerk from the office of Municipal Council, Nabha who has proved as per Assessment Register for the year 1994-95 regarding the property bearing No.B-1-1106/A having been recorded in the ownership of Hans Raj i.e. father of the plaintiff and the defendant No.3. PW-6 Jatinder Raj Pal is clerk from the office of Sub Registrar, Nabha, who has proved on record the sale deed dated 30.12.1985 as Ex.A1. The relevant entry made in the Register in this regard has also been proved as Ex.A2 and he has also proved record regarding registration of Will dated 11.10.1989 (Ex.P1).

To rebut the aforesaid evidence led by the plaintiff, the defendant No.3/appellant Pardeep Kumar examined himself as DW1.

It was urged on behalf of plaintiff that suit property, which is measuring 51 Sq. Yard consists of one room, a store, *chobara* and courtyard, was self acquired property of deceased Hans Raj which was purchased by him vide sale deed dated 30.12.1985 a certified copy of which has been brought on record as Ex.A2.

The trial Court has recorded the findings with respect to all the issues in favour of the respondent-plaintiff and has decreed the suit. The judgment and decree was challenged in appeal but the first Appellate Court has also affirmed the findings recorded by the trial Court and has dismissed the appeal.

Hence, this regular second appeal has been preferred.

As a first and foremost point, it has been raised on behalf of learned counsel for the appellant that the suit suffers from the vice of non-joinder of parties and as such the same was required to be dismissed on

that count. It is contended that two brothers v.i.z Rajat Walia and Vijay Kumar have not been impleaded as a party.

Prima facie, this limb of argument raised on behalf of the appellant appears to be attractive but on deeper scrutiny this Court finds no force in that. In fact, the suit was originally filed for getting an entry in the Municipal Records qua the Registered Will executed by the father in favour of the daughter. The defendant No.3/appellant appeared subsequently in the suit and filed a petition under Order 1 Rule 10 for his impleadment as a party but he never disclosed either in the written statement or in his testimony that the other brothers are also there and are necessary party in the suit and they are required to be impleaded otherwise suit is to be dismissed on account of non-joinder of necessary party.

That apart, the case of the plaintiff is that the suit house was in his exclusive ownership and possession. It is a case of the defendant-appellant that the suit property is under his exclusive ownership and possession as his father had, in a oral family settlement, allotted the same to the exclusion to all. Having taken a stand as above in the written statement, now the question would be whether the defendants No.3/appellant can be allowed to raise a question that the other brothers were also necessary party in the suit? Answer has to be negative because according to the defendant/appellant they are not necessary party as the house was owned by the defendant No.3 to the exclusion of all the others. Apart from the above, even if it is assumed that the brothers are necessary party in the suit, the next question would be whether the judgment and decree would bind them? Again the answer has to be negative as it is well

settled the judgment and decree passed in the suit would bind the parties only.

The next issue which has been raised by the appellant is that the Will has not been proved in accordance with law as no attesting witness has been examined and even the scribe who presented himself to depose on affidavit was not available for cross-examination for whatsoever be the reason. In such a case, it is urged that the suit cannot succeed.

The aforesaid issue has also been answered by the Courts Below by saying that the appellant has brought on record the death certificates of both the attesting witnesses of the Will. Of course under Section 68 of the Evidence Act, the requirements for proving execution of the Will is that at least one of the attesting witness should be called for the purpose of proving its execution but in case such attesting witnesses are not alive then the provisions under Section 69 would come into play which requires that it must be proved by the plaintiff that attestation by one of the attesting witness at least is in his handwriting. The trial Court had made a reference to a decision of the Supreme Court rendered in **Babu Singh and others Vs. Ram Sahai @ Ram Singh 2008 (3) Civil Court Cases 509 (S.C.)** in which it has been held that in a case where attesting witnesses are either dead or out of jurisdiction of Court or kept out of the way by the adverse party or cannot be traced out despite diligent search, in that event, Will may be proved in the manner indicated in Section 69 of the Evidence Act. In the case in hand, Harish Jindal has been examined who is son of one of the attesting witness, v.i.z., Mohinder Pal Jindal and he has proved his handwriting and the signature on the Will in question. So far as scribe

is concerned, of course if he had not been cross-examined then his testimony ordinarily would not be of much value. However, in such a situation, the Apex Court in **T.R.Srikantaiah Setty Vs. Balakrishna & Anr. 2000(1) Civil Court Cases 33 (Karnataka)** in a case in which a witness whose cross-examination is not evaded or deliberately prevented and became impossible by reason of his death, sickness or other causes mentioned in Section 33 of Indian Evidence Act, has held that it can be treated as evidence when it is corroborated from other independent witnesses and if Court is satisfied that there was no likelihood of deposition being seriously shaken by cross-examination. The aforesaid Rakesh Kumar has also proved on record and relevant entry made in the register regarding the Will.

Apart from the above, the trial Court has also noticed from the recital of the Will as to why the Will was being executed in favour of unmarried daughter to the exclusion of other brothers and sisters.

It has been urged by learned counsel, since the plaintiff is married and resides at her matrimonial house at Rajpura, she cannot be held to have come in possession of the property in question. However, trial Court has further noticed that when Will was being executed, she was unmarried and father died in the year 2001. She got married in the year 2010 only. Therefore, her coming in possession cannot be questioned on that count. Apart from the above, the defendant has not brought on record any material or any evidence to prove his possession on the suit house.

By the last resort, learned counsel for the appellant has raised the issue that even though the suit has been withdrawn, so far defendant

No.2 i.e. Municipal Committee is concerned, a direction has been given to Municipal Committee to make correction in the records of right accordingly as per the Will Ex.P-1.

In my considered view this limb of argument raised on behalf of the appellant is also noted only to be rejected for the reason that if there is dispute between the two private parties and one of the parties has succeed in entering his name in the municipal record or the other parties name has not brought on record by the Municipal Committee, then the *lis* is actually between the private parties and not with the Municipal Authority. The Municipal Committee, which is maintaining the record is not necessarily required to be impleaded as a party in the suit, therefore, after coming to the conclusion that Will is genuine and plaintiff is in possession of the suit property being owner, the direction given to the Municipal Committee to rectify the record accordingly cannot be faulted with on that count.

In view of the aforesaid discussion, this Court is of the view that learned counsel for the appellant has measurably failed to setforth any good ground or substantial question of law warranting interference of the Court in the impugned judgments and decrees.

In the result this appeal, being devoid of any merit, is, accordingly, dismissed.

(DR. RAVI RANJAN)
JUDGE

14.05.2019
anil

Whether speaking/reasoned Yes/No

Whether reportable Yes/No