

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

1. RSA-540-2018 (O&M)
Date of decision : 21.01.2020

Krishan Kumar

...Appellant

Versus

Satish Kumar (since deceased) through his LRs and others

...Respondents

2. RSA-4760-2018 (O&M)
Date of decision : 21.01.2020

Rajeev Sharma and others

...Appellants

Versus

Satish Kumar (since deceased) through his LRs and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Akshay Jindal, Advocate with
Ms. Janya Sirohi, Advocate and
Mr. Arthya, Advocate for the appellants.

ANIL KSHETARPAL, J. (ORAL)

CM-1324-C-2018 in RSA-540-2018

For the reasons stated in the application, which is duly

supported by an affidavit, legal heirs of respondent No.6 as mentioned in

para 3 of the application are ordered to be brought on record for the purpose of prosecuting the present appeal.

Application is allowed.

Main cases

By this order, two Regular Second Appeals bearing RSA-540-2018 and RSA-4760-2018, shall stand disposed of. These two appeals have been filed by the defendants against the concurrent findings of fact arrived at by the Courts below while decreeing the suit filed by the plaintiffs for declaration to the effect that the plaintiffs, defendant Nos.1 and 2 and proforma defendant Nos.11 to 13 are joint owners in joint possession of 1/8th share and defendant Nos.3 to 7 together are joint owners in possession of 1/8th share. Further declaration was sought that judgment and decree dated 04.10.2004 is not binding on the rights of the plaintiffs.

Undisputedly, the property was owned by Som Dutt, predecessor-in-interest of the plaintiffs and most of the defendants. Som Dutt died on 10.08.1993 leaving behind three sons and five daughters. After the death of Som Dutt, Rajeev Sharma and Deepak Sharma son of Swatanter son of Som Dutt had filed the suit claiming that they are owners in possession of the entire property on the basis of the Will dated 13.08.1991 allegedly executed by Som Dutt. In the aforesaid suit, brothers namely Krishan and Ravi Kumar, Rajeev and Deepak son of Swatanter entered into a compromise. The plaintiffs now claimed that as per natural succession, they are entitled to share in the property left by

their father being Class-1 heir.

Defendants contested the suit and pleaded that Som Dutt had bequeathed his entire property in favour of three sons/gandson Krishan Kumar, Ravi Kumar and Swatanter Kumar vide Will dated 20.01.1984.

Both the Courts below, on appreciation of evidence, have found that the Will dated 13.08.1991, set up by Rajeev Sharma and Deepak Sharma, has not been proved in accordance with Section 68 of the Indian Evidence Act, 1872 as none of the attesting witness was examined.

Both the Courts have also found that the unregistered Will dated 20.01.1984 is surrounded by suspicious circumstances as the same has been produced for the first time/seen light of the day, after a period of 27 years.

It may be noted here that Krishan Kumar, one of the son of Som Dutt had filed a civil suit challenging the Will dated 13.08.1991 in which the parties had entered into a settlement. Two sisters i.e. the plaintiffs were admittedly not party to the aforesaid compromise.

Learned counsel for the appellants has submitted that even if the attesting witnesses have not been examined, still since the will dated 13.08.1991 is a registered Will, therefore, it ought to have been accepted by the Court. He, in the alternative, has submitted that the Will dated 20.01.1984 has been proved and, therefore, the Courts erred in decreeing the suit.

This Court has considered the submissions and find no

substance therein. Section 68 of the Indian Evidence Act, 1872 mandates that if a Will is to be proved, it is necessary that at least one attesting witness is examined for proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. Section 68 of the Indian Evidence Act, 1872 is extracted as under:-

“68. Proof of execution of document required by law to be attested:-*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 :*

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”

From bare reading of the aforesaid provision, it is apparent that in absence of examination of at least one of the attesting witness, if he is alive and subject to process of the Court, the Will cannot be held to be proved in accordance with law, therefore, there is no substance in the first argument of learned counsel.

As regards alternative argument of learned counsel, it may be noted that Will dated 20.01.1984 is an unregistered Will, produced for the

first time/seen light of the day after a period of 27 years. Thus, the Courts have found that such Will cannot be relied upon to deny the plaintiffs of their share in the property left by a common ancestor. Both the Courts have given cogent reasons to disbelieve the aforesaid Will dated 20.01.1984.

In view thereof, there is no ground to interfere with the concurrent findings of fact arrived at by the Courts below .

Accordingly, both the appeals are dismissed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

21.01.2020

Pawan

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned:- **Yes/No**

Whether reportable:- **Yes/No**