

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA-621-2020 (O&M)

DATE OF DECISION: AUGUST 24, 2022

KIRAN DUTTA

...APPELLANT

VERSUS

CHANCHAL KUMARI (SINCE DECEASED)
THROGUH HER L.R. AND ANOTHER

...RESPONDENTS

CORAM: HON'BLE MR. JUSTICE MANOJ BAJAJ.

PRESENT: MR. RAJVINDER KAUR, ADVOCATE
FOR THE APPELLANT.

MANOJ BAJAJ, J.(ORAL)

CM-1833-C-2020

This is an application filed under Section 5 of the Limitation Act read with Section 151 CPC for condonation of delay of 211 days in filing the appeal.

Heard.

For the reasons mentioned in the application, the same is allowed and the delay is condoned.

Main Case

The appellant-defendant No.1 is aggrieved against the judgement and decree dated 11.4.2019, passed by the first appellate Court whereby the judgement and decree dated 5.8.2015, passed in Civil Suit No.246 of 2014 by the Civil Judge(Jr.Divn.), Yamuna Nagar at Jagadhari dismissing the suit of the plaintiff(respondent No.1) for mandatory injunction, was reversed and the suit was decreed.

The facts in brief leading to the appeal are that the plaintiffs filed

a suit for mandatory injunction asking for separate possession by way of partition relating to House No.22, Shiva Ji Park, Yamuna Nagar to the extent of $\frac{1}{2}$ share, by pleading that plaintiff and the defendants are sisters, and their father Bhola Nath died *intestate* on 6.2.1971. His widow Shanti Devi, daughters, Chanchal Kumari(plaintiff), Kiran Dutta, Siksha Devi (defendants) and son Naresh Kumar became owners of the suit property. Since, Siksha Sharma was legally adopted by the real brother of Bhola Nath in her early childhood, whereas Naresh Kumar went missing for the last about 13 years, and as Shanti Devi also died on 14.8.2010, the plaintiff and the defendants became owners of the suit property to the extent of $\frac{1}{2}$ share each. According to plaintiff, the defendant No.1 started residing in the suit property and claimed title over the same, therefore, on this cause of action, the above suit was filed, wherein consequential relief of permanent injunction restraining the defendants from alienating the suit property and changing its existing position was also prayed for.

The suit was contested by defendant No.1(appellant) who filed written statement and pleaded that she was the exclusive owner in possession of the suit property, as Shanti Devi had executed a Will in her favour. Further denying all the averments, it was prayed that the suit of the plaintiff be dismissed. The defendant No.2 supported the claim of plaintiff and prayed that parties are entitled to $\frac{1}{3}^{\text{rd}}$ share each in the suit property.

After completion of pleadings and framing of issues, the plaintiff adduced her evidence, whereas during the pendency of the suit, defendant No.1 was proceeded against ex-parte and defendant No.2 did not lead any evidence, and upon considering the same, the trial Court returned a finding against the plaintiff on the material issues and in favour of the defendants by

dismissing her suit.

Aggrieved against the said judgement and decree, the plaintiff preferred first appeal and the appellate Court reversed the decision passed by the trial Court and allowed the appeal. Hence the present Regular Second Appeal.

Learned counsel for the appellant has argued that the trial Court had passed a well reasoned judgement and decree in favour of the appellant-defendants by holding that one of the necessary parties, i.e. Naresh Kumar (brother of plaintiff No.1 and defendants) is not a party to the suit filed by the plaintiff-respondent No.1 for possession by way of partition, but the appellate Court has erroneously reversed the said finding. Learned counsel has argued that though there was an averment in the plaint that brother of the plaintiff is missing for the last about 13 years, but neither any declaration in this regard was sought, nor the said pleading was proved by them. She has argued that the impugned judgement and decree passed by appellate Court is not sustainable and the same deserves to be set aside. He prays that the appeal be allowed and the judgement and decree passed by the trial Court be restored.

After hearing the learned counsel and considering the material on record, this Court finds that no doubt the trial Court non-suited the plaintiff only on this ground that her brother Naresh Kumar is not a party, but the other parties to the suit are closely related to him and therefore, their right to seek partition of the property could not have been defeated. During the course of hearing, it has not been disputed by the learned counsel that indeed the whereabouts of the brother of the parties are not known. Further, a close analysis of the judgement passed by the appellate Court shows that the finding of the trial Court was reversed with the observation that once the

whereabouts of Naresh Kumar are not known, there was no reason to implead him as a party to the suit, and apart from it, considering the share of the said person to the extent of 1/4th share, the appellate Court has protected his interest also, by holding that the plaintiff is entitled to decree of separate possession by way of partition of her 1/4th share in the suit property.

At this stage, learned counsel for appellant-Kiran Dutta has argued that a separate application has been filed by appellant for adducing additional evidence, i.e. the Will dated 3.12.1971 executed by Shanti Devi (mother of the parties), and seeks permission of the Court to prove the same by way of additional evidence.

A perusal of the judgement and decree passed by the trial Court shows that though appellant-Kiran Dutta appeared during the suit proceedings, who also filed her written statement, but later on she was proceeded against *ex-parte* vide order dated 4.10.2012 and qua her, the suit was decreed *ex-parte*. Further, examination of the Will annexed with the application shows that it was in fact executed by Bhola Nath, whereby he had bequeathed his property in favour of his wife Shanti Devi. Since, no Will by Shanti Devi is ever propounded by any of the parties, who admittedly died on 14.8.2010, therefore, the suit property would devolve upon the parties by natural succession.

Thus, finding no merit in this regular second appeal, much less involvement of any substantial question of law, the same is dismissed.

August 24, 2022
Gulati

(MANOJ BAJAJ)
JUDGE

Whether Reportable : Yes/No
Whether Speaking/Reasoned : Yes/No