

RSA-2286-2022 (O&M)

Date of Decision : 23.02.2023

Nasib Singh (through his Power of Attorney)

...Appellant

versus

Charno @ Jasvir Kaur and others

....Respondents

Coram : Hon'ble Mr. Justice B.S. Walia

Present : Mr. P.K.S. Phoolka, Advocate for the appellant.

B.S. Walia, J. (Oral)

1. Challenge in the instant regular second appeal is to the judgment and decree dated 28.01.2021, passed by the learned Addl. District Judge, Mansa, in Civil Appeal No.42 dated 30.03.2016, upholding the judgment and decree dated 16.02.2016, passed by the learned Addl. Civil Judge (Senior Division), Mansa, decreeing the suit of plaintiff / respondent No.1.

2. Learned Counsel contends that the judgment and decree of the Courts below are liable to be reversed and the civil suit dismissed on account of mutation No. 4097 of inheritance qua land of Pritam Kaur having been sanctioned in favour of the appellant / defendant No.1 in the year 2001 in terms of Will of Pritam Kaur dated 17.05.1975 pursuant to her death in the year 1975 and inaction of the legal heirs to stake a claim on the basis of natural succession despite the appellant / defendant No.1 being in possession of the suit land for a number of years, consequentially, the civil suit filed in the year 2014 claiming rights over the suit property on the basis of natural succession being barred by limitation. Learned counsel contends that al-

though the Will in question was not a registered a document, yet since the attesting witnesses and the scribe of the Will dated 17.05.1975, had died, therefore, the Will had been proved by summoning the mutation proceedings record. Learned Counsel placed reliance on the decision in **S.R. Shrinivasa Vs. S. Padmavathama 2010 (5) SCC 274**, with regard to legal parameters involved in proving a Will. Relevant extract of the same is reproduced as under :-

“1. Stated generally, a Will has to be proved like any other document, the test to be applied, being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of Wills, one cannot insist on proof with mathematical certainty.

2. Since section 63 of the Succession Act requires a Will to be attested, it cannot be used as evidence until as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be a witness alive, and subject to the process of the Court and capable of giving evidence.

3. Unlike other documents, the Will speaks from the death of the testator and therefore the maker of the Will is never available for deposing as to the circumstances in which the Will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last Will and testament of the testator. Normally, the onus which lies in the propounder can be taken to be discharged on proof of the essential facts which go into the making of the Will.

4. Cases in which the execution of the Will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part of the making of Will under which he received a substantial benefit and such other circumstances raise suspicion about the execu-

tion of the Will. That suspicion cannot be removed by the mere assertion of the propounder that the Will bears the signatures of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the Will was made or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited before that might have had his own reasons for excluding them. The presence of suspicious circumstances make the initial onus heavier and therefore in cases where the circumstances attended upon the execution of the Will excite the suspicion of the Court, the propounder must remove all legitimate suspicion before the document can be accepted as the last Will of the testator.

5. It is in connection with Wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscious has been evolved. The test emphasis that in determining the question as to whether an instrument produced before the Court is the last Will of the testator, the Court is called upon to decide a solemn question and by reason of suspicious circumstances the Court has to be satisfied fully that the Will has been fully validly executed by the testator.

7. If a caveator alleges fraud, undue influence, coercion etc., in regard to the execution of Will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the Will may raise a doubt as to whether the testator was acting of his own free will and then it is a part of initial onus of the propounder to remove all reasonable doubts in the matter.”

3. On the basis of the pleadings, the following issues were framed by the learned trial Court :-

1. Whether the plaintiff is entitled to decree of declaration as prayed for ? OPP
2. Whether the plaintiff is entitled to decree of possession as prayed for ? OPP

3. Whether the plaintiff is entitled to decree of permanent injunction as prayed for ? OPP
4. Whether the suit is within limitation ? OPP
5. Whether the plaintiff has no cause of action and locus standi to file this suit ? OPD
6. Whether the suit is not maintainable ? OPD
7. Whether the plaintiff has not come to the Court with clean hands and has concealed material facts from the Court ? OPD
- 7-A. Whether deceased Pritam Kaur executed a Will dated 17.05.1975, in favour of defendant No.1, if so its effect ? OPD
8. Relief.

4. The learned Addl. Civil Judge (Senior Division), Mansa, vide judgment and decree dated 16.02.2016, decided issue Nos.1 to 4 and 7-A in favour of the respondent No. 1 / plaintiff, likewise, issue Nos. 5 to 7 were also decided in favour of respondent No. 1 / plaintiff by holding that the plaintiff had the locus standi to file the civil suit, the civil suit was maintainable and she had come to court with clean hands (due to typographical error it has erroneously been mentioned that aforesaid issues were decided in favour of appellant / defendant No.1 and against the respondent / plaintiff). It needs mentioning here that only respondent No.1 / plaintiff is the contesting respondent while the remaining respondents are proforma respondents being the L.Rs. of deceased Pritam Kaur and had admitted the claim of respondent No. 1 / plaintiff.

5. I have considered the submissions of learned counsel and perused the record as shown by him.

6. Admittedly, deceased Pritam Kaur was owner in possession of the suit land to the extent of 1/15th share of 257 Kanal 1 Marla of land

and she died on 15.11.1975, leaving behind three daughters and one son

as her class one legal heirs. Respondent No.1 / plaintiff, daughter of the deceased, Pritam Kaur claimed the suit property on the basis of natural succession by filing a civil suit challenging the alleged Will of Pritam Kaur dated 17.05.1975 as well as mutation No. 4097 of inheritance set up by her cousin i.e. appellant / defendant No.1. The Will allegedly executed by Pritam Kaur was not a registered document. Since the same excluded the natural legal heirs, onus was on the propounder to prove the veracity of the same. Although the plea is that in view of the attesting witnesses and scribe of the Will dated 17.05.1975, having died, the Will as was executed by deceased, Pritam Kaur, in favour of the appellant / defendant No. 1 had been proved by summoning the mutation proceedings record yet the plea stands negated from the findings recorded in paragraph No. 19 of the judgment of the lower Appellate Court wherein the learned Additional District Judge recorded that he had gone through the examination-in-chief of DW-1 Nasib Singh i.e. appellant herein, in which there was no reference of the attesting witnesses and the scribe of the Will having died and that he had merely placed reliance on the orders of mutation dated 08.08.2001 (Ex.D-2) passed by the Assistant Collector 1st Grade in which it was mentioned that other witnesses of the Will had died, that in the aforesaid mutation proceedings, statement of Bachan Singh s/o Major Singh r/o village Daliewali was recorded, wherein he was projected as an attesting witness of the Will, whereas perusal of the certified copies of the record of A.C. 1st Grade revealed that on the statement of Nasib Singh, A.C. 1st Grade presumed that scribe of the Will and Peeta Singh Numberdar had died, but there was no material available on the record to suggest that the attesting witnesses and scribe of the Will had died.

query as to whether there was any material on the record to show that the attesting witnesses and scribe of the Will had died, therefore, appellant / defendant No.1 was unable to examine them. Learned counsel for the appellant / defendant No.1 fairly conceded that there was no material on the record to show that the attesting witnesses and the scribe of the Will had died, therefore, appellant / defendant No.1 was unable to examine the said witnesses / scribe. The appellant / defendant No.1 could have taken recourse to the provisions of Section 69 of the Evidence Act, if he had proved both the attesting witnesses and scribe to have died, however, as has been noted above, neither there was any pleading nor any evidence led by appellant / defendant No.1 that both the attesting witnesses as well as the scribe had died. It needs mention here that before Section 69 of the Indian Evidence Act, can be resorted to, the propounder of the Will has to establish either the factum of the death of the attesting witnesses or their non availability by way of convincing evidence. However, since neither the appellant / defendant No.1 proved the non-availability of either of the attesting witnesses or the scribe of the Will, appellant / defendant No.1 failed to prove execution of the Will as required as per law, therefore resort to Section 69 of the Evidence Act could not have been made. Section 69 of the Evidence Act, reads as under:-

“Section 69- Proof where no attesting witness found-if no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

7. A perusal of Section 69 Evidence Act reveals that when no attesting witness of Will is found, it must be proved that the attestation of at

least one of the witness is in the handwriting of said witness and that the signature of the person executing the document is in the handwriting of that person. In the instant case, appellant / defendant No.1 did not examine any witness to prove that Will Ex.P-4/Ex.D-1 bore the thumb impression of Peeta Singh Numberdar or the signature of Basant Singh alleged attesting witnesses nor was any evidence led on the record that Will Ex.D-1/Ex.P-4 bore the thumb impression of alleged executant Pritam Kaur. DW-2 Jaspal Singh has placed certified copy of the statements of the parties recorded during the mutation proceedings but it was found by the learned Courts below that the aforesaid evidence did not establish the signatures of the attesting witnesses nor the thumb impression of Pritam Kaur. Plea of the learned counsel for the appellant / defendant No.1 that Will was proved in the mutation proceedings, is of no significance as it is well settled law that sanction of mutation does not determine the rights or title of a property and the mutation proceedings are only for updating the record for the purpose of ascertaining the land revenue payable, further that mutation proceedings are summary in nature and technicalities of law which extinguish or confer some right on a party is not to be gone into in such proceedings and question as regards the validity of the Will is to be determined and gone into before a Civil Court, therefore, if mutation was sanctioned in favour of appellant / defendant No.1, the same by itself cannot determine any question of right and title. For the reasons as are given above, mutation proceedings in favour of appellant / defendant No.1 would not vest any title in favour of appellant / defendant No.1. Accordingly, in the light of the position noted above, the learned Appellate Court rightly held that appellant / defendant No.1 had miserably failed to comply with the provisions of Section 69 of the Act, consequently, the Will had not been proved. Learned counsel for the appellant /

defendant No.1 has also not been able to controvert the aforementioned findings by reference to any record to establish the execution of the Will. Apart from the above, the learned Appellate Court held that there were a number of suspicious circumstances which created doubt with regard to the execution of the Will allegedly executed in the year 1975 in view of the same remaining under cover for close to a quarter of a century and having seen the light of day only in the year 2001 and no explanation having been given by the appellant / defendant No.1 for bringing the Will before the revenue authorities for updating the record only in the year 2001. Accordingly, on the death of Pritam Kaur her first class legal heirs became entitled for the inheritance of her property on the basis of natural succession as no Will was produced before any competent authority and on the death of Pritam Kaur, respondent No.1 / plaintiff and respondent Nos. 2 to 10 became the owners of the property left by Pritam Kaur and non sanctioning of mutation by the revenue authorities does not come in their way to inherit the property. The learned Courts below also held that no evidence had been led that appellant / defendant No.1 had taken care of the deceased or the deceased was residing with him and that in the circumstances, delay of 25 years in producing the Will before the revenue authorities assumes significance which also creates doubt qua the due execution of the Will. Although contents of the Will point out that Pritam Kaur was residing with her nephew, Nasib Singh, but no evidence was led by appellant / defendant No.1 to prove that she was residing with him at village Dalianwali. The learned Appellate Court further held that claim of appellant / defendant No.1 that he was looking after deceased, Pritam Kaur, was falsified from his cross-examination, as in his cross-examination, he had stated that Pritam Kaur had not called him in the marriage of

there been any bonding between Pritam Kaur and her nephew, Nasib Singh i.e. appellant / defendant No.1, Pritam Kaur would definitely have invited him in the marriage of her daughter and that since before the death of Pritam Kaur, her son and daughters were alive, there was no possibility of her residing in village Daliawali or to deprive her progeny from the succession to her property. The learned Appellate Court also held that mere deprivation of a natural heir in itself is not a suspicious circumstance because the entire idea behind execution of the Will is to interfere with the normal line of succession but in the instant case, the said principle would not be applicable as appellant/defendant No.1 i.e. propounder of the Will had completely failed to prove the Will besides all the legal heirs i.e. son and daughters had been deprived from inheritance by way of the alleged Will and further it had not been established by appellant / defendant No.1 that deceased, Pritam Kaur, was living with him, therefore, had executed the Will in his favour. The learned Appellate Court held that the Will was in the custody of appellant / defendant No.1 for almost 25 years but the attesting witnesses of the Will were not identifiable as there was no mention of the residence of the witnesses besides, the contents of the Will were in variation with the factual position of the case. There was no material on the record to show that Pritam Kaur was residing with appellant / defendant No.1 and there was no occasion for her to deprive her children from her property and that in the circumstances, no presumption of due execution of the Will could be drawn by waiving the requirement of proving the Will as per Section 69 of the Act and in the circumstances, the learned Appellate Court held that appellant / defendant No.1 has miserably failed to prove the execution of the Will Ex.P4/D1.

8. As regards the plea of the suit being time barred on account of it

having been filed in the year 2014, almost 39 years after the execution of

the Will in the year 1975 and 13 years after the sanction of the mutation in the year 2001, and in view of mutation having been sanctioned in favour of appellant / defendant No.1, limitation would run to begun from the said date, in view of the law laid down in the case of **Shyam Lal alias Kuldeep vs. Sanjeev Kumar and others 2009 (3) Civil Court Cases 535 (SC)** it needs mention here that in Shyam Lal's case (Supra), mutation was sanctioned on 20.02.1988, whereas Will was executed on 04.12.1978 while the suit was filed on 21.05.1991 and in view of there being no pleadings and evidence as to the date on which the plaintiff therein derived knowledge about the mutation or the Will, it was held that the suit was not filed within time for as per Article 58 of the Limitation Act, limitation of three years was stipulated for filing suit to obtain any other declaration and for such suit time begins to run when the right to sue first accrues and in the circumstances of the case the threat to the plaintiffs right having arisen for the first time when mutation was sanctioned.

However, in the instant case, learned Appellate Court held that it was the case of respondent No.1 / plaintiff that she had given the suit property to appellant / defendant No.1 on 'Theka' basis and that he had denied to handover the 'Theka' of Harri 2014. The learned Appellate Court held that although respondent No.1 / plaintiff had failed to prove the aforesaid facts but there was no evidence that she was having any knowledge that appellant / defendant No.1 had put a cloud on her title by asserting the Will in question. The Will admittedly did not see the light of the day till 2001 when it was produced before the revenue authorities for sanctioning the mutation and as per the record produced by appellant / defendant No.1, notice and munadi issued against respondent No.1 / plaintiff and defendant Nos.2 to 10 was affixed in

No.1 / plaintiff nor respondent Nos.2 to 10 were residing in village Dalianwali at that time. On the aforesaid basis, the learned Appellate Court held that the finding of the learned trial Court that respondent No.1 / plaintiff and other natural legal heirs were not aware of the mutation proceedings regarding the Will in question, does not call for any interference as in the absence of any effective notice having been served on the natural heirs of the deceased, there was no occasion for them to challenge the Will or to know about the cloud, appellant / defendant No.1 had put on their title qua the suit property. Appellant / defendant No.1 has failed to prove that respondent No.1 / plaintiff or other natural heirs were having any knowledge of the Will in question, therefore, plea of the suit being hit by limitation is without any basis and was accordingly rejected and the suit filed by respondent No.1 / plaintiff was held to be within limitation in view of the decision in **Joginder Kaur vs. Gurbachan Kaur and others 2013 (6) RCR (Civil) 685.**

9. Likewise in **Satnam Singh and another vs. Rajwant Kaur alias Rajjo and another 2011 (6) RCR (Civil) 363,** it was held that there is no period for filing a suit claiming inheritance unless the other party proves adverse possession. Relevant extract of the decision in Satnam Singh's case (supra) is reproduced as under:-

“15. So far as the limitation is concerned, the suit is well within limitation. The mutation of inheritance of Kehar Singh was passed in favour of appellants on 16.01.1985 and suit was filed on 13.09.1995 i.e. well within 12 years. Otherwise also, there is no period for filing a suit claiming inheritance unless the other party proves the adverse possession. It is not the case of defendant that they have not become the owners of suit property by way of possession.”

10. Similarly, in Ganpat and another vs. Lachhman and others 2008 (4) RCR (Civil), it was held that no period of limitation is prescribed for filing a suit for possession on the basis of inheritance. Relevant extract of the decision in Ganpat's case (supra) is reproduced as under:-

“After hearing the learned counsel for the parties, I find force in the contention of the learned counsel for the respondent. It is well established principle of law that inheritance does not remain in abeyance and the heirs after the death of last male holder succeeds to the property of deceased in accordance with law. Kashmira Singh, being the son of Niranjana Singh, deceased, was entitled to 1/3rd share in the land in dispute. After the death of Niranjana Singh he was not required to file any suit for possession on the basis of inheritance. He had become full owner of his share in the property on the death of last male holder. For establishing his right as an heir, he was not required to file a suit. However, a situation may arise when the heir is not in possession of the property inherited. In that event a suit for possession may have to be filed and on contest the same may fall on the defendant proving that he has perfected his title by adverse possession. It is such type of suit which is governed by the provisions of Article 65 of Limitation Act. In this view of the matter, with respect, I find that the view taken by R.N. Mittal, J. in Nagender Singh's (supra) that it is well settled that a suit for possession on the ground of inheritance should be filed within a period of 12 years from the inheritance opens, does not lay down correct law. The decision to which reference has been made in para no.9 of the judgment by the learned Judge, do not lay down any such rule. On the other hand, in all those decisions, it was the plea of adverse possession of defendant which was upheld. Thus I hold that no period of limitation is prescribed for filing a suit for possession on the basis of inheritance.”

11. In view of the position noted above, the learned Appellate Court held that there is no limitation for filing a suit for possession on the basis of inheritance or title and that the judgments cited by the learned counsel for the appellant / defendant No.1 were not applicable being distinguishable as issue regarding possession on the basis of title or inheritance was not involved. It was also held that the right to claim possession by respondent No.1 / plaintiff could be stalled by appellant / defendant No.1 by proving his adverse possession on the suit property but no plea of adverse possession had been raised by appellant / defendant No.1. Accordingly, in the circumstances, it was held that the suit filed by respondent No.1 / plaintiff was well within limitation.

12. The alleged Will is dated 17.05.1975 and is unregistered. The same was kept under wraps by appellant / defendant No. 1 for 26 years and was produced before the revenue authorities for the first time in 2001 when mutation of inheritance was sanctioned in his favour without notice to the legal heirs as admittedly the notice was sent at an address other than where respondent No. 1 / plaintiff and respondent Nos. 2 to 10 were residing. Besides, appellant / defendant No. 1 failed to explain the suspicious circumstances of all natural legal heirs having been excluded from succession and Will being in favour of a nephew in preference to the sons and daughters. Appellant / defendant No. 1 although alleged that Pritam Kaur was staying with him, failed to lead any evidence to said effect besides it does not stand to reason that in the presence of sons and daughters, a mother would reside with a nephew. The plea of limitation is meaning less in view of the judgments relied upon by the courts below as also in view of the fact that in the absence of adverse possession having been set up or for that matter evidence

of notice of the mutation proceedings having been given to the respondent No. 1/ plaintiff as well as respondent Nos. 2 to 10, limitation would not apply as in said case the legal heirs would have no knowledge of a cloud having been cast over their rights / title. Apart from the above none of the attesting witnesses or the scribe were examined nor was any evidence led of the attesting witnesses or the scribe being dead / not available nor was it proved that the signatures of at least one of the attesting witness as also of the executant were in their handwriting, therefore recourse to the provisions of Section 69 of the Evidence Act could not have been made. Decision in S.R. Shrinivasa's case (Supra) relied upon by learned counsel for the appellant /.defendant No. 1 does not in any way help the appellant defendant No. 1, instead covers the case squarely against the appellant / defendant No. 1 in view of the findings of the courts below and as noted in the preceding paragraphs. In the light of the position noted above, no question of law, much less substantial question of law arises for consideration by this Court. Accordingly, finding the appeal to be bereft of merit the same is dismissed in limine.

(B.S. Walia)
Judge

23.02.2023
rajesh

Whether speaking/ reasoned : Yes/No
Whether reportable : Yes/No