

per which, the plaintiffs as well as the defendant succeeded to the equal share in the estate left by Jawahara.

[3] Suit was contested by the defendant, who claimed that he is in possession of specific *kill*a numbers and is in possession of suit land to the extent of 1/4th share. Execution of Will as propounded by the plaintiffs was denied. On the basis of the pleadings, the following issues were framed:-

- “1. *Whether the plaintiffs are exclusive owners in possession of the suit land? OPP*
2. *Whether deceased Jawahara executed a valid will in favour of plaintiffs on 22.05.67 , if so, its effect? OPD*
3. *Whether the suit is within limitation? OPP*
4. *Whether the suit is not maintainable in the present form? OPD*
5. *Whether the plaintiffs have no locus standi to file the suit? OPD*
6. *Whether the plaintiffs have no locus standi to file the suit? OPD*
7. *Whether the suit has not been properly valued for the purposes of Court fees? OPD*
8. *Whether the plaint has not been signed in accordance with law? OPD*
9. *Whether the suit is barred provisions of Section 281(a) of Income Tax Act? OPD*
10. *Whether the suit is bad for mis-joinder of parties? OPD*
11. *Relief. ”*

[4] The trial Court upheld the Will in favour of the plaintiffs and decided issue No.2 in their favour and decreed the suit.

[5] In Appeal preferred by the defendant, lower Appellate Court reversed finding on issue No.2, holding that neither scribe nor the attesting

examined.

[6] Lower Appellate Court disbelieved Palu Singh, holding that he was living in a village situated at a distance of more than 40 kms away from the village of the parties and was a stranger to the family. Admittedly, Jawahara on the day he is alleged to have executed Will was about 80 years whereas Palu Singh (PW-1) in his testimony stated that the testator was aged about 40-50-60 years. The Will is an unregistered document but Palu Singh in his testimony claims that the Will was produced before the Tehsildar at about 12.00 noon and the same was read over by the Tehsildar, which all shows that Palu Singh was not present at the time Will was executed. The executant-Jawahara died in the year 1969 i.e. more than 1 year after the execution of the Will yet no effort was made to get the same registered. For 17 long years after Jawahara died in the year 1969, the Will never saw the light of the day. Mutation was sanctioned on the date of Jawahara mutating his estate equally amongst his sons on 28.08.1970 yet the plaintiffs despite having got numerous opportunities opted not to produce the Will for 17 long years.

[7] Mr. Mani Ram Verma, counsel for the appellants, is not in a position to dispute the aforesaid facts.

[8] Pure findings of fact have been recorded by the Courts below. Counsel for the appellants is not able to point out any evidence misread or ignored by courts below. Finding no perversity and keeping in view the scope of second appeal, this Court does not find any merit in the present

Reference can be made to *M/s Shivali Enterprises Vs. Smt. Godawari (Deceased) Thr. Lrs. & ors., AIR 2022 SC 4388*, observing as under :-

"14. This Court, in the case of Randhir Kaur v. Prithvi Pal Singh and Others (2019) 17 SCC 71, after considering the scope of interference under the old section 100 of the Civil Procedure Code, 1908 (for short "CPC") and Section 41 of the Punjab Act, has observed thus:

"15. A perusal of the aforesaid judgments would show that the jurisdiction in second appeal is not to interfere with the findings of fact on the ground that findings are erroneous, however, gross or inexcusable the error may seem to be. The findings of fact will also include the findings on the basis of documentary evidence. The jurisdiction to interfere in the second appeal is only where there is an error in law or procedure and not merely an error on a question of fact."

15. It could thus be seen that this Court has held that, even when a court exercises jurisdiction under Section 41 of the Punjab Act, it cannot interfere with the findings of fact in second appeal on the ground that the said findings are erroneous, howsoever gross or inexcusable the error may seem to be. It has been held that the findings of fact would also include the findings on the basis of documentary evidence. The jurisdiction under Section 41 of the Punjab Act would be available only when there is a substantial error or defect in the procedure provided by the CPC or by any other law for the time being in force.

16. A bench of three learned Judges of this Court, in a recent judgment in the case of Satyender and Others (supra), has observed thus:-

" 17. Be that as it may, though the requirement of formulation of a substantial question of law was not necessary, yet Section 41 of the Punjab Courts Act, requires that only such decisions are to be considered in second

appeal which are contrary to law or to some custom or usage having the force of law or the court below have failed to determine some material issue of law or custom or usage having the force of law. Therefore, what is important is still a "question of law". In other words, second appeal is not a forum where court has to re-examine or re-appreciate questions of fact settled by the Trial Court and the Appellate Court. The plaintiffs had claimed right over certain agricultural land and their case was that they have the right to be declared the owner of this property and the possession be handed over to the them, for the reasons that on this particular property defendants and their predecessors-in-interest were the tenants of the plaintiffs. Their case was that defendant No. 2 was their tenant who had sub-let the property in favour of his son, that is defendant No. 1 and therefore, the property should be reverted back to the plaintiffs and they should be declared the owner and should be given the possession of the property as well. Both the Trial Court as well as the First Appellate Court had held after evaluating the evidence placed by the plaintiffs that the defendant No. 2 and his brothers (who were not even made a party by the plaintiffs) were the tenants on the property and defendant No. 2 had not sub-let the property in favour of his son that is defendant No. 1 and the revenue entries being made in this regard in the year 1978 are wrong and without any basis as there was no order of any revenue authority for making such an entry. In short, the plaintiffs had failed to prove their case as owner of the land in dispute. Hence their case of declaration and possession was dismissed. The Second Appellate Court however, quite erroneously, and without any justification, gave an entirely new finding regarding two Killa Nos. 21//3/2 and 7//13 on which the plaintiffs claimed relief of declaration and possession, on the same grounds as raised by them for the other Killa Nos. The pleadings also show that the defendants had made a general denial of the plaintiffs' claim

for all the plots. Yet, the High Court held that since the defendants had not made any claim for plot nos. 21//3/2 and 7//13 and therefore by logic a decree of declaration of possession ought to have been given to the plaintiffs for these plots! This reasoning of the second Appellate Court is erroneous for the simple reason that the burden of proof was on the plaintiffs to prove their case, which they had failed. They have not been able to prove to the satisfaction of the Trial Court as well as the First Appellate Court about their claim of any kind over this property. Merely because the defendant did not raise a counter claim on this property it would not ipso facto mean that a decree ought to have been granted in favour of the plaintiffs. Plaintiffs have to prove their case on the strength of their evidence. For this reason, the reasoning given by the Second Appellate Court for decreeing the claim of the plaintiff for plot nos. 21//3/2 and 7//13 is incorrect and to that extent is liable to be set aside."

[emphasis supplied]

17. *It would thus be clear that this Court has held that, though it is not necessary to formulate a substantial question of law, the jurisdiction under Section 41 of the Punjab Act would permit only such decisions to be considered in second appeal which are contrary to law or to some custom or usage having the force of law, or when the courts below have failed to determine some material issue of law or custom or usage having the force of law. The Court held that second appeal is not a forum where the court is to re-examine or re-appreciate the question of fact settled by the trial court or the Appellate Court. It could thus clearly be seen that though in view of Section 41 of the Punjab Act, it is not necessary to frame a substantial question of law, the jurisdiction of the High Court under second appeal cannot be exercised for re-appreciation of evidence."*

[9] In view of the above, this Court does not find any reason to interfere in the well reasoned findings recorded by the lower Appellate Court

on issue No.2.

[10] In view of the above, regular second appeal is ordered to be

dismissed.

29.08.2024
'R. Sharma'

(PANKAJ JAIN)
JUDGE

Whether speaking/ reasoned
Whether reportable

:

Yes/No
Yes/No