(2006) 08 P&H CK 0193

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 2716 of 1999

Ram Saran	APPELLANT
Vs	
Deep Kumar and Others	RESPONDENT

Date of Decision: Aug. 11, 2006

Acts Referred:

- Registration Act, 1908 - Section 60
- Succession Act, 1925 - Section 63, 69

Citation: (2007) 148 PLR 733 : (2007) 1 RCR(Civil) 618

Hon'ble Judges: Mahesh Grover, J

Bench: Single Bench

Advocate: Anju Arora, for the Appellant; Avnish Mittal, for the Respondent

Final Decision: Dismissed

Judgement

Mahesh Grover, J.

A dis-satisfied plaintiff-appellant has filed the present Regular Second Appeal assailing the judgments and decrees dated 16.10.1996 and 9.11.1998 passed by Civil Judge (Junior Division), Jagadhri (hereinafter described as `the trial Court'') and Additional District Judge, Jagadhri (hereinafter referred to as `the lower Appellate Court''), respectively. A suit for declaration with consequential relief of permanent injunction was instituted by the appellant broadly on the averments that he and the respondents were descendants from a common ancestor, namely, Jeewana, who had five sons, i.e., Chauhal, Lakhu, Nawaja, Kabaj and Malji. All the five have since expired. Chhaju (respondent No. 3, who has since expired and is now represented by his legal representatives) is the son of Chauhal, whereas the appellant is the son of Surta son of Lakhu. Nawaja died leaving behind son-Suba. Smt. Multani (respondent No. 2) is the daughter of Nawaja and sister of said Suba. Kabaj left behind son-Rulia (respondent No. 4).

2. In question is the estate of Suba. According to the appellant, he and the respondents are Gujjars by caste and the main source of their livelihood is agriculture and they are governed by customary law prevailing in the States of Punjab and Haryana in the matter of alienation of the ancestral property. It was averred that the suit land is ancestral and the estate of Suba, who died on 16.11.1988 intestate leaving behind no issue, was liable to be succeeded by the appellant and respondent Nos. 2 to 4 being his only legal heirs. However, respondent No. 4 with an ulterior motive forged a Will allegedly having been executed by Suba in favour of respondent No. 1-Deep Kumar, (minor son of respondent No. 4) and laid a claim to the entire estate of deceased-Suba. It was alleged that Suba had not executed the alleged Will out of his own free volition being of unsound mind and a fraud was played upon him.

3. In their written statement, respondent Nos. 1, 2 and 4 admitted the factum of the parties being Gujjars by caste, but rest of the averments made by the appellant were denied. It was contended that Suba, out of love and affection and with his free will, executed a valid registered Will in favour of respondent No. 1. It was on the basis of this Will that respondent no.1 had succeeded to the share of Suba. It was further contended that all the co-sharers are in separate possession of their shares of the suit property for the last 50 years and that the appellant is not in possession of any portion thereof.

4. Respondent No. 3-Chhaju (since deceased) filed a separate written statement supporting the case of the appellant. Broadly on the above averments, the suit proceeded and the trial Court framed the following issues:

1. Whether the will dated 26.9.94 and mutation Nos. 161 and 108 recorded on the basis of will executed by the deceased Suba in favour of defendant No. 1 are illegal, ineffective, non-existent, non est, fraudulent, inoperative and not binding on the rights of the plaintiff? OPP

2. Whether the plaintiff is entitled for the relief of injunction as prayed for? OPP

3. Whether the plaintiff has no locus standi to file the present suit? OPD

4. Whether the suit is not maintainable in the present form? OPD

5. Whether the suit is false, frivolous and baseless, if so its effect? OPD

6. Relief.

5. After perusing the evidence on record, the trial Court proceeded to decide issue Nos. 1 and 2 together and held that the Will in question was a valid Will and that the custom as pleaded by the appellant had not been proved and that the appellant had no locus standi to file the suit. Accordingly, the suit was dismissed.

6. In appeal filed by the appellant, the lower Appellate Court affirmed the findings recorded by the trial Court. This has given rise to the present Regular Second Appeal

having been filed by the appellant. Mrs. Anju Arora, learned Counsel for the appellant argued that there were specific pleadings to the effect that the parties are Gujjars by caste and are governed by custom in the matter of alienation of the property, but no issue was framed by the trial Court on this aspect of the matter and, therefore, the judgments and decrees of the Courts below are liable to be set aside being erroneous. In support of this contention, she relied upon the judgment reported as 1993 (2) R.R.R. 600 (P.&H.) Bachna V ersus Sadhu (deceased) by Lrs. Learned Counsel further contended that the Will in question was not free from suspicious circumstances and, therefore, it could not have been used for depriving the other heirs of deceased-Suba from inheriting his estate which was ancestral. She also contended that one of the attesting witnesses of the Will in question, namely, DW4-Kitabu has not proved the execution of the will and, therefore, the same cannot be taken in to consideration. To strengthen her contention, she relied upon a judgment reported as 1996 (2) C C C 188 (P.&H.) - Deepa v. Shrimati Bhani.

7. On the other hand, Shri Avnish Mittal, learned Counsel for respondent Nos. 1 and 2 contended that both the Courts have recorded a concurrent finding that the Will in question was a valid registered Will having been proved on record and fraud, as pleaded by the appellant, was not established. He submitted that even the custom, which was pleaded, was not proved and further the status of the property was found to be nonancestral by both the Courts. Learned Counsel argued that in a Regular Second Appeal, the concurrent findings recorded by the Courts below ought not to be interfered with.

8. I have thoughtfully considered the rival contentions. A perusal of the record shows that the execution of Will Exhibit D1 by Suba in favour of respondent No. 1 was duly established. The Will is a registered document. Ram Singh, ex-Tehsildar, who was Sub Registrar at the relevant time and who had signed the endorsement,, appeared as DW6 and deposed that testator-Suba had presented the Will in question before him for registration which was read over to him and he had thumb-marked the same. He further stated that the witnesses to the Will also signed in front of him. Sunehera Ram-DW5, one of the attesting witnesses, proved the execution of the Will in question and testified that the same was written by him and that he had signed the same. In view of this, the validity of the Will in question was conclusively established. The plea of the appellant regarding the testator-Suba being of unsound mind was not supported by any evidence on record and, therefore, was rightly disbelieved by the Courts below. The contention of the learned Counsel for the appellant that the execution of the Will in question cannot be treated to have been proved as one of the attesting witnesses, namely, DW4-Kitabu has not deposed to that effect does not have any merit. In a judgment reported as 1993 P.L.J. 801 Lila Dhar v. Smt. Badhu and Anr., it was held as under:

(a) `Denial of attestation of Will by attesting witness - Mere denial by itself not negation of due execution of Will -Where attesting witnesses or some of them prove

hostile or unreliable. Court not powerless to declare in favour of Will -succession Act, Section 63.

(b) Succession Act, Section 69- Sound mind -Certificate endorsed by Registering Officer on the document- Admissible to prove that executant of sound mind.

(c) Succession Act, Section 63- Attestation by Sub-Registrar - Testator put his thumb impression in the presence of Sub Registrar, who also signed endorsement -Sub Registrar to be taken as attesting witness - Contents of endorsement admissible in evidence and shall have to be taken as true -Registration Act, Section 60.

9. Even under the provisions of Section 60 of the Registration Act, 1908, it is the duty of the Registering Officer to see that proper persons are present, competent to act and identified to his satisfaction, before issuing the necessary orders. In the instant case, the Sub Registrar has testified by stepping into the witness box as DW6 that the parties had signed/ thumb marked the Will in his presence and that the contents thereof were read over before doing so. In view of this, it can conclusively be held that the Will in question was a valid one.

10. The next question which is to be determined is as to whether the parties are governed by custom and whether the suit property is ancestral. Before venturing to answer the question of the parties being governed by custom, it would be appropriate to find out as to what is the nature of the property in dispute. No evidence worth-the-name was produced by the appellant to prove that the suit property was ancestral in the hands of deceased-Suba. In the jamabandis for the years 1977-78 (Exhibit P1) and 1983-84 (Exhibit P2) produced by the appellant, the name of Subadeceased is shown in the column of owner qua the land in dispute. Exhibit P3 is the copy of pedigree table which also does not, in any way, reveal the nature of the property in the hands of Suba. In view of the fact that there was no evidence to support the plea as set up by the appellant qua the ancestral nature of the suit property, it cannot be held that the suit property was ancestral.

11. The suit property not having been shown to be ancestral, the plea of the appellant that the parties were governed by custom being Gujjars would have no relevance as the case which was sought to be put up by him was that the property was ancestral and they being Gujjars were governed by custom in the matter of alienation of such ancestral property. Since the nature of the suit property being ancestral has not been established, the plea of custom becomes meaningless.

12. Even otherwise, the custom which was pleaded, was not proved by the appellant by any cogent evidence. The custom is not only to be pleaded, but has to be established. There has to be positive evidence of custom which has to be brought on record. The custom varies from place to place. Gujjars in Punjab may not be governed by the same custom as in Haryana. It even varies from district to district. Therefore, it was imperative upon the appellant to produce evidence to that effect. In a judgment reported as AIR 1935 Lah 228 Allaha Bakhsh and Ors. v. Pt. Sant Ram

and Ors., it was held as under:

Gujjars are a dominant agricultural tribe in the Punjab. Their main occupation is selling milk. In some districts they hold land and have been notified as an agricultural tribe. In Lahore District they are not even notified as an agricultural tribe. There is really no presumption that Gujjars follow the customs of the dominant agricultural tribes of Central Punjab.

13. In the judgment reported as Thakore Shri Vinayasinhji (Dead) by Lrs Vs. Kumar Shri Natwarsinhji and Others, , their Lordships of the Supreme Court observed as under:

Hindu Law- Impartible estate- Alienation- Family custom of inalienability of estate- Proof- There must be some positive evidence of such custom- Mere absence of any instance of alienation would not be any evidence of custom.

14. The contention of the learned Counsel for the appellant that since no issue was framed on the point of custom, a prejudice has been caused to the appellant, has no substance. The factum of custom was duly pleaded by the appellant and the parties could have very well asked for striking an issue on this aspect. That apart, both the Courts below have dealt with this point appropriately and, therefore, it cannot be said that the appellant was prejudiced on this count. Since there was no evidence on record to prove the custom, the judgment relied upon by the learned Counsel for the appellant in Bachna v. Sadhu (deceased) by Lrs. (supra) is of no avail.

15. For the foregoing reasons, there is no merit in the appeal and the same is dismissed.