(2006) 01 P&H CK 0165

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 2694 of 2005

Kapil Dev and Another		APPELLANT
	Vs	
Smt. Surinder @ Bimla Kaul and Others		RESPONDENT

Date of Decision: Jan. 6, 2006

Acts Referred:

- Evidence Act, 1872 - Section 68, 69

Citation: (2006) 142 PLR 625 : (2006) 2 RCR(Civil) 65

Hon'ble Judges: Satish Kumar Mittal, J

Bench: Single Bench

Advocate: R.K. Battas, for the Appellant;

Final Decision: Dismissed

Judgement

Satish Kumar Mittal, J.
This is defendant''s Regular Second Appeal. Though the suit of the plaintiff Smt. Surinder alias Bimal Kaul for joint possession of the land in dispute and permanent injunction restraining the defendants from alienating the share of the plaintiff was initially dismissed by the trial Court but the same was decreed by the first Appellate Court in her favour.

2. Undisputedly, one Malhar son of Nihal was the owner of the land in question. The plaintiff is the granddaughter of said Malhar. Her father predeceased his father Malhar. The land in question was got mutated by Ram Dass and Sohan Lal, predecessors of the defendants on the basis of the will dated 19.11.1963 alleged to have been executed by Malhar in favour of Ram Dass and Sohan Lal. After attaining the majority, the plaintiff filed the instant suit which was contested by the defendants on various grounds including that the plaintiff was not the daughter of Mool Raj, pre-deceased son of Malhar; the suit is barred by limitation; the suit in the present form is not maintainable; the will dated 19.11.1963 was validly executed by

Malhar in favour of Sohan Lal and Ram Dass.

3. The trial Court found that the plaintiff was the daughter of Mool Raj and being a legal heir, she was entitled to have a share in the land in question; the will dated 19.11.1963 (Ex.Dl) has not been proved and issue No. 2 was decided against the defendants. However, the suit of the plaintiff for joint possession was dismissed by the trial Court on the ground of limitation. The said judgment of the trial Court was set aside by the first Appellate Court vide judgment dated 22.3.1999, and the suit of the plaintiff was decreed while holding that the same was filed within limitation and the plaintiff was entitled to be declared as joint possession of the land in question. The findings on issues No.4 and 5 recorded by the trial Court were reversed.

4. Feeling aggrieved against the said judgment, the defendants filed the second appeal which was allowed by this Court vide order dated 8.11.2004 and the matter was remanded for fresh decision on the point of validity of the will as the same was not properly adjudicated by discussing the evidence in that behalf. The first Appellate Court again decided issue No.2 regarding validity of the will against the defendants. Hence, this Regular Second Appeal by the defendants.

5. I have heard the counsel for the appellant and perused the impugned judgment. I do not find any merit in the instant appeal. The first Appellate Court has held that execution of the Will dated 19.11.1963 ha not been proved. Admittedly, in this case neither the scribe nor any of the attesting witness has been examined by the defendants to prove the will as per the requirement of Section 68 of the Indian Evidence Act. In this case, none of the attesting witness of the will is alive. It has been observed by the first Appellate Court that in that situation the will could have been proved as per the requirement of Section 69 of the Indian Evidence Act in which the attestation of one of attesting witnesses, had to be shown to be that of the attesting witness and the thumb impression on the will had to be shown to be of the executant. The first Appellate Court has found as a fact that neither any attesting witness nor the scribe of the will nor the thumb impression of the executant of the will has been proved. Even no evidence regarding the mental state of the executant Malhar at the time of execution of the will has been proved. It has been further observed that the defendants have also not dispel the suspicious circumstances attached to the execution of the Will. The plaintiff was the grand daughter of the executant. Her name has not been mentioned at all in the alleged Will. Taking all these evidence into consideration, a finding of fact was recorded on issue No.2 that execution of the Will has not been proved by the defendants-appellants.

6. Counsel for the appellants has argued that the Will in question was a registered will and being a 30 years old document, its due execution must be presumed; and secondly the application filed by the defendants for leading additional evidence at the appellate stage to prove the signatures of one of the attesting witnesses in the will has been wrongly declined.

7. Both these contentions were also raised before the first Appellate Court and have been duly considered and rejected by the firs Appellate Court. The contention regarding additional evidence has been rejected on the ground that leading of the said evidence will not improve the case of the defendants because they have not led any evidence, oral or documentary, to prove the thumb impression of the executant on the alleged will (Ex.Dl), If the said thumb impression has not been proved, then leading the additional evidence to prove the signatures of one of the attesting witnesses on the alleged will with the help of another admitted signatures is of no consequence. Regarding the second contention, it was rightly held that due execution of the will cannot be presumed merely because the will is an old document. I do not find any illegality or perversity in the finding recorded by the first Appellate Court. In my opinion, no substantial question of law is arising in this appeal.

8. In view of the aforesaid, I find no merit in the appeal and the same hereby dismissed.