

(2003) 10 P&H CK 0131

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Miscellaneous No. 773-C of 1981 and Regular Second Appeal No. 1887 of 1980

Krishna Devi and Others

APPELLANT

Vs

Amarjit and Others

RESPONDENT

Date of Decision: Oct. 17, 2003

Citation: (2004) 2 CivCC 593 : (2004) 2 RCR(Civil) 696

Hon'ble Judges: Satish Kumar Mittal, J

Bench: Single Bench

Advocate: R.K. Aggarwal, for the Appellant; K.S. Grewal and Mr. P.S. Baath, for the Respondent

Final Decision: Dismissed

Judgement

Satish Kumar Mittal, J.

This Regular Second Appeal has been filed by the defendants against the judgment and decree passed by both the Courts below vide which the suit of the plaintiffs (respondent Nos. 1 to 3 herein) for declaration as well as possession has been decreed.

2.Respondent Nos. 1 to 3 filed the suit in question seeking declaration to the effect that they are the mortgagees in possession of the land measuring 6 kanals 15 marlas being 1/3rd share of 20 kanals 4 marlas situated in village Shamspur, Tehsil Samrala, District Ludhiana. They also filed a suit for possession regarding the land measuring 7 kanals 2 marlas being half share of the lands measuring 14 kanals 4 marlas situated in the same village. They claimed the aforesaid two pieces of land which belonged to one Charanji Lal on the basis of the will dated 29.7.1970 (Ex.PI), which was executed by the said Charanji Lal in their favour. It was further pleaded that the mutation of the aforesaid land was illegality got sanctioned by Smt.Krishna Devi (appellant No.1 herein) on the basis of the will date 10.10.1970 alleged to have been executed in her favour by the said Charanji Lal; and subsequently she mortgaged the land measuring 7 kanals 2 marlas in favour of appellant Nos.2 to 4,

though she was not having right to do so. Hence, the aforesaid suit was filed.

3. The appellants (defendant Nos. 1, 12, 13 and 14) only contested the aforesaid suit. It was contended that the mutation in favour of appellant-Smt.Krishna Devi was rightly sanctioned on the basis of the will dated 10.10.1970 of Charanji Lal, who was her father. The said will was contested by the plaintiff-respondents before the revenue Court, but in spite of that the mutation was sanctioned in favour of the appellant-Smt.Krishna Devi by the revenue Court and the appeal preferred by the plaintiffs against the said order was dismissed by the Collector, Ludhiana. The will set up by the plaintiffs in their favour was denied by the defendants. It was further pleaded that appellant No. 1 was the only daughter of Charanji Lal and there was no occasion with Charanji Lal to divert his daughter from the succession. Therefore, the alleged will dated 29.7.1970 (Ex.PI) in favour of the plaintiffs was a fabricated document. It was also alleged that the plaintiffs had illegally taken possession of the land measuring 6 kanals 15 marlas which was mortgaged with Charanji Lal.

4. On the basis of the pleadings of the parties, the following issues were framed by the trial Court-

1. Whether the suit is maintainable against the defendant No. 1 ? OPP

2. Whether Charanji Lal (deceased) executed a valid will dated 29.7.70 in favour of the plaintiffs? OPP

3. Whether Charanji Lal (deceased) executed a valid will in favour of the defendant No. 1. If so, its date, terms and effect? OPD 1.

4. Whether the plaintiffs are entitled to the declaration and possession as prayed for? OPP

5. Relief.

5. All these aforesaid issues have been decided against the appellants by both the Courts below. Out of these five issues, two issues i.e. issue Nos.2 and 3 were material on which it has been concurrently held by both the Courts below that the will dated 29.7.1970 (Ex.PI) executed by Charanji Lal in favour of the plaintiffs was duly proved whereas the alleged subsequent will dated 10.10.1970 alleged to have been executed by the said Charanji Lal in favour of defendant No. 1 was held not to be proved. It was found by both the Courts below that the will dated 29.7.1970 (Ex.PI) was not surrounded by any suspicious circumstances and its execution was duly proved. It was also held that no evidence was led by the defendants to establish that the said will Ex.PI was a forged document. Regarding the subsequent will set up by defendant No.1, it was held that neither the original will was produced on the record nor an attempt was made to prove the said will by leading secondary evidence. Even the witnesses, who alleged to be the scribe and attesting witness of the said will, have not established the due execution of the said will. It has been further found that even the appellants No. 1 did not appear in the witness box in

support of her claim. Only her attorney, namely, Kaka Singh (DW4) appeared as a witness who produced the will dated 10.10.1970 as Mark "A" and stated that the same was executed by Charanji Lal infavour of the appellant-Smt. Krishna Devi. It was held that neither the original will was produced nor its loss was established. While recording the aforesaid findings, the suit of the plaintiffs was decreed by both the Courts below.

6. The learned counsel for the appellants raised threefold submissions before me. Firstly that the execution of the will dated 29.7.1970 (Ex.PI) was not proved on record and the finding recorded by both the Courts below on this aspect is illegal and perverse. Secondly, the will dated 29.7.1970 (Ex.PI) was surrounded by suspicious circumstances and the Courts below have not properly considered and appreciated those suspicious circumstances while considering the aspect of the validity of the said will. Thirdly, the findings recorded by both the Courts below on issue No.3 regarding the execution of the subsequent will dated 10.10.1970 are not sustainable. Even if defendant No.1 was not able to produce on record the original will or prove the said will by leading the secondary evidence, he can now be allowed to prove the said will by leading additional evidence, and in that regard the appellants have filed an application under Order 41 Rule 27 C.P.C. along with this appeal. The same should be allowed and the appellants be given an opportunity to prove the subsequent will by leading additional evidence.

7. While opposing the aforesaid contention, learned counsel for the respondents argued that both the Courts below have recorded concurrent findings of facts on both the material issues, i.e. issues No.2 and 3, which do not require any interference in this Regular Second Appeal. He submitted that no substantial question is arising in this appeal nor any such question has been formulated by the appellants. He further submitted that on issue No.2, the will (Ex.PI) set up by the plaintiffs has been duly proved both in its execution and free from any suspicious circumstances. On the other hand, the will set up by the defendant-appellant No.1 has not even been produced before the Courts below. Neither its existence nor its execution was established. Therefore, he prays that there is no substance in the appeal of the appellants and the same is liable to be dismissed.

8. After hearing the arguments of the learned counsel for both the parties and perusing the record of the case, I do not find any substance in any of the arguments raised by the learned counsel for the appellants. Both the Courts below, on the basis of the statements of Rajwant Singh (PW1), Sarpanch, who had attested the will Ex.PI, Faquir Chand (PW2), who was Secretary of the village Panchayat, who had scribed the will, have held that the execution of the will dated Ex.PI was duly established. This finding of the Courts below is a finding of fact. Even, as per the assertion of defendant No.1 that in the subsequent will a reference was made about the first will (Ex.PI), also establishes the execution of the first will. Further, the appellant-Smt.Krishna Devi even did not appear in the witness box in support of

here assertion that the will dated 29.7.1970 (Ex.PI) was never executed. In my opinion, she cannot dispute the execution of the first will, particularly when in the will set up by her a reference was made to the first will saying that the same was got executed from the testator by force. If that was the position, defendant No. 1 should have established the fact that the first will was got executed from the testator by force or by playing the fraud. But no evidence was led by the appellant No.1 in this regard. Therefore, I do not find any illegality or irregularity in the findings recorded by both the Courts below regarding execution of the first will.

9. I also do not find any illegality in the finding recorded by both the Courts below that the will dated 29.7.1970 (Ex.PI) was not surrounded by any suspicious circumstances. Learned counsel for the appellants referred to certain circumstances, which were also pleaded before the first Appellate Court, to canvass that the will was surrounded by suspicious circumstances. In this regard, he referred that the appellant-Smt.Krishna Devi was the only daughter of Charanji Lal and there was no reason to exclude her, who was the natural heir of the testator; the testator was bed ridden at the time of execution of the will (Ex.PI); the said will was unregistered; he died at the house of defendant No. 1; the beneficiary of the will took active part in the execution of the will and even one of the plaintiffs, who appeared as PW3 denied that Charanji Lal was having any son or daughter. In the will (Ex.PI), which was scribed in the proceeding book of the Gram Panchayat, it was categorically mentioned that the only daughter of the testator was happily married and a huge amount was spent on her marriage. It was also mentioned in the will that the plaintiffs were grandsons of his real brother Ram Kishan and they were rendering service to him, therefore, the will was executed in their favour. The aforesaid fact shows the mind of the testator. Merely because appellant No.1 was his daughter does not establish that the will (Ex.PI) was surrounded by suspicious circumstances when the execution of the will have been duly established. The other circumstances as pleaded by the appellants also do not establish any circumstances which create any suspicious in the mind of the Court regarding the genuineness of the will (Ex.PI). I do not find any illegality in the findings recorded by the Courts below on this aspect of the matter.

10. The third contention raised by the learned counsel for the appellants is also without any substance. Undisputedly, the original will set up by appellant No.1, in her favour was not produced on record nor any application to prove the said will by way of secondary evidence was filed before the Courts-below. Even, appellant No.1 did not appear in the witness box in support of her claim, for which adverse inference can be drawn against her in view of the decisions rendered by the Hon"ble Supreme Court in [Vidhyadhar Vs. Manikrao and Another](#), and [Iswar Bhai C. Patel @ Bachu Bhai Patel Vs. Harihar Behera and Another](#), . The witness examined by appellant No.1 in her favour did not support her case. Mangat Rai (DW1), who was the scribe of the alleged will dated 10.10.1970 did not produce the register of the relevant date. Rather, he had produced the register of some different date i.e.

4.11.1970. Even, Jagat Singh (DW2), who was the attesting witness, could not tell on what date the said will was executed. Both the Courts below, after considering all these evidence available on the record, have recorded a pure finding of fact on issue No.3 which does not require any interference in this Regular Second Appeal.

I also do not find any reason to allow the application filed by the appellants under Order 41 Rule 27 C.P.C. for additional evidence to prove the alleged will dated 10.10.1970. Since this application filed by the appellant does not fulfil the necessary ingredients prescribed for leading additional evidence under Order 41 Rule 27 C.P.C, this application cannot be allowed at the belated stage. Hence, the application under Order 41 Rule 27 C.P.C. is dismissed.

In view of the aforesaid, I find no merit in this appeal and the same is hereby dismissed with no order as to costs.