

Pooran Singh Vs. Naraini and ors.

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Court : Allahabad

Decided On : Jul-29-2005

Reported in : 2006(1)AWC351

Judge : S.N. Srivastava, J.

Acts : [Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950](#) - Sections 176 and 229B; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11 - Order 41, Rule 27

Appeal No. : C.M.W.P. No. 30262 of 2002

Appellant : Pooran Singh

Respondent : Naraini and ors.

Advocate for Def. : M.D. Singh 'Shekhar' and ;Rajendra Kumar, Advs. and ;S.C.

Advocate for Pet/Ap. : J.J. Munir, Adv.

Disposition : Petition dismissed

Judgement :

S.N. Srivastava, J.

1. This writ petition is directed against the judgment and decree of trial court dated 1.6.1989 dismissing Suit No. 10/88-89 of petitioner for declaration of bhumidhari

rights and judgment and decree of the first appellate court as well as second appellate court affirming judgment and decree of trial court.

2. The property in dispute belonged to Bhojraj. After the death of Bhojraj petitioner instituted a Suit under Section 229B/176 of the U.P.Z.A. and L.R. Act for declaration of bhumidhari rights on the ground that Bhojraj, who died on 17.11.1976, had already executed a registered Will on 3.7.1976 in favour of plaintiff (petitioner herein). It was also averred in the plaint that as defendants-Naraini and Mulo Devi, daughters of Bhojraj, got their names entered in the revenue records on the basis of undisputed successions, hence the suit.

3. Defendants (respondents-herein) denied plaint allegations and execution of Will relied upon by the plaintiff. They pleaded that they being daughters of Bhojraj inherited his property after his death.

4. Trial court disbelieved plaintiffs case on the ground that execution of Will is not proved from the evidence on record. First appellate court and second appellate court also dismissed the suit by affirming trial court's judgment and decree.

5. Heard Sri Hemant Kumar, holding brief of Sri J. J. Munir, learned Counsel for the petitioner and Sri M. D. Singh Shekhar, learned Counsel for contesting-respondents.

6. It is urged by the learned Counsel for the petitioner that Suit No. 2/95-96, Puran Singh v. Vidya Devi and Ors., instituted by the plaintiff-petitioner for declaration of title and dispossession of Vidya Devi and others relying upon same Will dated 3.7.1976 was decreed on 29.6.1996 which became final and operates as res judicata, as sale deed executed by Smt. Naraini and Smt. Mulo Devi in favour of Smt. Vidya Devi and others was the subject-matter of said Suit and defendants of present suit were parties to that Suit also, hence decree dated 29.6.1996 passed by the Sub-Divisional Officer, Sadar Agra in aforesaid suit has force of res judicata and is binding between the parties. Learned Counsel for the petitioner further urged that during pendency of the proceedings in second appeal one of the attesting witnesses Shyam Babu Sharma filed an affidavit along with an application under Order XLI, Rule 27 of the C.P.C. by which execution of Will was

proved, but the lower appellate court illegally refused to consider this affidavit. It was further urged that it was a registered Will and as such the natural heirs will not succeed the property in view of the Will.

7. In reply to the same, learned Counsel for the opposite party urged that the Will relied upon by petitioner was not proved by attesting witnesses and as such the judgment and decree of the courts below was passed in accordance with law.

8. Considered the arguments of learned Counsel for the parties and also carefully gone through the entire record.

9. All the courts below have recorded a finding that execution of Will in favour of plaintiff was not proved by examining attesting witnesses. From the record also it transpires that execution and attestation of Will in question was not proved and suit was rightly dismissed by the courts below. It is also clear from the record that attesting witnesses were alive, but defendant did not summon to examine them in the trial court. Finding recorded by the courts below that execution of Will relied upon by the plaintiff was not proved does not suffer from any error of law. No material was brought to the notice of the Court also to show any perversity or infirmity in the finding.

10. So far as the ex parte decree passed in Suit No. 2/95-96 against the transferee Smt. Vidya Devi and others during pendency of Appeal No. 54/89 is concerned, this ex parte decree also does not help petitioner in view of the fact that Suit No. 10/88-89 was instituted in the year 1989 and the same was dismissed on 1.6.1989 on merits and the judgment and decree of trial court was affirmed by the first appellate court and second appellate court.

11. The principle of res judicata under Section 11 of the C.P.C. is not available to petitioner, as instant case was former suit decided prior in time to the subsequent suit.

12. Section 11 of the C.P.C. is being quoted below for ready reference :

11. Res Judicata.--No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former

suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I. -- The expression 'former suit' shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.'

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13. From perusal of above, it is clear that the subsequent suit was instituted during pendency of the appeal. As Suit No. 10/88-89 was a former suit which was decided by the trial court on 1.6.1989 prior to institution of subsequent suit (No. 2/95-96) and the judgment and decree passed in former suit was also affirmed by all other courts below, hence the ex parte judgment and decree of subsequent Suit No. 2/95-96 will not be a res judicata in former Suit No. 10/88-89 which was instituted and decided prior to institution of subsequent suit.

14. The affidavit allegedly filed by one of the attesting witnesses before the second appeal court was rightly rejected and was not admitted as additional evidence by second appellate court, as petitioner had full opportunity to summon and examine the attesting witnesses of the Will before the trial court which he did not avail. The filing of an affidavit by an attesting witness at second appellate stage as additional evidence was rightly not admitted on record by the second appellate court, as none of ingredients of Order XLI, Rule 27 of the C.P.C. were attracted.

15. As attestation and execution of Will was not proved by the plaintiff-petitioner, suit was rightly dismissed by all the courts below. There is no perversity or error of law in any of the impugned judgments of the courts below. No other point was pressed before the Court by the learned Counsel for the petitioner.

16. Petition lacks merit and is dismissed. No order as to cost.