

Smt. Ram Devi and ors. Vs. Jagdish Chander

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Court : Punjab and Haryana

Decided On : Feb-01-1994

Reported in : (1994)107PLR175

Judge : V.K. Bali, J.

Acts : [Evidence Act, 1872](#) - Sections 65; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 41, Rule 27

Appeal No. : Regular Second Appeal No. 1912 of 1993 and Civil Misc. No. 4304-C-93

Appellant : Smt. Ram Devi and ors.

Respondent : Jagdish Chander

Advocate for Def. : R.L. Gupta, Adv.

Advocate for Pet/Ap. : C.B. Goel and; Anil Khetarpal, Advs.

Disposition : Application allowed

Judgement :

V.K. Bali, J.

1. During the pendency of this Regular Second Appeal which arises from judgment and decree passed by the trial Court decreeing the suit of plaintiff Jagdish

Chander and so confirmed by the first Appellant Court, this application Under Section 65 of the Indian Evidence Act for permission to lead secondary evidence so as to prove the will set up in the written statement has been filed. Notice of this application was given to plaintiff-respondent, who has filed reply and opposed the prayer contained in the application.

2. Before the plea raised by Mr. C.B. Goel, Advocate assisted by Mr. Anil Khetarpal, Advocate, learned counsel for the applicant for allowing the application aforesaid is dealt with, it will be useful to trace briefly the facts of the case. Jagdish Kumar @ Jagdish Chander respondent (here-in-after to be referred as plaintiff) filed suit for declaration. The burden of his plaint was that he, Satish Kumar and Wazir Chand sons of Shri Pokhar Dass were three brothers. Wazir Chand died leaving behind his widow, Ram Devi, son of Par-veen Kumar and three daughters, Sunita Rani, Narbta Rani and Veena Rani. Pokhar Dass was owner of agricultural land comprised in Khewat No. 469/443, Khatoni No. 1000, fully detailed in the plaint. He was owner of some other property as well which too has been described in the plaint. It was pleaded that the property was ancestral qua him and defendants and there used to be daily disputes with regard to management and control of the property. In order to avoid such disputes, a family settlement cum arrangement was arrived at by convening family panchayat consisting of family friends, common relations and other respectables of the village in December, 1967. As a result of the mutual family arrangement, plaintiff was declared to be owner in possession of land described in Khewat No. 469/443, Khatoni No. 1000, Rect. No. 91, Khasra Nos. 1/2, 9/2, 10, 11, 12 and Rect. No. 92, Khasra Nos. 6, kitta 6, total land measuring 46 kanajs 3 marlas. Even since then he was in actual physical possession of the suit land as owner. Defendant No. 1 and predecessor-in-interest of defendant Nos. 2 to 6 colluded with revenue officials and got entered the name of plaintiff as tenant in the revenue record and themselves as owners. A mutation came about in collusion with the revenue officials wherein the name of plaintiff was shown as tenant and that of defendants as owners. The revenue entries that came into existence in view of the said mutation, thus, became subject matter of challenge in the civil Court. Defendants contested the suit denying family settlement as sought to be made out by the plaintiff and also pleaded existence of will by virtue of which the land, subject matter of dispute, was bequeathed in

favour of two brothers, namely, Wazir Chand and Satish Kumar in equal shares by their father, Pokhar Dass. It is pleaded that mutation was sanctioned on the basis of will executed in the very presence of plaintiff. He could not, thus, challenge the same after time lag of 15 years. It is further pleaded that Pokhar Dass had inherited 10-1/2 acres of land from his father. Thereafter, he purchased 21 acres of land from third person, half of which was transferred by him in favour of his son, Jagdish Chand-plaintiff by a separate sale deed. At that time defendant-brothers, namely, Satish Kumar and Wazir Chand were minors. This arrangement was done with an understanding that plaintiff would be owner of 10-1/2 acres of land and other 10 1/2 acres of land which he purchased in his own name and the one which he inherited from his father would be given to brother-defendants in equal shares and in that manner all the brothers would be owners of 10-1/2 acres of land. Before his death, Pokhar Dass had executed a will in favour of his two sons. As brother-defendants, namely, Wazir Chand and Satish Kumar were minors, plaintiff presented the said will before the revenue officers himself. The mutation was attested in favour of Satish Kumar and Wazir Chand. The trial Court, on the contentions raised by the parties, as noticed above, framed the following issues:-

- '1. Whether the plaintiff is owner in possession of the suit land OPP.
2. Whether the suit is not maintainable in the present form? OPD.
3. Whether the suit is bad for non-joinder and mis-joinder of parties? OPD.
4. Whether the plaintiff is estopped by his own act and conduct from filing the present suit? OPD.
5. Whether the suit is time barred? OPD.
6. Whether the plaint has not been properly verified, if so, to what effect? OPD.
7. Whether the suit has not been properly valued for the purposes of court fee and jurisdiction? OPD.
8. Relief.'

After resultant trial, the suit instituted by plaintiff was decreed. The appellants seriously contested the issue of family arrangement as alleged by the plaintiff and the first appellate Court while dealing with the appeal of the appellants came to the conclusion that the plaintiffs case with regard to family settlement had not been proved by him. However, the suit was still decreed and appeal preferred by appellants was dismissed on the ground that what could not be proved by plaintiff was proved by defendants as they admitted the alleged family arrangement in their written statement. The contents opinion of the Appellate Court, enough to prove family arrangement as alleged by plaintiff. It would be better to reproduce paragraph 3 of the written statement for appreciating the controversy in issue:-

'Thereafter he purchased 21 acres of land from third person out of which he got registered sale deed in favour of his elder son Jagdish plaintiff and at that time his two sons, namely, Satish Kumar and Wazir Chand were minors. So, rest of the land he got executed in his own favour with the understanding that the plaintiff has got his total share at that very time and rest of the land i.e. ten and half acres already owned by him and ten and half acres of land purchased by him for another two sons, so that all the three sons should get property in equal shares.'

Perusal of paragraph 3, reproduced above, would manifest beyond doubt that it was entirely different kind of arrangement that was pleaded in the written statement. As mentioned above, the case of the appellants was that Pokhar Dass had inherited 10-1/2 acres of land and had purchased 21 acres of land. Sale deed with regard to 10-1/2 acres of land was registered in his name whereas other 10-1/2 acres of land was purchased in the name of plaintiff. It was nowhere admitted by the appellants in their written statement that there was any family arrangement with regard to land in dispute. The first Appellate Court also upheld the family arrangement as pleaded by the plaintiff on the ground that he (plaintiff) was in possession for a long time and he was recorded to be in possession being tenant without any payment of rent. This is again complete misreading of documentary evidence and non-appreciation of the controversy in its correct prospective. The revenue records clearly record the appellants to be owners and the basis of their ownership is the will executed by Pokhar Dass. Obviously, the appellants, who are younger brothers of plaintiff, were not in possession as the land was managed by

plaintiff and in these circumstances he could only be recorded in possession without payment of rent on account of his being brother. No conclusion of family arrangement could, thus, be arrived at from the entries recorded in the revenue records.

4. Mr. Gupta, learned counsel for the plaintiff, however, contends that even if the family settlement was not proved, the will having been discarded by both the courts below, the property owned by Pokhar Dass would go by natural succession and there being three brothers, each one of them would inherit seven acres of land. Insofar as other 10-1/2 acres of land is concerned, the same was purchased by him as reflected in the sale deed, contends the learned counsel.

5. Confronted with this situation, appellants filed the present application Under Section 65 of the Indian Evidence Act for permission to lead secondary evidence so as to prove the will said to have been executed by their father-Pokhar Dass. It requires to be mentioned here that no specific issue was framed with regard to existence of will. However, after returning a finding that by virtue of family arrangement plaintiff had got the property in dispute to the exclusion of the defendants, the suit was decreed. The trial Court discarded the will by observing in paragraph 8 of its judgment that the will had not been produced on records; there were contradictions regarding written will in the mutation and there was no mention that the natural heirs of Pokhar Dass were debarred. All these facts, in view of the trial Court, created suspicion execution regarding execution validity of the will. When the matter came up to be disposed of by the first Appellate Court in an appeal preferred by the defendants, on the question of will, the same was discarded not on the grounds given by the trial Court but instead it was said that there could not be an oral will. The relevant part dealing with the Will reads thus:-

'It shows that mutation was being decided in the village Nissing in the presence of Mangal Sain, member panchayat, Smt. Jaggo Devi widow of Pokhar Dass, Jagdish son of Pokhar Dass and Bal Kishan attorney of Smt. Tara Wanti and Satwanti daughters of the deceased. It further shows that all these persons are present and they admit the correctness of the will 'Mashmula' and they said that the mutation be sanctioned in accordance with the will. It further goes to recite that

no party has any objection to it and the enquiry has also been made. It goes to say that the mutation as entered in favour of Wazir Chand and Satish Kumar on the basis of 'Wasiatnama Jabani Masmula' is sanctioned. As deed of will is never made Jabani or oral, I fail to understand how an oral will can be produced before a revenue officer or can be produced before a revenue officer or can be enclosed with the papers of the mutation. The oral will can neither be enclosed nor it could be produced. What appears to me is that it was some oral arrangement between the parties which prompted Jagdish Chander to consent to the land being transferred in favour of his two younger brothers in exclusion of himself. Had it not been so, the two sisters would not have deputed their attorney to be present at the time of sanction of the mutation and Jagdish Chander would not have stood excluded from the land which was the subject matter of that mutation No. 2961.'

The perusal of the extracted portion of the judgment passed by the first Appellate Court would, thus, reveal that instead of accepting the plea of defendants with regard to existence of the will, the Appellate Court rather chose to give finding that the land was transferred in favour of younger brothers of plaintiff on account of some arrangement which, as mentioned above, was never the case of defendants.

6. Mr. Goel, learned counsel appearing on behalf of the appellants has taken me through the entire evidence including the mutation which recites the existence of a Will. It has been discarded on the solitary ground that there could not be an oral will. The mutation, however, clearly mentions the will to be 'Masmula' which means in English 'attached'. It is not known as to how and under what circumstances that word 'Jabani' i.e. oral has been mentioned because nothing could be attached with the mutation proceedings if the will was only oral. The matter does not end there as DW6 Raghbir Singh Kanun-go, who was signatory to the mutation reciting factum of will, clearly deposed that the papers of special power of attorney and that of will were there with the mutation. DW5 Bal Kishan has been produced to prove that the will was scribed by him and he also happens to be real uncle of three brothers i.e. plaintiff and defendants, Wazir Chand and Satish Kumar. Not only that, DW4 Bhagat Ram was also produced to prove execution of the will by the testator. Ghansham Dass another real uncle of the parties also supported the case of defendants by stating that Pokhar Dass had executed will in favour of the

defendants. The real sisters of the parties, who are beneficiaries if the property is to go by succession, also support the execution of the will by their father, Pokhar Dass. DW6 Raghbir Singh Kanungo while appearing in the witness box in the year 1989 clearly stated that 'Nathi Bey' i.e. attached papers with the mutation, are destroyed in accordance with Para 7.39 of Land Records Manual and that in this case as well 'Nathi Bey' i.e. attached papers were destroyed. It requires to be mentioned that the mutation pertained to the year 1968.

7. The ingredients of Section 65 of the Indian Evidence Act to lead Secondary evidence are, thus, certainly available on the records of the case. The existence of the will is proved and so is the loss thereof. This Court is of the considered view that the interest of justice requires that appellants i.e. the defendants, who as mentioned above, happened to be brothers of plaintiff, should be permitted to lead secondary evidence. It shall be open to the appellants either to rely upon the evidence which has already been led in the case or to lead additional evidence in support of the will. This court has adopted the course aforesaid for another reason as well i.e. it is, prima facie, proved on records of the case that father of the parties, Pokhar Dass, had 10-1/2 acres of land on July 4, 1962 in his name. On the same very day another piece of land measuring 10-1/2 acres of land on July 4, 1962 in his name. On the same very day another piece of land measuring 10-1/2 acres was purchased but that was in the name of plaintiff. The will is with regard to 21 acres of land. This leaves the plaintiff only with 10-1/2 acres of land. Although it is not conclusive but, prima facie, it appears that Pokhar Dass wanted to see through that all his sons get property in equal shares. The aforesaid facts with regard to land holding of Pokhar Dass and plaintiff, are made out from the contents of the application filed by the appellants in this Court under Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure alongwith supporting documents. However, I am not deciding that application and leaving it open to the appellants to make such an application before the trial Court.

8. The contention of Mr. Gupta in opposing the application Under Section 65 of the Indian Evidence Act has simply to be noticed to be rejected. It is argued that the trial Court has given a finding that the alleged will, if any, is invalid and the said finding has been confirmed by the Appellate Court. It is, thus, argued that once the

will has been discarded, even if permission is granted to lead secondary evidence, the same would not advance the cause of the appellants and, therefore, no useful purpose will be served in permitting defendants to prove the will by leading secondary evidence. This argument has no substance whatsoever. The manner in which the will was ignored and, in particular, by the trial Court, has already been mentioned above. The Appellate Court did not doubt the validity of the will on the ground that it was surrounded by suspicious circumstances. It rather chose to reject the will on the ground that the same was oral as also that the same could not be produced on the records of the case.

9. In view of the discussion made above, application filed by the appellant-defendants Under Section 65 of the Indian Evidence Act is allowed. Consequently, judgment and decree passed by the trial Court and so confirmed by the first Appellate Court, is set-aside. The case is remitted to the trial Court for deciding the same in accordance with law. The observations made in this order are only for the purpose of deciding the application Under Section 65 of the Evidence Act and shall not be construed as an expression of opinion. The trial Court shall, thus, decide the matter, uninfluenced of any observations that have been made in this order.

10. Parties through their counsel are directed to appear before the trial Court on February 28, 1994.