Before S. S. Nijjar, J

CHANAN KAUR @ CHANDAN KAUR AND ANOTHER,—*Defendant / Appellants*

versus

KARTARI (DECEASED) THROUGH HER L. Rs.,—*Plaintiff/ Respondents*

R.S.A. NO. 2015 OF 1982

17th March, 2004

Code of Civil Procedure, 1908—Hindu Succession Act, 1956—Civil suit by plaintiffs claiming to be the natural heirs of deceased under the 1956 Act—Defendants claiming to be the only legal heirs of the deceased on the basis of a registered will—Trial Court dismissing the suit while holding the Will executed in favour of defendants is genuine—1st Appellate Court reversing the findings of Trial Court—Plaintiffs only challenging the validity of the Will—No plea with regard to the identity of the land which was subject-matter of the Will raised by plaintiffs—No issue framed by Trial Court as to whether the suit land was covered under the will—Ist appellate Court relying upon oral evidence led in support of facts not pleaded by plaintiffs—1st appellate Court misdirecting itself by overlooking the well settled law with regard to pleadings and proof of the facts pleaded—Appeal allowed while setting aside the judgment and decree of 1st appellate Court.

Held, that the plaintiffs had only challenged the validity of the Will on the ground that it was not validly executed, No plea was raised by the plaintiffs with regard to the identity of the land, which was subject-matter of the will. No issue was framed by the Trial Court as to whether the suit land was covered under the will. That being the position, no amount of evidence adduced by the plaintiffs could have been looked into in support of the oral argument that the Will did not relate to the land situated in village Basiala, District Hoshiarpur. The appellate Court committed an error of law in relying on oral evidence which had been led in support of the facts not pleaded by the plaintiffs. The findings of facts recorded by the Trial Court have been erroneously reversed by the learned Appellate Court.

(Paras 14 and 15)

Amit Jain, Advocate, *for the appellants.*

Sarwan Singh, Senior Advocate, with N. S. Rapri, Advocate, *for the respondents.*

JUDGMENT

S. S. NIJJAR, J.

(1) Whether any amount of evidence in support of a plea not specifically pleaded by a party can be looked into by the Court, is the substantial question of law, which arises in this Regular Second Appeal.

(2) The plaintiffs have filed a suit for declaration to the effect that they are owners in equal shares and are in possession of 19 Kanals 1 Marla, 1/2 share out of 38 Kanals 3 Marlas out of the suit land. Defendant Nos. 1 to 3 have no right or interest in the suitland and consequently Mutation No. 2838 decided on 12th September, 1978 by the Assistant Collector 1st Grade, Garhshankar, is ineffective and against the rights of the appellants, or in the alternative, the suit is for joint possession of 19 Kanals 1 Marla and 1/2 share of 38 Kanals 3 Marlas in Khewat No. 123/232-233 over the suit land. The plaintiffs alleged that the suit land was owned by one Matta, son of Gopi, who died in the year 1975. They are only legal heirs of the deceased under the Hindu Succession Act, 1956, but defendant Nos. 1 to 3 have managed to get the mutation entered in their names in collusion with revenue staff on the basis of an alleged Will executed by Matta deceased. The plaintiffs claim to be in peaceful possession over the suit land. The suit was filed after the defendants began to deny the rights of the plaintiffs.

(3) The defendants controvered the plea taken by the plaintiffs. They denied that the plaintiffs are the legal heirs of the deceased. Defendant Nos. 1 and 2 claim to be the daughters of one of the sons of the deceased namely Tarlok Ram. The deceased is said to have had three sons. They claim to be the only legal heirs of the deceased on the basis of a Will allegedly executed on 18th June, 1975. It is claimed that the deceased was unmarried and he was being served by his daughters and defendant No. 3, whom he had treated as his daughters-in-law. The Will dated 18th June, 1975 was registered. On the basis of the aforesaid Will, Mutation No. 2838 was sanctioned.

(4) On the pleading of the parties, the Trial Court framed the following issues :—

1. Whether deceased Matta *alias* Mast Ram executed a valid will dated 18th June, 1975 in favour of defendant Nos. 1 to 3 ? OPD
2. Whether the suit is bad for nonjoinder of necessary parties ? OPD
3. Whether the suit land has not been correctly described in the plant ? If so; its effect ? OPD
4. Whether the plaintiffs are estopped from suing their acts, conduct and admissions ? OPD
5. Whether the suit is not maintainable in the present form ? OPD
6. Whether the suit is correctly valued for the purposes of Court fee and jurisdiction ? OPP
7. Relief.

(5) The Trial Court, after discussing the evidence, has come to the conclusion that the defendants have successfully proved that the Will is genuine and was voluntarily executed in favour of the legatees. The issue has been decided against the plaintiffs and in favour of the appellants. Issue Nos. 2, 3, 5 and 6 have been decided against the defendants. The suit filed by the plaintiffs has been dismissed.

(6) Against the aforesaid judgement, the plaintiffs filed an appeal in the Court of Additional District Judge, Hoshiarpur. *Vide* its judgment and decree dated 6th September, 1982, the Appellate Court has set aside the judgment and decree passed by the Trial Court and the suit filed by the plaintiff has been decreed for a declaration as prayed.

(7) Aggrieved against the judgment and decree of the lower Appellate Court, the defendants have filed the present Regular Second Appeal.

(8) I have heard the learned counsel for the parties and perused the record.

(9) Before the Trial Court, the plaintiffs did not raise the plea that the Will dated 18th June, 1975 did not relate to the suit land. The suit was filed by the plaintiffs claiming to be the natural heirs of the deceased under the Hindu Succession Act, 1956. In the written statement, the defendants had categorically stated that the plaintiffs are not the heirs of Matta *alias* Mast Ram, who had three sons. Defendant Nos. 1 and 2 claim to be the daughters of one of the sons i.e. Tarlok Ram, whereas defendant No. 3. claims to be the widow of Tarlok Ram. In paragraph 3 of the written statement, the defendants had put forward the plea that the deceased had executed a Will during his life time, on 18th June, 1975 in favour of the defendants in lieu of the services rendered to him by the defendants. The plaintiffs filed a replication to the written statement on 14th June, 1979. In reply to paragraph 3 of the written statement, the plaintiffs merely stated that the same is wrong and is denied.

(10) From the perusal of the issue framed by the Trial Court, it becomes evident that the plaintiffs never made an application to the Trial Court for framing an issue to the effect that the will dated 18th June, 1975 did not cover the suit land. The issue only pertains to the fact whether the Will dated 18th June, 1975 was validly executed in favour of defendant Nos. 1 to 3.

(11) The Trial Court after examing the entire matter came to the conclusion that the deceased had been looked after by defendant Nos. 1 to 3. It has been held to be well established that the defendants used to render services to Matta deceased, who out of love and affection executed a valid Will in lieu of the services rendered to him on 18th June, 1975. The will was duly registered and the testator had admitted the contents of the Will to be correct.

(12) During the course of arguments before the Trial Court, it was submitted that the Will, which was executed as Ex.D1 does not cover the property situated which was the subject-matter of the suit. It was argued that the will had covered only the property which had been mentioned in the upper part of the Will. The Trial Court negatived the aforesaid arguments on the ground that the testator had incorporated the following lines in the Will :—

"Mere baad yehi mere waris hein. Is liye anni Hiyat main apni Jumla jayabad mankula wa gair mankula ka intzamm karna chahta hun to ki baad main koyi jhagra na ho".

(13) The Trial Court, therefore, held that from the word 'Jumla', it is clear that the testator wanted to give his entire property by way of Will to the legatees. The Trial Court further held that if the testator had intended to Will only part of the property, he would not have used the words "gair mankula". According to the Trial Court, a perusal of the Will clearly shows that the testator gave his entire estate to the legatees. The trial Court, in my opinion, applied the correct test while interpreting the contents of the will. It has been held that the Court is to apply its mind regarding interpretation of the words used in the will by putting itself in the arm chair of the testator and to look from his angle and view point. The trial Court concluded that if one was to apply the aforesaid test, the conclusion would have been that the testator had no other person except the legatees in his mind as the beneficiaries of the Will. The trial Court further held that the defendants have been successful in proving their case beyond "any shadow of doubt" and leave no scope for any suspicious circumstances because the will itself speak in favour of the legatees. The Appellate Court reversed the findings of fact recorded by the trial Court and has held that the Will had been executed in U.P. The appellate Court has also held that even though the testator has used the word "Jumla", which is equivalent to English word "all or entire" would not lead to the conclusion that the suit property is also included in the Will. The Appellate Court also makes a reference to the recital, wherein the testator had stated that he intends to make a Will so as to obviate the dispute about his entire property after his death. According to the learned Judge, use of the word "entire property" and the word "Jumla" would not be sufficient to extend the intention of the testator to include the property which was situated in Punjab at Village Basiala. District Hoshiarpur. The testator did not give any detail about the property situated in the area of Basiala, District Hoshiarpur (Punjab). Therefore, according to the learned Judge, the testator seems evidently to have intended not to bequeath the property which is the subject matter of the dispute in the present case. The learned Judge, therefore, reversed the findings of fact recorded by the trial Court. In my opinion, the lower Appellate Court misdirected itself by overlooking the well settled law with regard to the pleadings and the proof of the facts pleaded.

(14) As noticed earlier, the plaintiffs had only challenged the validity of the Will on the ground that it was not validly executed. No plea was raised by the plaintiffs with regard to the identity of the land, which was subject matter of the Will. No issue was framed by the trial Court as to whether the suit land was covered under the Will Ex. D1. That being the position, no amount of evidence adduced by

the plaintiffs could have been looked into in support of the oral argument that the Will Exhibit DI did not relate to the land situated in village Basiala, District Hoshiarpur. In the case of **Saddik Mahomed Shah** *versus* **Mt. Saran and others (1)**, it has been held "no amount of evidence can be looked into upon a pleading which was never put forward". The aforesaid law laid down by the Privy Council has been reiterated by the Hon'ble Supreme Court in the case of **Bhagat Singh and others** *versus* **Jaswant Singh, (2).** Recently in the case of **Bonder Singh and others** *versus* **Nihal Singh and others (3),** the Hon'ble Supreme Court has observed as follows :—

> "As regards the plea of sub-tenancy (shikmi) argued on behalf of the defendants by their learned counsel, first we may note that this plea was never taken in the written statement the way it has been put forth now. The written statement is totally vague and lacking in material particulars on this aspect. There is nothing to support this plea except some alleged revenue entries. It is settled law that in the absence of a plea, no amount of evidence led in relation thereto can be looked into. Therefore, in the absence of a clear plea regarding sub-tenancy (shikmi), the defendants cannot be allowed to build up a case of sub-tenancy (shikmi). Had the defendant taken such a plea, it would have found place as an issue in the suit. We have perused the issue framed in the suit. There is no issue on the point".

(15) In view of the aforesaid, it becomes apparent that the appellate Court committed an error of law in relying on oral evidence which had been led in support of the facts not pleaded by the plaintiffs. In my opinion, the findings of facts recorded by the trial Court, have been erroneously reversed by the learned Appellate Court.

(16) In view of the above, this appeal is allowed. The judgment and decree of the lower Appellate Court dated 6th September, 1982 are set aside and that of the trial Court dated 1st September, 1980 are hereby affirmed and the suit filed by the plaintiffs is dismissed. No costs.

R.N.R.

(1) 1930 Privy Council 57
(2) AIR 1966 S.C. 1861
(3) 2003 (1) P.L.J. 366