

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. 6918-6919 OF 2011

NARINDER SINGH RAO

.....APPELLANT

VERSUS

**AVM MAHINDER SINGH RAO
AND OTHERS**

....RESPONDENTS

JUDGMENT

ANIL R. DAVE, J.

1. Being aggrieved by the Judgment delivered in Civil Regular Second Appeal No. 3937 of 2005 and Cross Objection No. 9-C of 2005 dated 21st May, 2010 by the High Court of Punjab & Haryana at Chandigarh, these appeals have been filed by original defendant No.1.
2. The facts giving rise to the appeals in a nutshell are as under:

Rao Gajraj Singh and his wife Sumitra Devi were occupiers of the suit property. The property appears to have been constructed somewhere in 1935 and as per the municipal record, it belonged to Rao Gajraj Singh. A document was executed by Rao Gajraj Singh to the effect that upon death of himself or his wife, the suit property would be inherited by the survivor. The said writing was attested by Rao Devender Singh, the son of Rao Gajraj Singh's real sister.

Rao Gajraj Singh expired on 29th March, 1981 and thereafter Sumitra Devi, who had eight children, started residing at Ranchi with the appellant.

Somewhere in 1980s, Sumitra Devi got constructed some shops in the suit premises and the said shops were given on rent.

On 1st June, 1989, Sumitra Devi executed a Will whereby she bequeathed the suit property to one of her sons, namely, Narinder Singh Rao (the present appellant and original defendant No.1) and she expired on 6th June, 1989.

3. After the death of Sumitra Devi, her four children, one of them being the present respondent No.1, filed a suit for declaration claiming their right in the suit property. Subsequently, the plaint was amended so as to make it a suit for partition. According to the case of the said children, the Will was not genuine and therefore, the said Will could not have been acted upon and

as Sumitra Devi was survived by eight children, the suit property would be inherited by all the children. Thus, each child had 1/8th share in the suit property.

4. Even after death of Rao Gajraj Singh, the suit property continued to remain in his name because nobody had got the property mutated in the names of his heirs/legal representatives after his death.

5. The said suit was dismissed and therefore, the original plaintiffs, along with others, preferred an appeal. After hearing the learned advocates and considering the facts of the case, the lower appellate court dismissed the said appeal though allowed the appeal on the question of court fee.

6. Being aggrieved by the judgment delivered by the lower appellate court, original plaintiff No.1 filed a second appeal, being Civil Regular Second Appeal No. 3937 of 2005. On the issue with regard to court fee, cross objection was filed by the present appellant. The said appeal was partly allowed whereas the cross objection was dismissed on 25th May, 2010 and being aggrieved by the judgment delivered in the said appeal, the present appeal has been filed by the appellant, who is original defendant no.1.

7. It is pertinent to note as to how the High Court has decided the Second Appeal and for that purpose let us look at the findings, which are as under:

The ultimate findings arrived at by the court below are to the effect that the writing executed by Rao Gajraj Singh, which stated that upon death of himself or his wife, the suit property would be inherited by the survivor, was neither in the nature of a Will nor in the nature of transfer of the property because the said writing was neither registered as required under the provisions of the Indian Registration Act, 1908 nor was attested by two witnesses as it should have been done, had it been a Will. Thus, the writing executed by Rao Gajraj Singh, in the eyes of law, was only a piece of paper, having no legal effect. Factually also, the said writing was not a Will because it was not attested by two attesting witnesses as is required to be done for execution of a valid Will. It is also a fact that the said writing had not been registered and by virtue of the said writing either complete ownership or share of Rao Gajraj Singh was not transferred to Sumitra Devi, thus, the High Court in its impugned judgment rightly ignored the said writing executed by Rao Gajraj Singh.

8. Upon the death of Rao Gajraj Singh, no mutation entry was made in the Municipal Corporation records to show as to who had inherited the property in question and the said property continued to remain in the name of late Rao Gajraj Singh.

9. By virtue of the Will executed by Sumitra Devi, whereby the property had been bequeathed to the present appellant, the appellant claims complete ownership over the suit property.

10. So far as inheritance of the suit property by the present appellant in pursuance of the Will dated 1st June, 1989 executed by Sumitra Devi is concerned, the finding of the lower appellate court is to the effect that the Will was validly executed by Sumitra Devi, which had been attested by two witnesses, one being an advocate and another being a medical practitioner. Though there was an allegation to the effect that Sumitra Devi was not keeping good health at the time when she had executed the aforesaid Will and she was not having sound and disposing mind at the time of execution of the Will, the said submission made before the courts below was not accepted. Upon appreciation of evidence adduced, it was held that the Will was validly executed and Sumitra Devi was competent to execute the Will which had been duly attested by two competent witnesses. In the circumstances, the courts below came to the conclusion that the Will was validly executed. The question with regard to the state of mind of the testatrix and execution of the Will being a question of fact, the High Court rightly accepted the findings arrived at by the lower appellate court. As the said finding has been accepted by the High Court, in our opinion, even this

Court would not re-appreciate the said fact. In the circumstances, so far as the validity of the Will is concerned, it is treated to have been executed properly. The next question which was to be considered by the High Court was with regard to the ownership right of the suit property. The property was in the name of Rao Gajraj Singh and no evidence of whatsoever type was adduced to the effect that the property originally belonged to Sumitra Devi. Looking to the said fact, the findings arrived at by the High Court that the suit property belonged to Rao Gajraj Singh cannot be disturbed. As Rao Gajraj Singh died intestate and was the owner of the property at the time of his death, the suit property should have been inherited by his widow, namely Sumitra Devi and his eight children in equal share, as per the provisions of the Hindu Succession Act, 1956. In that view of the matter, the High Court arrived at the conclusion that the suit property would be inherited by all the 9 heirs i.e. Sumitra Devi and her eight children and therefore, Sumitra Devi had inherited only $1/9^{\text{th}}$ of the right and interest in the suit property whereas $1/9^{\text{th}}$ of the right and interest in the suit property belonged to each child of Rao Gajraj Singh.

11. Though the Will executed by Sumitra Devi has been treated as a validly executed Will, Sumitra Devi, who had only $1/9^{\text{th}}$ of the right and interest in the suit property, could not have bequeathed more than her

interest in the suit property. If Sumitra Devi was not a full-fledged owner of the suit property, she could not have bequeathed the entire suit property to the present appellant- Narinder Singh Rao who has claimed the entire property by virtue of the Will executed by Sumitra Devi. At the most Sumitra Devi could have bequeathed her interest in the property which was to the extent of $1/9^{\text{th}}$ share in the said property. So the High Court rightly came to the conclusion that the $1/9^{\text{th}}$ share in the suit property belonging to Sumitra Devi would be inherited by the present appellant - Narinder Singh Rao by virtue of the Will executed by her. In addition to his own right and interest in the suit property to the extent of $1/9^{\text{th}}$ share, which the present appellant had inherited from his father, the present appellant would get $1/9^{\text{th}}$ share in the suit property as he also inherited share of his mother Sumitra Devi whereas all other children of Rao Gajraj Singh would get $1/9^{\text{th}}$ share each in the suit property. Thus, the present appellant would be having $2/9^{\text{th}}$ share in the suit property.

12. In our opinion, the aforestated findings arrived at by the court below are absolutely just and proper. So far as findings of facts are concerned, the same have been finally decided by the court below and therefore, we would not like to interfere with the findings of the fact.

13. So far as legal issues are concerned, in our opinion, the court below did not make any error while coming to the aforestated conclusions after applying law to the facts of the case.

14. The learned counsel appearing for the parties had made lengthy submissions, however, in our opinion not a single submission made on behalf of the appellant is impressive.

15. On behalf of the appellant, the submissions were made to the effect that the suit property in fact belonged to Sumitra Devi though it was in the name of Rao Gajraj Singh. The provisions of Benami Transfer (Prohibition) Act, 1988 had been referred to by the learned counsel appearing for the appellant. The question whether the suit property in fact belongs to an individual i.e. whether he is a beneficial owner or is a benami, is a question of fact. There was no averment made in the plaint with regard to the aforestated allegation. No issue to the said fact had been raised before the trial court. The said issue had been raised for the first time before the appellate court and in our opinion, the issue with regard to the fact could not have been raised before the appellate court for the first time and therefore, all submissions made in relation to the provisions of Benami Transfer (Prohibition) Act, 1988 and with regard to real ownership of the suit property cannot be looked into at this stage.

16. The submissions made with regard to the mental capacity of Sumitra Devi at the time of execution of the Will cannot also be looked into at this stage because the mental capacity of the testator to execute a Will being a question of fact, we would like to accept the findings arrived at by the court below and all allegations with regard to soundness of mind of Sumitra Devi at the time of execution of the Will or allegation with regard to undue influence of the present appellant with whom Sumitra Devi was residing at the time of her death cannot be looked into by this Court as they are the issues pertaining to fact. We, therefore, do not accept the submissions made with regard to validity of the Will executed by Sumitra Devi.

17. As we have come to the conclusion that the Will executed by Sumitra Devi was just and proper, the consequences of the Will would be like this:

Rao Gajraj Singh was survived by his eight children and his widow – Sumitra Devi. As Rao Gajraj Singh died intestate, according to the provisions of the Hindu Succession Act, his property would devolve upon all his nine heirs i.e. his widow and eight children. So, everyone would get $\frac{1}{9}$ th share in the property of Rao Gajraj Singh. Though Sumitra Devi had executed her Will and had bequeathed the entire property in question to the present appellant namely Narinder Singh Rao, Sumitra Devi could not have bequeathed under her Will what she did not own. She was only $\frac{1}{9}$ th owner

of the suit property so she could have bequeathed only her share i.e. 1/9th share in the suit property. As a result of the Will of Sumitra Devi, Narinder Singh Rao- the appellant would not only inherit his own share in the property, which he had inherited from his father Rao Gajraj Singh but he would also inherit share of his mother Sumitra Devi as per her Will. Thus, the present appellant would become the owner of 2/9th share of the suit property. In our opinion the final finding of the High Court that the appellant is the owner of 2/9th share of the suit property is, therefore, absolutely correct.

18. The averments with regard to court fee are not of importance at this stage as looking to the facts of the case, the court below has rightly come to the conclusion that the issue with regard to the court fee was a matter between the litigant filing the suit and the court and the defendants need not have bothered about the same.

19. The learned counsel appearing for both sides have cited several judgments. The propositions laid down in the said judgments cannot be disputed, however, the fact remains that the said judgments do not render any assistance to the appellant in view of the aforestated facts.

20. In view of the findings of fact arrived at by the courts below and the legal position clarified hereinabove and by the High Court, in our opinion,

the High Court has committed no error and therefore, we see no reason to interfere with the impugned judgment.

21. For the aforesaid reasons, the appeals are dismissed with no order as to costs.

.....J.
(R.M. LODHA)

.....J.
(ANIL R. DAVE)

New Delhi
MARCH 22, 2013.

JUDGMENT