
(2019) 05 UK CK 0229

In the Uttarakhand High Court

Case No : Second Appeal No. 31 Of 2015

State Of Uttarakhand And Another

APPELLANT

Vs

Meenakshi Chaudhary

RESPONDENT

Date of Decision : 22-05-2019

Acts Referred:

Hindu Succession Act, 1956 — Section 29
Evidence Act, 1872 — Section 65(a), 68, 69, 70, 71
Specific Relief Act, 1963 — Section 21, 31
Code Of Civil Procedure, 1908 — Section 100, 105, Order 41 Rule 27, Order 41 Rule 31
Transfer Of Property Act, 1882 — Section 59
Registration Act, 1908 — Section 49

Citation : (2019) 05 UK CK 0229

Hon'ble Judges : Sharad Kumar Sharma, J

Bench : Single Bench

Advocate : M.C. Pandey, Devesh Ghildiyal, Ajay Veer Pundir

Final Decision : Dismissed

Judgement

Sharad Kumar Sharma, J

1. This is defendants' Second Appeal, wherein the defendants have questioned the propriety of the judgement rendered by Civil Judge, (Senior Division), Dehradun in Original Suit No. 23 of 2012, Meenakshi Chaudhary v. State of Uttarakhand and another, which was decreed in favour of the plaintiff/respondent on 30th March 2013. The said judgement was put to challenge in a Civil Appeal by the Defendants/appellants being Civil Appeal No. 66 of 2013, State of Uttarakhand and another v. Meenakshi Chaudhary. The said Appeal too was dismissed by the Court of 4th Additional District Judge, Dehradun impugned judgement order dated 25th November, 2014, thereby dismissing the Appeal and had affirmed the decree of declaration rendered in favour of the plaintiff/respondent by the learned trial Court.

2. The brief facts, which require for consideration before this Court in the present

Second Appeal is that the plaintiff/respondent herein on 24th January 2012, had instituted a Suit being Suit No. 23 of 2012, Meenakshi Choudhary v. State of Uttarakhand and others, whereby she has sought a decree of declaration of a right in relation to the property, which has been more particularly, described at the foot of the plaint constituting, being the property bearing Municipal No. 43 new number 127, Guru Road, Patel Nagar, Dehradun, the part of which has been claimed by the plaintiff/respondent in her pleading, which has been purchased by her virtue of a sale deed dated 8th July, 2008 and the remaining part i.e. an area equivalent to 249.07 square metres having an area of 13.38 square metres which is being vested with the plaintiff/respondent by virtue of a registered Will dated 28th November 2007. The contention of the plaintiff/respondent in the Suit was that the declaration which has been sought for by the defendant to the Suit by treating the property as to be an "escheat" property by virtue of the Case No. 1 of 2011, State v. Property No. 43 (old No.), new No. 127, Guru Road, Patel Nagar, Dehradun preferred under Section 29 of the Hindu Succession Act, 1956, was sought to be declared as a nonest decree being rendered on 1st August 2011, and to be declared as to be "null and void".

"अ. यह कि कलक्टर/जिलाधिकारी देहरादून द्वारा वाद संख्या 01/011/विविध अन्तर्गत धारा 29 हिन्दू उत्तराधिकार अधिनियम, सरकारबनाम सम्पत्ति संख्या 43 (पुराना नं०) 127 (नया नं०) गुरु रोड़ पटेलनगर में पारित निर्णय दिनांक 01.08.11 को अवैध निष्प्रभावी, शून्य एवं वादिनी पर अबंधनकारी उद्घोषित किया जावे।"

3. She has contended that since the property in question stood vested in her in pursuance to the unassailed Will dated 28th November 2007 and the sale deed dated 8th July 2008, the property in dispute will never fall to be within the ambit of the definition of "Escheat" property under Section 29 of the Hindu Succession Act, 1956, which deals with the "escheat" property.

4. Before venturing further, it would be relevant and essential to refer Section 29 of the Hindu Succession Act, 1956, which reads as under:-

"29 Failure of heirs .-If an intestate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the government; and the government shall take the property subject to all the obligations and liabilities to which an heir would have been subject. State Amendments Chapter IIA Andhra Pradesh: After Chapter II, insert the following Chapter, namely:- "Chapter IIA Succession by survivorship"

5. On a simplicitor interpretation of Section 29 of the said Act, it relates to deal with only those immovable properties, for which the owner of the property has died intestate and has left no heirs behind him to succeed, and hence the provisions of Section 29 of the Hindu Succession Act, 1956, would apply only in those circumstances, where the property would devolve on the Government in the absence of there being any heir of the deceased owner of the property in question. In the plaint in question, it is a specific case of the plaintiff/respondent which has been brought in by the plaintiff/respondent in the pleading that the late Mr. Harish Chandra Kalsi, who was admittedly the earlier recorded owner of

the property in question he has executed a registered Will in favour of the plaintiff/respondent by virtue of which part of the property constituting of the property in dispute referred above was bequeathed to her by the registered document.

6. It would be apt to observe at this juncture itself that as far as the propriety of the said Will dated 28th November 2007 is concerned, the veracity of which has never been put to challenge by the defendants/appellants, when they had tried to get their rights declared under Section 29 of the Act by instituting Case No. 1 of 2011, State v. Property No. 43 (old No.), new No. 127, Guru Road, Patel Nagar, Dehradun, which was decided by virtue of a judgement dated 1st August 2011. The second aspect which is relevant for deciding the matter is that late Mr. Harish Chandra Kalsi, out of the total property, which stood vested in him, only part of the property having an area of 197.02 square metres had been sold to one Mr. Amar Kant Malik and some portion of it was sold to the plaintiff/respondent by the sale deed dated 8th July, 2008.

7. Once again at this stage, it would be relevant to mention that as far as the said Will of the property is concerned, is yet again not a bone of contention at the behest of the defendants/appellants at any stage of the proceedings nor the sale deeds executed by late Mr. Harish Chandra Kalsi was even challenged. Since both the documents either the registered Will, or registered sale deed referred above by which property stood divested has not been challenged, they would confer a valid title. Hence, the claim raised for the declaration by the plaintiff/respondent was in relation to the properties which were covered by the two registered documents, executed in her favour as its owner and not in the capacity of being the daughter of the deceased owner of the property and secondly the document, based on which she claims her ownership since having purchased the property in question by registered sale deed, it will definitely have precedence of right over it.

8. But faced with the order dated 1st August 2011, which has been rendered by the Court of District Magistrate, the necessity arose before the plaintiff/respondent to get the declaration to the effect that the order dated 1st August 2011, as obtained by the defendant under Section 29 of the Hindu Succession Act, 1956 was null and void.

"आदेश

उपजिलाधिकारी सदर की आख्या दिनांक 28.07.2011, एवं वरिष्ठ पुलिस अधीक्षक की आख्या दिनांक 29.12.2008 तथा विभिन्न स्तर से प्राप्त आख्याओं के आधार पर सम्पत्ति सं. जिसका पुराना नम्बर 43 तथा नया नम्बर 127 गुरूरोड पटेलनगर, थाना पटेल नगर जिला देहरादून कोलावारिस सम्पत्ति होने की पुष्टि की गयी है। अतः उपरोक्त आख्याओं से सहमत होने हुए हिन्दु उत्तराधिकार अधिनियम की धारा 29 के अनुसार उक्त सम्पत्ति को राजगामी सम्पत्ति (Escheat) मानते हुए राज्य सरकार में निहित किये जाती है। आदेश की एक प्रति मुख्य नगर अधिकारी देहरादून को इस निर्देश के साथ प्रेषित की जाय कि उक्त राजगामी (Escheat) धोषित की गयी सम्पत्ति को नगर निगम देहरादून के अभिलेखों में मृतक हरीश चन्द कलसी पुत्र स्व० श्री हेमराज कलसी के स्थान पर राज्य सरकार (द्वारा कलक्टर देहरादून) इन्द्राज किया

जाय।"

9. This Suit was contested by the defendant by filing a written statement paper No. 33 (ka) wherein the defendants in their written statement as filed on 13th August 2012, had come up with the case that the predecessor owner of the property had never made any such declaration by virtue of the Will executed in favour of the plaintiff/respondent nor he had ever executed any sale deed as pleaded and prayed for by the plaintiff/respondent.

10. Another precise ground, which has been raised by defendant/appellant in the written statement by the respondent, was to the effect that since late Mr. Harish Chandra Kalsi died issueless, the property ought to be declared as an "escheat" property under Section 29 of the Hindu Succession Act, 1956.

11. During the course of the argument, the learned counsel for the defendants/appellants has drawn an attention to the pleadings which has been raised in para 5 of the written statement which was based upon a statement / letter written by late Mr. Harish Chandra Kalsi to the City Magistrate on 22nd May 2010, wherein the learned counsel for the defendants/appellants on its basis submits that that appellant had made a complaint to the Magistrate, that he had never executed any document and if at all any document on which the reliance is placed ought to be treated as to be a document which has been obtained by him because at the relevant point of time, he was not in a sound mental state of mind, when he has executed such a document. But we cannot be oblivious of the fact both Will and sale deeds were unassailed registered documents.

12. However, in response to it, the learned counsel for the plaintiff/respondent submits that the reliance which has been placed on the letter dated 22nd May 2010, which is alleged to have been written by the predecessor owner of the property to the City Magistrate, in fact, was never placed on record as an evidence before the trial Court, nor the same was ever proved by the defendants/appellants, as per the law of evidence. If the entire written statement is scrutinized and particularly in light of the pleadings raised in para 10 of the written statement, rather the defendants/appellants though had denied the plea raised in paras 10 and 11 of the plaint, but alternatively, they had pleaded that the so-called Will dated 28th November 2007 and the sale deed dated 8th July, 2008, the plaintiff/respondent cannot claim any right over the property in question because the two documents, as referred above were never willingly executed by the predecessor owner of the property in question and if at all, if it is treated to have been validly executed in the eyes of law, it was executed by exercising fraud upon him as he was not in a sound state of mind as per his letter to City Magistrate dated 22.05.2010.

13. The learned counsel for the plaintiff/respondent submits that the said plea taken by the defendants/appellants was not tenable for the reason being that the pleadings raised in para 5 and 10 pertaining to the inferences drawn from the statement of the so-called letter submitted by the predecessor owner Mr. Harish

Chandra Kalsi, on 22nd May 2010, since it was never produced on record nor was proved as per the law of evidence involved therein and the same was referred above. After the exchange of the pleadings, the learned trial Court framed the following issues:-

- "1. क्या वादी वादपत्र की सूची में वर्णित वादग्रस्त सम्पत्ति का स्वामी घोषित किये जाने योग्य है? यदि हां तो प्रभाव।
2. क्या कलक्टर/डी.एम द्वारा वाद संख्या 1/2011 विविध अंतर्गत धारा 29 हिन्दू उत्तराधिकारी अधिनियम में पारित निर्णय दिनांकित 1.8.2011 अवैध, शून्य व निष्प्रभावी है?
3. क्या न्यायालय को प्रस्तुत वाद की सुनवाई का क्षेत्राधिकार प्राप्त है?
4. क्या वादी द्वारा वाद को अल्पमूल्यांकित कर अपर्याप्त न्याय शुल्क अदा किया गया है?
5. वादी क्या अनुतोष, यदि कोई हो, पाने का अधिकारी है?"

14. What is important to be witnessed here is that the plaintiff/respondent in support of his contentions, apart from producing himself in the Witness Box as PW1 has also adduced an oral testimony of PW2 Mr. Chaudhary Sachin and PW3 Bhagat Singh to prove her case. While on the contrary, record shows that it has been specifically recorded by the learned trial Court that the defendant/appellant has not adduced even a single oral witness or even the letter itself to substantiate its stand taken in the written statement. Apart from it, the plaintiff/respondent has also produced a voluminous documentary evidence pertaining to the orders passed by the District Magistrate paper No. 10(ka), the publications made in the newspaper paper No. 11(A), bank statement 12(ga), list of document, by which she has annexed copy of the sale deed dated 8th July, 2008 and the Will dated 28th November 2007 by the list of document paper No. 37 (ga), which was later on numbered as a paper No. 38 (ga) and 39 (ga) respectively.

15. Yet again at this stage too, the defendant/appellant had not adduced even a single oral evidence to prove that the defendants/appellants had any independent document or witness to show his title or right over the property in question, so as to get it declared as an "escheat" property under Section 29 of the Hindu Succession Act, 1956. The learned trial Court dealt with the issue and what is important to be remarked here is that in the proceedings before the learned trial Court, the opportunity to lead evidence of the defendants/appellants was closed, however, at no stage or no point of time, the defendant/appellant had filed any application or prayed for setting aside of the said order of closing his opportunity to lead an evidence and hence the said order has attained its finality qua the defendant/appellant.

16. The learned trial Court considering the impact of issue No. 2, which was framed with regard to the entitlement of the plaintiff/respondent to declare herself as to be the owner of the property. The learned trial Court while deciding issue Nos. 1 and 2 had considered the propriety of the sale deed, as well as the Will, the certified copy of which was filed as paper No. 38 (ga) and 39 (ga)

respectively and had come to the conclusion that as far as the property in question is concerned, it cannot be declared as to be an "escheat" property, because the predecessor owner of the property in question was succeeded by the plaintiff/respondent, his daughter who claims her right by virtue of a registered Will and also her claim right over the part of the property which she has claimed was purchased by her by a registered sale deed.

17. The learned trial Court while considering the impact of the evidence adduced by the parties and impact pertaining to the closure of an opportunity to lead an evidence of the defendant/appellant had proceeded with the Suit by the judgement dated 30th March 2013 had decreed the same, holding the order dated 1st August, 2011 as bad in the eyes of law. Consequently, the plaintiff/respondent was declared as to be an owner of the property in question since having succeeded the same by virtue of the Will and partially by virtue of the sale deed.

18. Being aggrieved against the said judgement and decree dated 30th March, 2013, the defendant/appellant had preferred a First Appeal being First Appeal No. 66 of 2013, State of Uttarakhand and another v. Meenakshi Chaudhary and others. It has been argued by the learned counsel for the defendants/appellants that though there has been various grounds which has been pleaded and raised by the defendants/appellants in the Memorandum of Appeal while assailing the impugned order / judgement dated 30th March 2013, but none of the grounds as taken by him in the Appeal has been considered, a statement for consideration by the First Appellate Court while dismissing the Appeal by the impugned judgement dated 27th April 2013. The grounds, which has been raised by the learned counsel for the defendant/appellants is that no reliance can be placed on the Will dated 28th November 2007, as well as, on the sale deed dated 8 th July, 2008 on the ground that in view of the provisions contained under Section 68 of the Indian Evidence Act, 1872, which reads as under :-

"68. Proof of execution of document required by law to be attested.-If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]"

19. The case of defendant/appellant as argued was that the Will in question was not proved as per the provisions contained under Section 68 of the Indian Evidence Act as therein and hence it will not create any right in relation to the part and parcel of the property which was mentioned in the plaint for which the declaration was sought.

20. The argument of the learned counsel for the defendant/appellant is that the burden to prove the valid execution of the registered Will dated 28th September 2007, it required the compliance of Section 68 of the Indian Evidence Act, 1872, and the execution of the document was required to be proved by producing one of the attesting witnesses to the same, failing which the said document ought not to be read in evidence, to have conferred any right in favour of the plaintiff/respondents and since the provisions of Section 68 of the Indian Evidence Act, 1872, stood not complied with, no reliance can be placed on the Will dated 28th September 2007.

21. At this stage itself, it would be relevant to remark, though already dealt earlier, that the defendant/appellant, since had obtained an order dated 1st August 2011, by invoking Section 29 of the Hindu Succession Act, 1956, the necessity arose for the plaintiff/respondent to get the order dated 1st August 2011, declared as null and void and set aside and to get her rights established, based on the Will dated 28th November 2007, and the sale deed dated 8th July 2008. Section 68 of the Indian Evidence Act, on which the reliance has been placed by defendant/appellant, was regarding proving of the document by producing one of the attesting witnesses to the Will. What is important to be remarked at this stage, is that this Court is also of the view that the Suit in question was not in relation to dealing with the propriety of the Will dated 28th November 2007, or the sale deed 8th July 2008, in fact, the Suit was instituted by plaintiff/respondent for setting aside the ex parte decree dated 1st August 2011, which was rendered in favour of the State Government, declaring the property as to be an "escheat" property.

22. As far as Section 68 or 69 of the Indian Evidence Act is concerned, the same would have been relevant only for consideration only when exclusively the plaintiff/respondent's claim was based upon a declaration sought to be made and foundationed on the determination of the veracity of a document i.e. a Will in questions dated 28th November 2007, which was not the case in question. In fact, the case in question involved the declaration of right by virtue of the Will dated 28th November, 2007, which was sought by the plaintiff/respondent, which was already upheld by the defendant/appellant as against the present plaintiff/respondent has the determination of the veracity of the sale deed was absolutely an alien to the proceedings under Section 29 of the Hindu Succession Act, 1956 and even beyond the scope of Section 29, as Collector couldn't have determined the validity of registered Will or sale deed while considering the issue of escheat property.

23. At this stage, it would be pertinent to mention that it was not the Will, which was the subject matter of scrutiny in the Suit or was it of any avail to undergo the test of a declaration, which has been flowing to the plaintiff/respondent in pursuance to the Will dated 28th September 2007, in fact, the clause, as stated herein was since against the order obtained by the defendant/appellant under Section 29 of the Hindu Succession Act, which was being sought to be set aside,

the Will cannot be said to be a subject matter of controversy, which required a determination of the effect of renouncement after as specified under Section 69 of the Act but in the instant case there is no renouncement as such, as it is evident from the records.

24. Apart from it, the Will since it was registered and since its validity was not challenged or questioned by anyone, it would be deemed to be taken as to be validly executed and registered by the sub Registrar and it would confer a valid title on the plaintiff/respondent in relation to the property covered by the Will dated 28th November 2007.

25. The defendant also submits that pertaining to the propriety of the sale deed dated 8th July, 2008, executed by the predecessor owner of the property in relation to the part of it which was sold to the plaintiff/respondent. It has been argued by Mr. M.C. Pandey, learned Additional Advocate General for the defendants/appellants that if at all the plaintiff/respondent claimed herself to be an adopted daughter of the deceased owner, in that eventuality, there was no occasion for the predecessor owner of the property, that apart from executing a Will dated 28th November 2007, why would he proceeded to execute the sale deed for the property by virtue of a sale deed dated 21st August 1998.

26. As far as the propriety of the sale deed is concerned, once again, this Court is of the view that since it is not a challenge to it in question and the same is not resulting into hampering of any of the legal rights, which the defendant/appellant claims on the basis of its devolvement from being the escheat property. The learned trial Court, on considering the findings and issues thus framed had by virtue of the judgement dated 30th March 2013, Court had concluded that is declaration made under Section 29 of the Hindu Succession Act, 1956 in favour of the defendant/appellant and by instituting a Case under Section 29 before the Collector/District Magistrate was bad in the eyes of law, because the defendant/appellant had neither questioned any of the documents of title and its validity before any competent Court and law draws presumption as against the registered document which creates a right in favour of the person in whose favour it has been executed.

27. Admittedly, in support of his contention, the defendant/appellant has not either produced any documentary or oral evidence of any nature to prove to the contrary that the Will or the sale deed executed by the predecessor owner of the property was not a valid document nor any plea to the contrary was raised ever by the defendants/appellants ever by filing of any counterclaim. Thus the learned trial Court while dealing with the Issue nos. 1 and 2 had rightly held that since the paper number 39 (ga) i.e. a registered Will and Paper No. 38 (ga) i.e. the registered sale deed these documents itself duly specifies and establishes their right which has been created in favour of the plaintiff/respondent and thus the declaration, which has been made in their favour was absolutely just and proper and legally tenable and it is rather pointed out that if at all the defendant/appellant had any right to claim over the property, contending it to be an escheat

property, they ought to have drawn a proceedings for its cancellation and thus the defendants/appellants right would be barred by Section 21 of the Specific Relief Act as the registered document treated to have been validly executed until and unless the same is challenged and set aside by the competent Court.

28. Consequently, the learned trial Court while determining it's finding on Issue Nos. 1 and 2 had set aside the order dated 1st August 2011, rendered in Case No. 1 of 2011, State v. Property No.43 (old No.), new No. 127, Guru Road, Patel Nagar, Dehradun under Section 29 of the Hindu Succession Act, 1956 as rendered by the Collector and declared the same as null and void and has held that the plaintiff/respondent's right flow from the registered Will dated 28th September 2007, and the sale deed dated 8th July, 2008.

29. Being aggrieved against the judgement of declaring of the order dated 1st August 2011, as to be void, the defendant/appellant has preferred a Civil Appeal being Civil Appeal No. 66 of 2013, State of Uttarakhand and another v. Meenakshi Chaudhary, which was filed on 27th April 2005. Questioning the veracity of the judgement/decreed as passed by the learned trial Court decreeing the Suit of declaration of the plaintiff/respondent on 30th March 2013, the defendant/appellant has contended that during the pendency of the First Appeal, there was certain other documents which he had sought to bring on record by filing of an application under Order 41 Rule 27 CPC, i.e. paper No. 25C2 on 9th September 2014, but the learned Appellate Court, admittedly, by virtue of its order dated 28th November 2014, had rejected the application of the defendant/appellant and the said order of rejection of the application rejecting application under Order 41 Rule 27 was not challenged hence that too since was not assailed by the defendants/appellants has attained its finality and the documents as sought to be brought on record by virtue of an application under Order 41 Rule 27 CPC, ought not to be read for the purposes of an adjudication of the First Appeal, as the non challenging of the order of rejecting the application under Order 41 Rule 27 CPC, would cease his rights to substantiate his argument based upon any of the document which was sought to be placed on record by virtue of adducing of an additional evidence by virtue of application paper No. 25C which stood rejected, means that it couldn't have been read in evidence in the civil proceedings, because relying on such document will amount to reading a document without giving an opportunity of rebuttal to other party which is not permissible under the law of evidence.

30. Another argument, which has been extended by the learned Additional Advocate General for the defendants/appellants is to the effect that the learned Appellate Court had not considered all the grounds, which have been raised by the defendants/appellants in the First Appeal while challenging the judgement and decree of declaration dated 30th March 2013. Although, this ground is not being accepted for the reason and rationale that merely incorporation of a ground in the Memorandum of Appeal for challenging an order passed by the subordinate Court would not suffice to establish that all the grounds as pleaded

therein were the bone of contention which was argued before the Appellate Court. Its' not a specific case pleaded by the defendant/appellant as to which ground was argued and was not considered by the Appellate Court. There has had to be a specific plea in this regard, which is lacking in the present Second Appeal.

31. The learned Appellate Court was only required to consider the grounds which were actually pressed by the defendants/appellants at the time of arguing the Appeal. Even the learned Appellate Court too has recorded a concurrent finding of fact that the defendants/appellants themselves had not made any efforts to substantiate their case i.e. either to produce an oral evidence or a documentary evidence in support of their claim or contentions in order to establish that the property in question would fall to be under Section 29 of the Hindu Succession Act, 1956 and in the absence of the same. Coupled with the fact that the learned trial Court had passed an order that his opportunity to lead the evidence was closed was yet again an admitted fact and that an order which was not challenged by the defendants/appellants by approaching before a Superior Court against interlocutory orders which was detrimental to the interest of the defendant/appellant, questioning the order, closing his opportunity to lead evidence, hence it is no more open for him to argue that the Appellate Court had not dealt with the case which was pleaded by the appellant, more particularly, when he has not questioned the propriety of the order, rejecting his application under Order 41 Rule 27 CPC, on 28.11.2014, as well as, he has not questioned the orders dated 29.01.2013 passed by the learned trial Court which has closed his opportunity of the defendant to lead his evidence.

32. The learned Additional Advocate General for the defendant/appellant submits that once he has preferred a Second Appeal, questioning the propriety of the judgements passed by the Court below, it would be deemed that the appellant also intends to question the order passed by the learned trial Court, wherein his opportunity to lead an evidence was closed by order dated 29th January, 2013 and also that the order dated 20th November 2014, whereby the application under Order 41 Rule 27 IPC, preferred by the appellant was rejected. This Court is not in agreement with the argument as extended by the learned Additional Advocate General for the appellant for the reason being that the two orders, as passed during the pendency of the Suit or during the pendency of the Appeal, they constitute to be an independent order whereby a certain document which was sought to be relied was declined to be accepted on record as an evidence and secondly order dated 29th January, 2013, was an order passed during the course of the proceedings which has closed an opportunity of the appellant to lead his evidence and none challenging of the same would amount to be a bar created against him in questioning the effect of the impugned judgement under challenge on the ground of rejection of his application under Order 41 Rule 27 CPC, more particularly, also when at least the appellant himself has not questioned the propriety of the said order by invoking Section 105 of the Code of Civil Procedure.

33. As far as the contention raised by the appellant pertaining to the property being an "escheat" property under Section 29 of the Hindu Succession Act, 1956, this Court is of the opinion that as far as the ingredients required for declaring the property as to be an "escheat" property, these condition and circumstances was not available nor it was proved otherwise by the appellant/defendant, to establish that it was an "escheat" property which would in the absence of there being any heirs qualified to succeed the property would vest with the State Government, as it has been the consistent case of the plaintiff/respondent, which remained un rebutted by any evidence that she happens to be the daughter of the predecessor owner of the property, who had executed a Will and when she has claimed her right by virtue of the sale deed which remained un rebutted, she has contended that she has acquired a right and title over the part of the property, which was a subject matter of the Appeal and hence the declaration made under Section 29 of the Hindu Succession Act, 1956, by the learned Collector/District Magistrate while rendering the judgement and decree dated 1st August 2011, as rendered in Case No. 1 of 2011, State v. Property No. 43 (old No.), new No. 127, Guru Road, Patel Nagar, Dehradun is not available to the defendant/appellant and the property in question will not fall to be an "escheat" property under Section 29 of the Hindu Succession Act, 1956, and it will not vest with the State Government as the covenants of Section 29 of the Act remained unfilled and un-established.

34. The learned Additional Advocate General for the appellant contends that the judgement rendered by the Appellate Court, do not satisfy the test of Order 41 Rule 31 of the Code of Civil Procedure, because the grounds taken by them and coupled with the fact that there was no specific determination of grounds for questioning the trial Court's order will not be available, because on the scrutiny of the judgement, it was rather the Court which was scrutinizing the propriety of the judgement as rendered on 1st August 2011 by the Collector, and it was not a case that the Court was ceased with the declaration of a right of the plaintiff/respondent rather nor it was a case which was based on the scrutinization of the validity of the Will or the validity of the sale deed, which remained unquestioned by the defendant/appellant.

35. Even otherwise also, if the judgement of the learned Appellate Court is gone into, the appellate Court has considered the findings which has been recorded on the issues and the foundationed on which the findings has been arrived at and has been concurrently affirmed the judgement of the trial Court in appeal holding thereof that since the plaintiff/respondent succeeds the predecessor owner of the property, the ingredients of Section 29, will not be available and the property in question cannot be declared as an "escheat" property and had dismissed the Appeal by the impugned judgement dated 26th November 2015.

36. The second appeal was argued at admission stage on 27th February 2005 and was admitted on the following substantial question of law :-

"1) . Whether the courts below were justified in decreeing the suit of the plaintiff

when the property in question was rightly declare as ESCHEAT property under Section 29 of the Hindu Succession Act, and consequently the property vested in the State Government subject to all the obligations and liabilities to which any heir would have been subjected.

2). Whether the courts below were justified in decreeing the suit of the plaintiff when it was categorically proved beyond doubt that Shri Harish Chandra Kalsi during his life time neither had executed any will in favour of Meenakshi Chaudhary nor any sale deed."

37. Challenging both the judgements, the Second Appeal, which has been preferred by the appellant is on the substantial question of law that in the absence of there being any heir succeeding the estate of a deceased, it was bound to be declared as to be an "escheat" property, in view of the findings and reasoning which has been given above and as given by both the Courts below since the plaintiff/respondent has succeeded in establishing that she being the heir of the deceased predecessor owner, it means that there was a devolvement of right over the property by virtue of a registered sale deed, as well as, by that of a registered Will, which remained un-assailed. Their grounds that its non declaration of property as to be an "escheat" property under Section 29, was that was contrary to the provisions contained under Section 29 of the Hindu Succession Act, 1956 itself, because the circumstances existing in the present case do not establish the fact that the property remained un-succeeded by deceased owner of the property which could have been vested with State as an "escheat" property under Section 29 of the Act of 1956.

38. The second substantial question of law, as sought to be pressed was that as to whether the predecessor owner of the property has executed any Will in favour of the plaintiff/respondent or not? As far as the second substantial question of law is concerned, yet again he submitted that since that was not an issue proved or covered by Section 31 of the Specific Relief Act and was not a question under challenge at the behest of the defendant/appellant in any other independent proceedings wherein his exclusive right as an "escheat" property which stood adjudicated by the judgement dated 1st August 2011, which has been set aside by the learned trial Court, it cannot be held that the second substantial question of law involves consideration in the present case because the Will since being a registered document will be treated to be valid document, unless proved otherwise.

39. The learned Additional Advocate General for the appellant submits that in view of the ratio as propounded by the Hon'ble Apex Court in a judgement as reported in AIR 2000 SC 426 Ishwar Dass Jain (dead) through LRs v. Sohan Lal (dead) by L.Rs, particularly, the reliance has been placed on para 14 of the said judgement which reads as under:-

"14. We shall first deal with the proof of the certified copy of the deed of mortgage. So far as the mortgage deed is concerned, the plaintiff filed a certified

copy and called upon the defendant to file the original. The defendant refused to do so. The plaintiff, therefore, proceeded to file the certified copy as secondary evidence under Sub-clause (a) of Section 65 of the Evidence Act. This was certainly permissible. The mortgage is a document required to be attested by two attestors under Section 59 of the Transfer of Property Act and in this case it is attested by two attestors. The mode of proof of documents required to be attested is contained in Sections 68 to 71 of the Evidence Act. Under Section 68, if the execution of a document required to be attested is to be proved, it will be necessary to call an attesting witness, if alive and subject to the process of Court and is capable of giving evidence. But in case the document is registered -then except in the case of a will-it is not necessary to call an attesting witness, unless the execution has been specifically denied by the person by whom it purports to have been executed. This is clear from Section 68 of the Evidence Act. It reads as follows:

Section 68: If a document is required by law to be attested, it shall not be used as evidence until one attesting witness atleast has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.

In the present case, though it was stated in the written statement that there was no relationship between the parties as mortgagor and mortgagee, the defendant admitted in his additional pleas in the same written statement that the mortgage deed was executed but he contended that it was executed to circumvent the Rent Control legislation. In fact, in his evidence as DW2 the defendant admitted the execution of the mortgage. It must therefore be taken that there was no specific denial of execution. Hence it was not necessary for the plaintiff to call the attessor into the witness box, this not being a will. The plaintiff could therefore not be faulted for not examining any of the attestors. Hence the mortgage stood proved by the certified copy. The Courts below were right in accepting that the deed was proved. Point 2 is decided in favour of plaintiffs-appellants."

40. In the said authority which was relied by defendant/appellant, the said question was pertaining to the consideration of a registered document as executed and which was required to be proved in accordance with Section 68 of the Indian Evidence Act. This judgement was rendered on altogether in a different context wherein the issue before the Hon'ble Apex Court was a claim raised by the appellant as a legal representative of the mortgagor and the original plaintiff/respondent in the Suit before the Sub Judge had decided the issue and had sued the question of redemption of the usufructuary mortgage which has not been accepted by the learned trial Court and has dismissed the

Suit.

41. It was under altogether different set of circumstances where a redemption of usufructuary mortgage was under consideration where the Hon'ble Apex Court in para 14 had dealt with the issue pertaining to the importance of registration of a document and its proof, more particularly, when the right itself stands settled or sought to be established based on the document in question. In the instant case, the said ratio as propounded in para 14 of said judgement will not apply the reason being that the controversy here in hand has flowed from a declarations, which was already made in favour of the defendant/appellant by virtue of an order dated 1st August 2011, rendered in Case No. 1 of 2011, in proceedings under Section 29 of the Hindu Succession Act, 1956, as decided by the Collector, which was sought to be set aside and for the purposes of setting aside the said decree, the reliance was placed on the registered documents i.e. the Will dated 28th November 2007, and registered sale deed dated 8th July 2008, which as per the provisions of the Registration Act, would be deemed to have been validly executed until and unless the same is put to challenge and set aside by a competent Court of law.

42. The second judgement, on which the reliance has been placed by the learned Additional Advocate General for the appellant was on a judgement as reported in AIR 2000 SC 3522 (1), Kannian and another v. Sethurama, where a reference is made to para 2 by him of the said judgement as to what would be the effect of the proviso to Section 68 of the Indian Evidence Act. Para 2 of the said judgement is quoted hereunder:-

"2. The Will was an unregistered one. There were stated to be three attesting witnesses -- two of them are dead and one was not produced. The trial Court did not rely upon the evidence of the scribe for the purpose of establishing the validity of the Will. The lower Appellate Court merely stated, while reversing the decree, that the scribe had been examined to prove the will. How the scribe was examined, what was stated by him and whether that statement amounted to the scribe being regarded as an attesting witness was not held by the lower Appellate Court. The High Court on the other hand dealt with the evidence of the scribe and then came to the conclusion that he could not be regarded as an attesting witness."

In this case, which has been relied it rather deals with a Will which was an unregistered one and they were stated that there to be three attesting witnesses; two of them were there and one of them was not produced. This was a situation where the provisions of Section 68 of the Indian Evidence Act was sought to be attracted in relation to a document i.e. a Will based on which a right was claimed and since being an unregistered document was required to undergo the test of evidence contemplated under Section 68 of the Indian Evidence Act. Hence, this judgement too as rendered by the Hon'ble Apex Court was under altogether a different contest where a scrutiny of an unregistered document was sought to be established before the Court for the purposes of claiming of a right.

43. But, as far as the case at hand is concerned, the Will dated 28th November 2007, was not the foundation of declaration or challenge but what was the basis on which the declaration was sought to be made was in favour of the defendant/appellant under Section 29 of the Hindu Succession Act, 1956 which was put to challenge on the ground that the property in question of the predecessor owner may not be treated as to be an "escheat" property in the absence of there being any heir. Here, the Will which was registered was placed reliance because the Will contained a declaration that the plaintiff/respondent enjoyed the relationship of being the daughter of the predecessor owner and as such it cannot be said that the property of the predecessor owner was an "escheat" property. But in the case relied by the appellant/defendant there the unregistered Will itself was a question of determination, which is not available in the instant case, where the declaration made by Collector under Section 29 itself was put to challenge.

44. Even otherwise also, as per the provisions contained under the Registration Act, particularly as provided Section 49, it draws a presumption that when a document is registered and has not been questioned, in that eventuality, the said document is to be treated as to have been validly executed and is to be read in evidence if the document creates a right. It would be unjust not to consider the argument extended by the learned Additional Advocate General for the appellant with regards to the implications of Section 105 of the Code of Civil Procedure. For the said purpose, a reference to the provisions contained under Section 105 of the Code of Civil Procedure becomes relevant which is quoted hereunder:-

"105. Other orders.- (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

45. Section 105 of the Code of Civil Procedure contemplates a situation where an error in a judgement under challenge in Appeal has crept in on account of the error committed by the Court below in relation to any order passed in an interlocutory manner during the pendency of the principal proceedings or any irregularity committed by the Court which can be set forth as the ground of an objection in the Memorandum of Appeal.

46. First of all, the issue before the learned trial Court was not of scrutinizing the validity of the document but rather a decree of declaration made against order dated 1st August, 2011 rendered under Section 29 of the Hindu Succession Act, 1956. Hence declining to challenge an order rejecting application under Order 41 Rule 27 CPC on 28th November 2014, or an order dated 29th January, 2013,

directing to close the evidence of defendant/appellant since has not been set forth by the appellant, admittedly, in the grounds of Appeal which has been taken before the Second Appellate Court, the same cannot be questioned now at this stage of hearing Second Appeal, and that too when both question would not have any bearing at this stage on the merits of the matter.

47. Secondly, an order dated 29th January, 2013, passed by the trial Court directing the closure of an opportunity to lead an evidence since too has not been challenged by the appellant at any stage or even before this Court by invoking Section 105 of the Code of Civil Procedure, this Court is of the view that the implications of Section 105 will not automatically flow without until and unless the case is built up in the manner, or there being any specific ground raised by the appellant. It has to be specifically pleaded that non challenging of an interlocutory order passed during pendency of proceedings was having a direct impact on the veracity of the judgement which has been put to challenge by the appellant in the Appeal. Since the said ground was neither pleaded nor established is not available to the appellant as he argued at this stage, hence, consequently, the Second Appeal fails and is hereby dismissed.

48. After the conclusion of the judgement, the learned Additional Advocate General for the appellant submits that the plaintiff/respondent, who was claiming herself to be the daughter of the deceased owner of the property in question i.e. the estate owner was not a natural heir and the factum of adoption was not proved. For the said purpose too, this Court will have to confine the consideration, which has been raised by the plaintiff/respondent in the Suit which was primarily confined and based upon a declaration which was made in favour of the defendant/appellant by the judgement dated 1st August 2011, only under Section 29 of the Hindu Succession Act, 1956. In such an eventuality, where a propriety of an order is put to challenge by the plaintiff/respondent, the issue of establishment of valid adoption would not be relevant when it's a right which was flowing from an independent documents registered by the predecessor owner of the property in favour of the plaintiffs/respondents, which is not necessarily required to be executed only in favour of the natural successor of the predecessor owner of the property. Since it was a Will and it was a testament which was executed by the owner of the property, it was exclusively in his domain to deal with his property or assets in the manner in which he desired even if there is a reference of the plaintiff/respondent being the daughter in the Will, it will have no bearing as far as the declaration under Section 29 of the Act of 1956, made by the order dated 1st August 2011 in a case preferred by the defendant/appellant under Section 29 of the Hindu Succession Act, 1956 being Case No. 1 of 2011, State v. Property No. 43 (old No.), new No. 127, Guru Road, Patel Nagar, Dehradun.

49. Accordingly, this Court is of the view that both the substantial questions as framed on 27th February 2015 are not at all involved, which is required to be answered by this Court under Section 100 of Code of Civil Procedure. Thus the

Second Appeal fails and is hereby dismissed. However, there would be no order as to cost.