

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

R.S.A.No.4200 of 2012 (O&M)

Date of Decision: January 30th, 2015

Harpal Kaur & another

...Appellants

Versus

Ranjit Kaur & others

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr.G.S.Ghuman, Advocate,
for the appellants.

Mr.Kanwaljit Singh, Senior Advocate with
Mr.B.B.S.Randhawa, Advocate,
for the respondents.

AMIT RAWAL, J.

This Regular Second Appeal at the instance of the appellant-plaintiffs is directed against the judgments and decrees of both the Courts below, whereby the suit of the appellant-plaintiffs, for possession/joint possession as owner/co-owner to the extent of ½ share out of the share/land left behind by Sadhu Singh deceased on the basis of the natural succession and as well as on the basis of the registered Will of Paramjit Kaur dated 5.9.2005 with regard to the land comprised in khewat No.19, khatauni No.19, khasra Nos.10//22/2(4-0), 23/1(4-0), 24/2(3-16), 15//2(8-0), 3(8-0), 4(7-4), 5/1(3-16), 6(7-16), 7(7-8), 8/1/1(2-0), 13/2/2(0-8), 13/3(1-12), 14(8-

0), 16/1(5-2), 15//17/2(5-2), 26(1-0), 16//9(8-0), 10(8-0), 11(8-0), 12(8-0), 19/2(2-9), 20/1(5-2), khewat No.130, khatauni No.159, khasra Nos.14//5/2 (1-19), 5/3(0-4), 5/4(2-8), 15//1/2(0-11), 1/3(4-5), $\frac{1}{4}$ share in the land compromised in khewat No.241, khatauni No.276, 277, khasra Nos.14//8/1 (0-10), 14/2(0-13), 14//7(7-10), situated in the area of village Mohanpur (Jandiala), Tehsil Phillaur, District Jalandhar, H.B. No.101, as shown in the jamabandi for the year 2002-03, after declaring the mutation of inheritance of Sadhu Singh in the revenue record as wrong and incorrect and against facts, has been dismissed by both the Courts below.

The facts as enumerated from the impugned judgments and decrees between the parties to the lis, in brief, are referred herein below:-

Sadhu Singh son of Mehar Singh was the owner in possession of the suit property and he had two sons, namely, Amarjit Singh and Daljit Singh and one daughter Surinder Kaur. Paramjit Kaur appellant (since deceased) was the wife of Sadhu Singh. It is a matter of record that Daljit Singh son of Sadhu Singh had pre-deceased Sadhu Singh. Sadhu Singh died on 3.5.2002 and as per the appellant-plaintiffs, he is alleged to have executed a Will dated 20.5.1999 registered on 10.6.1999 and on the basis of the said Will, the suit property was bequeathed in favour of Paramjit Kaur, his wife, to the extent of $\frac{1}{3}$ share, Amritpal Singh son of Daljit Singh son of Sadhu Singh and Amarjit Singh son of Sadhu Singh were given $\frac{2}{3}$ share. The mutation on the basis of the said Will had also been sanctioned in favour of all the beneficiaries, i.e., Paramjit Kaur $\frac{1}{3}$ share, Amritpal Singh $\frac{1}{3}$ share and Amarjit Singh $\frac{1}{3}$ share.

Paramjit Kaur wife of Sadhu Singh and Surinder Kaur daughter

of Sadhu Singh challenged the alleged Will by filing the suit bearing No.28 of 2005 on the ground that the mutation was sanctioned at the back of the plaintiffs and they did not get any property being heirs on the basis of natural succession, i.e., both plaintiffs Paramjit Kaur and Surinder Kaur are entitled to half share, i.e., $\frac{1}{4} + \frac{1}{4} = \frac{1}{2}$ share out of the estate of Sadhu Singh. In essence, plaintiff Nos.1 and 2 claimed their share to the extent of half share out of the estate of Sadhu Singh. It was alleged that mutation of inheritance by Sadhu Singh, *prima-facie*, was wrong and against the facts and plaintiffs were not bound by the said mutation.

It is pertinent to mention here that during the pendency of the suit, Paramjit Kaur died, leaving behind Surinder Kaur as daughter, Amarjit Singh as son, Amritpal Singh, Amanpreet Kaur as daughter and Ranjit Kaur widow of her pre-deceased son Daljit Singh to be her only legal heirs on the basis of natural succession. However, Paramjit Kaur died leaving behind a registered Will dated 5.9.2005 bequeathing her entire share , i.e., $\frac{1}{3}$ in the suit land in the name of grand-daughter Harpal Kaur daughter of Surinder Kaur. Along with the suit, photo copy of the Will was attached. It would be apt to extract para 11-A of the amended plaint herein below:-

“That during the pendency of the suit, Smt.Paramjit Kaur died, leaving behind Surinder Kaur as daughter, Amarjit Singh as son, Amrit Pal Singh, Amanpreet Kaur as daughter and Ranjit Kaur widow of her pre-deceased son Daljit Singh, to be her only legal heirs, on the basis of natural succession. However, Smt.Paramjit Kaur died leaving behind a registered Will dt.05.09.2005, bequeathing her entire share in the suit land in the name of Smt.Harpal Kaur d/o Smt.Surinder Kaur and thus, she has been introduced as the legal heir (newly legal heir on

the basis of the Will dated 05.09.2005). Photostat of the Will above said is attached herewith.”

The said suit was contested by the respondents, i.e., defendant Nos.1, 2, 3 and 4 by raising as many as five preliminary objections that the suit was not maintainable, locus-standi of the plaintiffs, suit having been barred by the doctrine of akin to res judicata, the Will dated 20.5.1999 was executed by Sadhu Singh in favour of defendant Nos.1 and 2 and plaintiff No.1 in his free disposing mind and defendant Nos.1 and 2 are in possession of the suit property in question and after the death of Paramjit Kaur, Amarjit Singh, Amritpal Singh, plaintiff No.2 and defendant Nos.3 and 4 are/were the legal heirs.

The trial Court, on the basis of the pleadings of the parties and the Will between the parties to the lis framed the following issues:-

- “1. Whether Sadhu Singh executed a legal and valid will dated 20.5.1999, if so its effect? OPD
2. If issue No.1 is not proved, whether the plaintiffs are entitled to possession as co-owner to the extent of ½ share qua the estate of Sadhu Singh on the basis of natural succession as alleged? OPP
3. Whether the suit is not maintainable in the present form? OPD
4. Whether the suit is barred by principle of resjudicata as alleged? OPD
5. Relief.

The appellant-plaintiffs, in support of the assertions made, examined the following witnesses:-

PW-1	Surinder Kaur
PW-2	Harpal Kaur
PW-3	Amarjit Singh Lambardar

PW-4 Mukesh Mishra, Deed Writer

Thereafter, the evidence of the plaintiffs was closed.

On the other hand, respondent-defendants examined the following witnesses:-

DW-1 Ranjit Kaur
DW-2 Gurdial Singh
DW-3 Jaswant Rai, Registration Clerk

Thereafter, after tendering some documents, the defendants closed their evidence.

The trial Court, despite the fact that there was no issue framed with regard to the Will dated 5.9.2005, yet was called upon to decide the genuineness of the Will as the appellant-plaintiffs laid much stress on the Will and also examined the witnesses in support of the Will. It is the settled law that the Court can adjudicate the matter where the issue was not framed and where parties were alive to the matter in controversy. Though, it is a matter of common knowledge with regard to the aforementioned proposition of law, but it would be apt to cite two judgments in support of the aforementioned settled law, which are:-

1. **M/s Fancy Agriculture Works Versus Sunil Kumar and others, 2006(2) R.C.R. (Civil) 144; and**
2. **Tika and others Versus Ram Chander and others, 2003 (3) R.C.R.(Civil) 541.**

The appellant-plaintiffs examined PW-3 Amarjit Singh Lambardar, one of the attesting witness of the Will dated 5.9.2005 executed by Paramjit Kaur and PW-4 Mukesh Mishra, Deed Writer.

The respondent-defendants sought the permission of the trial Court to prove the Will dated 20.5.1999 by means of secondary evidence and the trial Court vide order dated 24.8.2010 allowed the application by accepting the plea of the respondent-defendants that the Will had been lost and the certified copy of the Will was proved and exhibited as Ex.D2 as the Will dated 20.5.1999 was a registered document. DW-1 Gurdial Singh, the attesting witness to the Will, appeared in the Court and proved the execution of the Will as required by Section 63(c) of the Indian Succession Act. DW-2 Gurdial Singh withstood the cross-examination and his testimony in examination-in-chief was not shattered by the appellant-plaintiffs. DW-3 Jaswant Rai, Registration Clerk also produced the record of the Will Ex.D2 retained in the office of Sub-Registrar, Noormahal.

As per the Will dated 20.5.1999, Paramjit Kaur wife of Sadhu Singh was bequeathed 1/3 share and defendants Amarjit Singh and Amritpal Singh each to the extent of 1/3 share. Sadhu Singh excluded his daughter Surinder Kaur from the inheritance and Paramjit Kaur became joint owner of 1/3 share out of property and Harpal Kaur, the legal heir of plaintiff No.2 Surinder Kaur was given 8 kanals 2 marlas of land and the same was not connected with the suit property. Harpal Kaur was impleaded as legal heir of Paramjit Kaur on 12.10.2006 in ex-parte proceedings and she claimed joint possession of the suit property by stepping into the shoes of Paramjit Kaur on the basis of the original cause of action.

The trial Court dismissed the suit of the appellant-plaintiffs and found that the Will executed by Sadhu Singh was a genuine Will as the defendants were able to prove the execution of the Will. The trial Court

found that the Will, being a registered document, was proved in accordance with the provisions of Section 68 of the Indian Evidence Act and even none of the attesting witness had confirmed that the Will was surrounded by suspicious circumstances as per testimony, much less, cross-examination, corroborated the compliance of the provisions of sub-clause (c) of Section 63 of the Indian Succession Act.

The appellant-plaintiffs challenged the said judgment and decree by filing an appeal. The Lower Appellate Court proceeded to decide the execution of the Will dated 5.9.2005, certified copy of which was exhibited as Ex.P2 on the premise that Harpal Kaur set up the said Will by alleging that she had succeeded to the share of Paramjit Kaur. Surinder Kaur entered into the witness box as PW-1 and deposed that Harpal Kaur inherited the property of Paramjit Kaur on the basis of the Will dated 5.9.2005 and Harpal Kaur appeared in the witness box as PW-2. Surinder Kaur did not depose that Sadhu Singh had not executed any Will and rather she deposed that she did not know whether Sadhu Singh had executed the Will on 20.5.1999 or not. The Lower Appellate Court found that the onus to prove execution of the Will dated 5.9.2005 was on Harpal Kaur. The original Will dated 5.9.2005 had not been produced in the Court and only certified copy was produced. PW-3 Amarjit Singh in the evidence did not utter a single word that he had seen or not seen the the original Will in the Court at the time of his deposition and similar was the testimony of Mukesh Mishra, Scribe of the Will dated 5.9.2005 Ex.P2. The Lower Appellate Court also found that Harpal Kaur had not sought the permission to prove the Will by means of secondary evidence. The Lower Appellate Court, after

noticing the evidence threadbare, found that the Will executed by Sadhu Singh dated 20.5.1999 Ex.D2 was validly executed, whereby Paramjit Kaur widow, his son Amarjit Singh and his grand-sons became the joint owners of the suit property in equal share and Harpal Kaur was not proved to be the legal heir of Paramjit Kaur and Surinder Kaur, plaintiff No.2 would be only entitled to succeed to the extent of 1/3 share of the property of Paramjit Kaur, who had since expired. In essence, she would be entitled to succeed 1/9 share of the suit property being daughter of Paramjit Kaur on the basis of the natural succession. The Lower Appellate Court dismissed the appeal of the appellant-plaintiffs vide judgment and decree dated 24.7.2012.

The aforementioned Regular Second Appeal was filed in this Court on 27.9.2012. The appellant-plaintiffs did not disclose in the grounds of appeal the factum of filing a review application on 21.8.2012 before the Lower Appellate Court against the judgment dated 24.7.2012. This Court on 30.11.2012 issued notice of motion for 12.2.2013. The respondent-defendants brought the factum of filing of the review by the appellant-plaintiffs through Misc.Application No.1031-C of 2013 and sought the dismissal of the present appeal on this ground.

This Court in pursuance to the said application, issued a show cause notice to appellant No.1 as to why suitable action be not taken for suppressing the material fact of filing the review application. The appellants filed reply to the show cause notice. However, when the matter came up for final hearing, the learned counsel appearing for the applicant-appellants did not press the application and sought the permission of the Court to withdraw the application. Accordingly, the application is ordered to be withdrawn.

However, he requested that the appeal be heard and decided on merits.

Mr.G.S.Ghuman, learned counsel appearing for the appellant-plaintiffs, in support of grounds taken in the Regular Second Appeal, has submitted that there was no occasion for the Lower Appellate Court to decide the genuineness or ingenuineness of the Will dated 5.9.2005 as there was no issue framed on the said Will and, therefore, the Lower Appellate Court did not have any occasion to decide the genuineness of the Will. He further submitted that Harpal Kaur was impleaded as legal heir of Paramjit Kaur vide order dated 12.10.2006 and accordingly the amended plaint was filed by adding para 11-A, extracted above. He further submitted that the original Will dated 20.5.1999 had not seen the light of the day and in the absence of the original Will, the Will which has been proved on record by way of secondary evidence could not have been exhibited and should have been marked. The Will dated 20.5.1999 had not been proved on the file and both the Courts below have committed an illegality and perversity, much less, rendered erroneous finding in accepting the Will. He has further submitted that the Will dated 5.9.2005 of Paramjit Kaur was not subject matter of adjudication as there was no issue framed with regard to the Will dated 5.9.2005 executed by Paramjit Kaur. Harpal Kaur was impleaded as legal heir and the subject matter was only with regard to the Will dated 20.5.1999 and not the Will dated 5.9.2005 and since there was no such issue framed in respect of the Will nor defendants sought the framing of such issue and yet if the Lower Appellate Court was of the view that such issue should have been framed, the matter should have been remanded back to the trial Court and the parties should have been given opportunity to lead the

evidence.

He has further submitted that the property already inherited by Paramjit Kaur was not challenged by the defendants and was not subject matter of the suit. The Lower Appellate Court had gone beyond the pleadings, much less, beyond the issues. He further submitted that the appellant-plaintiffs had proved the original Will by referring to the examination-in-chief of the witnesses to the Will dated 5.9.2005 and, therefore, the Courts below have committed an illegality in holding that the original Will dated 5.9.2005 has not been produced and, thus, submitted that the following substantial questions of law arise for determination by this Court:-

- i) Whether the Ld.Lower Appellate Court has acted in a perverse manner in deciding the appeal of the present appellants and further modifying the judgment of Ld.Trial Court and in giving further adverse findings without there being any issue on the point on which Ld.Lower Appellate Court proceed to determine the erroneous finding given by said court?
- ii) Whether Ld.Lower Appellate Court can frame an issue or point of determination on his own and that too without any application or cross objection and give finding on the same against the appellants without affording any opportunity to lead evidence to the parties?
- iii) Whether Ld.Lower Appellate Court can be allowed to set aside the order dated 12.10.2006 (regarding L.R of Paramjit Kaur-plaintiff No.1) passed by the Ld.Trial Court without there being any challenge to the same by the defendant-respondents?
- iv) Whether Ld.Lower Appellate Court can be allowed to hold that the Will Ex.P2 as set up by Harpal Kaur remained

unproved. Especially when it is already held to be proved by ld. Trial court and no appeal/cross objections have been filed against the same by the defendants-respondents?

v) Whether the Ld.Lower Appellate Court can set aside and reverse any finding or order against the appellants without there being any challenge thereto by the defendants-respondents?

vi) Whether Lower Appellate Court can proceed to determine any point of its own without there being any such issue in the case and even beyond pleading of the parties?

vii) Whether the Lower Appellate Court can be further allowed to decide succession to the 1/3rd property already inherited by Paramjit Kaur-plaintiff no.1 which was not under challenge and was not the subject matter of the suit?

viii) Whether Lower Appellate Court has further acted perversely by giving finding qua the property already owned by Paramjit Kaur-plaintiff no.1 which was not under challenge in the suit?

ix) Whether seeing from any angle since the judgment and decree passed by Lower Appellate Court is beyond issues framed in the suit, beyond pleadings, without jurisdiction and as such the same is perverse and as such is liable to be set aside?

x) Whether the findings of both the courts below are perverse, erroneous, unlawful and as such are liable to be set aside and the suit of the appellants-plaintiffs deserves to be decreed in the interest of justice?"

In support of his submissions, learned counsel appearing for the appellant-plaintiffs has relied upon the following judgments:-

- a) Sheo Datt Versus Mst.Sarbati, 1970 PLR 702;**
- b) Onkar Singh Versus Karnail Singh, 2008(1) R.C.R. (Civil) 710;**
- c) Pratima Sinha and others Versus Shashi Kumar Narain Sinha and others, 2004(13) SCC 599;**
- d) Fiza Developers & Inter-Trade P.Ltd. Versus AMCI**

- e) (I) Pvt.Ltd. & Anr., 2009(17) SCC 796; and
Makhan Lal Bangal Versus Manas Bhunia and
others, 2001 AIR (SC) 490.**

Mr.Kanwaljit Singh, learned Senior Counsel appearing for the respondents, in support of his case, has submitted that both the Courts below have rendered a finding of fact and law, based on the appreciation of oral and documentary evidence brought on record and, therefore, no illegality and perversity, much less, substantial question of law arises. He has further submitted that it was only the appellant-plaintiffs, who, after the amendment of the plaint by adding para 11-A set up the plea of Will dated 5.9.2005 of Paramjit Kaur and, therefore, invited the attention of the Court to deal with the said Will. In support of the aforementioned two cited judgments, i.e., Tika and M/s Fancy Agriculture Works (supra) to contend that if the parties are alive to the situation and despite the fact the issues are not framed, the Court is not precluded to decide the matter and, thus, prayed for dismissal of the appeal.

I have heard the learned counsel for the parties and appraised the judgments and decrees of both the Courts below with their able assistance and is of the view that the appeal is liable to be dismissed.

The afore-noted submissions of the learned counsel appearing for the appellants, I am afraid, are devoid of merit. It is settled proposition of law, as has been held by this Court in Tika and M/s Fancy Agriculture Works cases (supra) that the Court can adjudicate the matter where the issue was not framed when the parties were alive to the matter in controversy.

The appellant-plaintiffs by amending para 11-A of the plaint

invited the ire of the Court by examining PW-3 Amarjit Singh Lambardar and PW-4 Mukesh Mishra, Deed Writer of the alleged Will dated 5.9.2005.

In view of the fact that the appellant-plaintiffs themselves called upon the attention of the Court by leading evidence, the Court was enjoined upon an obligation to decide the validity of the Will set up by the appellant-plaintiffs. The argument of the learned counsel for the appellants that the Lower Appellate Court ought to have remanded back the matter to the trial Court by appropriately framing the issue qua genuineness and execution of the Will dated 5.9.2005 (Ex.P2) is also not sustainable for the reason that the Lower Appellate Court rendered a finding on the Will by invoking the provisions of Order 41 Rule 33 CPC. For the sake of brevity, the provisions of Order XLI Rule 33 CPC are extracted herein below:-

“Power of Court of Appeal-The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]:

[Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]”

On perusal of the provisions extracted above, it leaves no

manner of doubt that the Lower Appellate Court is empowered to decide the appeal by granting or declining relief which even has not been sought for. The judgments cited supra in support of the submission of the appellant-plaintiffs are also not applicable to the facts and circumstances of the case for the reason that the judgment in Sheo Datt's case (supra) deals with framing of the additional issue by incorporating the provisions of Order 41, Rules 23-A and 25. It was a case where the Lower Appellate Court had framed the additional issue and the controversy was whether the entire trial was to be thrown open or only the report on the additional issue was required to be framed. Therefore, this judgment is not applicable to the facts of the present case.

Onkar Singh's case (supra) was also a judgment on the similar lines as to what has been held in Sheo Datt's case (supra).

The case of Pratima Sinha and others (supra) also refers to dismissal of the suit on preliminary ground without framing of any issue and the Court found that the dismissal of the suit was not proper. Thus, the aforementioned judgment would also not be applicable to the controversy between the parties to the list in the present appeal.

The judgment in Fiza Developers & Inter-Trade P.Ltd. (supra) dealt in respect of proposition by holding that the focus of the Court should be on the question on which evidence has been led and to indicate the party on whom the burden of proof lies and the issue was framed and in case the proceedings are summary in nature, the issues are not required to be framed. Therefore, the aforementioned judgment is also not applicable to the facts of the present case.

The judgment in Makhan Lal Bangal's case (supra) also dealt with the framing of issue at the stage of trial. Therefore, this judgment is also not applicable to the present case.

In view of the fact that the Lower Appellate Court has discharged the obligation as envisaged under Section 96 CPC being the last Court of fact and law and as well as invoked the provisions of Order 41 Rule 33 CPC, no fault can be found with the findings rendered by the Lower Appellate Court by holding that the Will dated 5.9.2005 had not been proved. On perusal of the record of the trial Court, it is seen that certified copy of the Will dated 5.9.2005 (Ex.P2) had been proved on record. It is settled law that mere exhibition of the document does not dispense with the proof. (See Sait Tarajee Khimchand and others Versus Yelamarti Satyam and others, AIR 1971 SC 1865). No application for leading secondary evidence has been moved by the appellant-plaintiffs as certified copy of the Will is not primary evidence. In the absence of any application for leading secondary evidence at the instance of the appellant-plaintiffs to prove the execution of the Will dated 5.9.2005, Lower Appellate Court rightly discarded the Will by holding that the original Will had not been proved.

On the contrary, the registered Will dated 20.5.1999 (Ex.D2) has been proved on record through the testimony of the attesting witnesses and the Court itself found that witnesses while making the statements and withstood the cross-examination and have conformed to the provisions of Section 63(c) of the Indian Succession Act. The Will cannot be said to be surrounded by suspicious circumstances.

It has been rightly held that Harpal Kaur would succeed to the state of Surinder Kaur being grand-daughter to the extent of 1/9 share out of the suit property as Paramjit Kaur was given 1/3 share by virtue of the Will dated 20.5.1999 registered on 10.6.1999 executed by Sadhu Singh, who is none else but the husband of Paramjit Kaur and father of Amarjit Singh and Daljit Singh.

Both the Courts below have rendered a finding of fact and law based on appreciation of oral and documentary evidence. There is no illegality, much less, perversity in the findings recorded by both the Courts below. There is no merit in the appeal. No substantial question of law arises for determination of this Court.

Accordingly, the appeal is dismissed.

January 30th, 2015
ramesh

(AMIT RAWAL)
JUDGE