

In the High Court of Punjab and Haryana at Chandigarh

R.S.A.No.1701 of 2015 (O&M)
Date of decision: 20.10.2015

Shingara Singh

.....Appellant

Versus

Nasib Kaur through LRs Karamjit Kaur and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. G.S.Punia, Sr. Advocate with
Ms.Harveen Kaur, Advocate,
for the appellant.

Mr.Akshay Bhan, Sr. Advocate with
Mr.Vaibhav Sehgal, Advocate and
Mr.Santosh Kumar, Advocate,
for respondent No.1.

Mr.Eshjot Walia, Advocate for
Mr.Vaneet Soni, Advocate,
for respondents No.4 to 7.

- 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?***

Raj Mohan Singh, J.

1. Defendant No.1 is in second appeal against the judgment and decree dated 31.10.2014 passed by Additional

District Judge, Ludhiana, vide which judgment and decree dated 25.7.2011 passed by Civil Judge, (Jr.Divn.)Ludhiana has been upheld.

2. Plaintiff Nasib Kaur (deceased) filed suit for declaration and permanent injunction to the effect that Gurdev Singh son of Niranjan Singh was resident of village Raian District Ludhiana, who died on 23.12.1993. Gurdev Singh married twice. Jagir Kaur was his first wife, who died about 42 years back from whom he had three children i.e. Shingara Singh, Rajinder Singh and Paramjit Kaur, defendants No.1 to 3 respectively. After the death of Jagir Kaur, Gurdev Singh married plaintiff about 39-40 years back. Gurdev Singh had one child from this wedlock i.e. Karamjit Kaur-defendant No.4. Marriage of defendant No.3 was solemnized by the plaintiff and Gurdev Singh several years back and she is living in her matrimonial house. She did not visit her father for several years nor took any care of plaintiff and Gurdev Singh. Defendants No.1 and 2 were vagabond type of persons and they did not care for the plaintiff and Gurdev Singh. They are un-married and have been quarelling and threatening Gurdev Singh during his life time. When the marriage of Karamjit Kaur was to be solemnized with Bhagwant Singh, defendants No.1 and 2 created scenes and threatened Gurdev Singh of dire consequences. Resultantly, Gurdev Singh had to come to Raikot, where brother of the plaintiff, namely, Bhagwan

Singh, has been residing. There, they performed marriage of Karamjit Kaur with Bhagwant Singh on 26.3.1989 and immediately thereafter, Gurdev Singh filed criminal complaint against defendants No.1 and 2 under Section 107 Cr.P.C. The attitude of defendants No.1 and 2 was totally intolerable, which ultimately led to their dis-inheritance by publishing news item by Gurdev Singh. Plaintiff has been serving Gurdev Singh through his life time and Gurdev Singh executed valid Will dated 21.12.1993 in favour of the plaintiff bequeathing all his movable and immovable properties. Will was executed by him in Mangat Nursing Katani Kalan District Ludhiana where he was undergoing treatment. In view of the said Will, the estate of Gurdev Singh including movable and immovable properties came to plaintiff at the time of his death as the plaintiff was his legal heir. Plaintiff further alleged that she is in actual physical possession of the house, landed property of Gurdev Singh and the defendants have no right, title or interest in any manner. After the *bhog* ceremony of Gurdev Singh, plaintiff went to Raikot along with his brother and when she came back defendants refused her claim over the property and rather got a mutation sanctioned in their favour in the absence of the plaintiff. Mutation in question is claimed to be illegal and not binding upon the rights of the plaintiff. Defendants threatened the plaintiff that they will alienate the property of Gurdev Singh

including tractor-trolley etc. which prompted the plaintiff to file the present suit.

3. Defendants No1. and 2 contested the suit. They claimed that they are in possession of the suit land and suit is not maintainable under Section 34 of the Specific Relief Act. Plaintiff is residing in Raikot and she does not live in village Raian. They claimed that the Will in favour of the plaintiff is forged and fictitious and the same was prepared after the death of Gurdev Singh. False documents were procured from Mangat Nursing Home, whereas, Gurdev Singh was under treatment in Government hospital, Katani Kalan. Besides challenging the locus of the plaintiff, the suit was contested on other customary pleas. They claimed that Gurdev Singh was in sound disposing mind on 21.12.1993 and in the presence of marginal witnesses, he executed a Will in respect of his entire estate in favour of the defendants being his sons for the services rendered to him. On the basis of Will dated 21.12.1993, defendants claimed ownership and mutation was duly sanctioned in their favour in respect of estate of Gurdev Singh and they have been continuing as owners in possession thereafter. Other facts were denied by the defendants in respect of filing of criminal complaint by Gurdev Singh against them.

4. After filing of replication, following issues were framed by the trial Court:-

“1. Whether the plaintiff is owner in possession of the property in dispute ? OPP

2. Whether all other movable and immovable properties of deceased Gurdev Singh devolve upon the plaintiff by virtue of Will dated 21.12.1993 ? OPP

3. Whether plaintiff is owner in possession of the tractor described in the head note of the plaint ?
OPP

4. Whether the plaintiff is entitled to injunction as prayed for ? OPP

5. Whether the present suit is barred under Section 34 of the Specific Relief Act ? OPD

6. Whether Gurdev Singh executed a valid Will dated 21.12.1993 in favour of defendants No.1 and 2 ?
OPD

7. Whether the property described in item No.10 in the head note of plaint is owned by defendant No.1 and 2 ? OPD

8. Whether the suit is not maintainable in the present form ? OPD

9. Whether the suit is not properly valued ? OPD

10. Whether the plaintiff is estopped to file the present suit by act and conduct ? OPD

11. Relief.”

5. Both the parties led their respective evidence, trial Court discussed issues No.1 to 3 jointly and decided the same in favour of the plaintiff. Under issue No.4, plaintiff was held entitled to injunction. Issues No.5, 9 and 10 were not pressed by the defendants.

6. In view of findings recorded under issues No.1, 2 and 3, issues No. 6 and 7 were accordingly decided in favour of the plaintiff. Defendants failed to prove the Will in their favour and also failed to prove their right, title or interest in the property. Issue No.8 was also answered in favour of the plaintiff and accordingly, suit was decreed by the trial Court, vide judgment and decree dated 25.7.2011.

7. Defendant No.1 went in appeal, which was dismissed by the lower Appellate Court vide judgment and decree dated 31.10.2014. Hence, the present appeal came to be filed before this Court.

8. In the present regular second appeal filed by defendant No. 1 Shingara Singh, following questions of law have been formulated:-

“1. Whether the judgments and decrees of both the Courts below suffers from perversity as the courts below have not appreciated the evidence of plaintiff in regard to suspicious circumstances regarding

execution of Will Ex.P-1 and has upheld the Will merely stating that the Will has been proved ?

2. Whether the propounder of the Will is required to remove all suspicious circumstances surrounding the execution of the Will especially when Will is unregistered and is executed just a day before his death disinheriting all the sons ?

3. Whether it was incumbent upon the plaintiff to prove his possession in order to seek simple declaration ?

4. Whether the suit is barred under Section 34 of the Specific Relief Act ?

5. Whether the statement of a witness can be ignored on the ground that his cross-examination has not been completed although his cross-examination is deferred time and again and cross-examination itself ran into more than 34 pages ?

6. Whether it is the duty of the courts to limit the cross-examination of the witness ?

7. Whether the Courts below wrongly closed the evidence of the appellant and the judgments and decrees are vitiated on this ground alone.”

9. I have considered the arguments of both the parties and have also perused the material on record.

10. Learned senior counsel for the appellant has argued that the suit itself is not maintainable under Section 34 of the Specific Relief Act as the plaintiff is not proved to be in possession of the suit land, therefore, simplicitor suit for declaration is not maintainable. In support of his argument, learned counsel relied upon **Heirs Kantilal Purshottamdas Patel vs. Dahiben Jagdish Rathod, 2003 AIR (Gujarat) 82; Vinay Krishna vs. Keshav Chandra and another, 1993 AIR (SC) 957** and **Mehar Chand Das vs. Lal Babu Siddique and others 2007 (2) RCR (Civil) 628** to contend that plaintiff Nasib Kaur was residing in Raikot alongwith her brother, rather Gurdev Singh and the plaintiff shifted to Raikot and there the Will was forged by the plaintiff. The Will in favour of the defendants is proved on record and the trial Court did not discuss the cross-examination of attesting witnesses of the Will in favour of plaintiff which has resulted in failure of justice. Learned senior counsel further stated that the mutation in favour of defendants on the basis of Will already stood implemented. There is no material on record viz. revenue record to prove possession of the plaintiff over the suit land. While relying upon issue No.1, learned senior counsel states that onus of issue No.1 was on the plaintiff. The statement of PW-3 is proved to be in utter contradiction with taxi driver, who has been examined as PW-2. According to learned senior counsel, the Courts below have not

discussed the cross-examination of PW-2 Jasbir Singh. Relying upon cross-examination of aforesaid witness, learned senior counsel states that Sheetal Singh arrived after the witness had left for Ludhiana. The witness was plying taxi in the year 1993. The witness knew Gurdev Singh for the last 14-15 years as he used to do the job of filling low line fields by means of tractor trolley also in that area. The witness had brought Gurdev Singh from his village Raian to Mangat Nursing Home on 20.12.1993. Gurdev Singh had asked him to attest the Will as marginal witness when he had brought scribe Kamlesh Kumar at Katani Kalan. The witness took Kamlesh Kumar after the completion of Will to Ludhiana and left him there. They got free from Katani Kalan after execution of Will at about 9.30/ 10.00 A.M.

12. Learned counsel further relied upon statement of PW-3 Sheetal Singh to the effect that both were present and, therefore, the statement runs contradictory to PW-2. According to his testimony, the Will was scribed by Kamlesh Kumar, deed writer, at the instance of Gurdev Singh in Mangat Nursing Home. Jasbir Singh, the other marginal witness was also present and the witness signed the Will as marginal witness along with Jasbir Singh. Jasbir Singh signed first and thereafter witness Sheetal Singh signed the Will as attesting witness. The testimony of this witness runs counter to the testimony of PW-2, wherein PW-2 has stated that Sheetal Singh had arrived only after he had left

for Ludhiana. Further statement of Dr.Sukhwinder Singh, PW-5 (wrongly numbered as PW-4) has been relied upon to show that he issued certificate to Gurdev Singh to the effect that Gurdev Singh was under his treatment on 21.12.1993. Certificate dated 21.12.1993 has been admitted to be correct under his signature which is Ex.P-4/2. Dr.Sukhwinder Singh diagnosed Gurdev Singh as a patient of heart disease, therefore, he referred him to Civil Hospital for E.C.G. and other treatment. The doctor further stated that Gurdev Singh might have come a day before in the evening but he attended him in the morning of 21.12.1993 and he mentioned the physical condition of the patient in Ex.PW-4/1, which was issued in the evening of 21.12.1993.

13. Learned senior counsel further highlighted the cross-examination of the doctor to the effect that he had not admitted Gurdev Singh in his hospital when kacha draft of Ex.PW-4/1 was written. The doctor did not consult the admission register nor he mentioned the admission number in the certificate Ex.PW-4/1 as he did not admit Gurdev Singh. Gurdev Singh remained under his treatment and he examined him for about two hours. The doctor admitted that no document was written by Gurdev Singh in his presence nor the doctor was summoned by any one to attest any document. Gurdev Singh was not present at the time of issuance of Ex.PW-4/1. However, at the time of issuance of reference slip Ex.PW-4/2 he was there but the doctor did not

obtain his signature or thumb impression. On a pointed question as to who got the doctor to enter mark 'A' to 'A' in certificate Ex.PW-4/1 in the evening that the patient was in full senses but due to trouble of hands and general weakness he was unable to sign, the answer was that wife of Gurdev Singh came to the doctor in the evening for securing certificate and he told her that the patient is under his treatment and if he is to issue certificate, he will issue the same after obtaining signatures but since patient was referred to Civil Hospital, doctor could not get signature or thumb impression on the certificate but the certificate was issued.

14. Learned counsel also relied upon the statement of PW-4, plaintiff, to impeach the credibility of the witness in the context of ration card to show that in the earlier ration card before the preparation of new ration card, names of Shingara Singh and Rajinder Singh were mentioned along with Gurdev Singh and the plaintiff. The witness pleaded ignorance about the extent of property of Gurdev Singh in village Bagli Kalan. The witness further admitted that about 10 years back, she had gone to Raikot at the house of her brother Bhagwan Singh because Shingara Singh and Rajinder Singh were threatening her husband.

15. Learned counsel further highlighted the cross-examination of PW-4 to show that she has admitted that doctor

of Mangat Nursing Home was inside the room when the Will was scribed. No one asked him to attest the Will at that time. Nobody asked the doctor at that time if Gurdev Singh was fit enough to execute the Will. Even at the time of execution of Will, Gurdev Singh was having pain in the chest. Gurdev Singh died in Civil Hospital and the plaintiff along with Gurdev Singh went to Hospital in the evening of 22.12.1993 (wrongly shown as 22.12.1995 in the statement attached with the grounds of appeal).

16. Further the statement of PW-1 Kamlesh Kumar, deed writer is sought to be impeached by relying upon the cross-examination of the witness to the effect that the attestator was lying in his ward, while the scribe was scribing the Will sitting outside the ward. The scribe had gone inside the ward to seek his instructions from where the scribe had earlier drafted rough Will and even at that time the doctor was not present. The scribe knew the fact that Gurdev Singh used to sign and not used to put thumb impression.

17. On the other hand, learned counsel for the respondents relied upon the replication of the plaintiff to show that specific evidence has come on record to the effect that she came back from Raikot and was very much present in the village. Though, onus of issue No.1 was on the plaintiff, ouster of co-sharer has to be proved. Learned counsel further states

that it was not necessary for the plaintiff to seek relief of possession when she claims that she was in joint possession. Possession of one of the co-sharer is possession of other unless ouster is established, therefore, bar created under Section 34 of the Specific Relief Act will not be attracted. The limitation starts running from the date when right to sue first accrues. Mere entry in the record of right in the name of defendant is not enough to furnish any cause of action. The cause of action will start only when right is threatened. In support of his contention, learned counsel relied upon **Ibrahim vs. Sharifan**, AIR 1980 (P&H) 25, wherein, a Division Bench of this Court propounded the aforesaid proposition of Article 58 of the Limitation Act.

18. Learned counsel further submitted that vide news item Ex.PX/1, defendants were disowned by Gurdev Singh and even after solemnization of marriage of his daughter Karamjit Kaur, defendant No.4, application under Section 107 Cr.P.C. was moved against the defendants which showed disinheritance of the defendants to the hilt after 25.3.1990. Further the cross-examination of DW-1 remained incomplete despite number of dates on which the cross-examination went on. The Court allowed the cross-examination in lawful manner. Two Civil revisions were filed by the defendant but it was not complete and ultimately, the evidence was closed. He himself filed the

petition for seeking opportunity in this Court, therefore, it does not lie upon him to say that there was long cross-examination. Civil Revision No.2752 of 2011 was filed by the appellant against the order closing evidence by order of the Court. They themselves wanted to adduce evidence. Learned counsel further states that the plea regarding the Will in favour of defendant negates the theory of the testator being not hale and hearty. Defendants have also relied upon a Will which had not been proved on record. The Will is claimed to be of the same date. While relying upon testimony of PW-2, learned counsel states that the testimony is sought to be misread by the appellant inasmuch as that PW-2 has stated that he came back thereafter. According to cross-examination of PW-2, the witness knew Gurdev Singh for the last 14-15 years, therefore, defendants cannot allege such incriminating flaw in the statement of the witness. Further there is no such requirement that the doctor must act as attesting witness of a Will, which was executed in the hospital. Certificate has not been found to be wrong on any premise. On the other hand, the expert opinion on the signature of Will of the defendant-appellant is negative inasmuch as the signature appearing on the Will relied upon by the appellant are not tallying. Thumb impression has not been examined by the expert.

19. Learned counsel also relied upon **Surjit Kaur vs.**

Harchand Singh and others 2008 (4) RCR (Civil) 65 to remove any suspicious circumstance in the context of signature and thumb impression on the Will. Since the testator was quite old and his hands used to tremble and for that reason if thumb impression was taken, the same itself is not a suspicious circumstance.

20. In the light of aforesaid facts, if questions as formulated by learned counsel for the appellant are appreciated, then question No.1 is found to be not involved. The Courts below have based their conclusion on the basis of evidence. No perversity has been recorded nor found on the basis of appreciation of evidence. Will in favour of the plaintiff has been found in terms of its execution. The statements of the witnesses could not be shattered to make the Will Ex.P-1 shrouded with suspicious circumstances. Question No.2 is hypothetical. It is true that propounder of the Will has to remove all suspicious circumstances surrounding the execution of Will. In the present case, no such evidence has come to fore, which may impel the Court to arrive at such a conclusion that the Will is shrouded with suspicious circumstances. If the entire evidence is read in the background proved on record, Will is not proved to be suffered with any suspicious circumstance even if the same is unregistered which was executed one day before the death of testator. Question No.3, if appreciated in the context of co-

sharership, has its own meaning. Plaintiff being widow of Gurdev Singh falls under the category of Class-I heir coupled with Will, it was not incumbent upon the plaintiff to seek possession being co-sharer. In the light of observations made in **Sharifan's case** (supra), the cause of action accrued only when possession of the plaintiff is threatened. Even if the plaintiff does not seek possession, she would be deemed to be in joint possession, therefore the suit for declaration was maintainable. Question No.4 has to be answered in the light of observation made in question No.3. Question No.5 is based on appreciation of evidence and is not a pure question of law. Questions No.6 and 7 are question of fact and the same do not involve.

21. In nut shell both the Courts below have rightly concluded that the plaintiff has successfully proved her case and consequently, she has been declared to be exclusive owner in the suit property as detailed in the plaint on the basis of Will dated 21.12.1993 and further she is held owner in possession of the tractor bearing No.PAV-3317 alongwith trolley, thresher, umbrella, cultivator, pulley etc. Mutations sanctioned in favour of defendants No.1 and 2 in respect of estate of Gurdev Singh are held illegal and invalid and without any basis and they have been restrained from dis-possessing the plaintiff illegally and forcibly and also from alienating the property in any manner.

This Court is of the opinion that no material has come, upon

warranting this Court to take any other view except the view taken by the Courts below.

22. Resultantly, this appeal is found to be totally bereft of merit and the same is accordingly dismissed.

(RAJ MOHAN SINGH)
JUDGE

October 20, 2015
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