

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

RSA No.1537 of 1992 (O&M)
Date of decision:16.11.2016

Gulzara Singh (deceased through LRs) & ors. ... Appellants

Vs.

Gurdev Singh (deceased through LRs) & ors. ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Hemant Sarin, Advocate
for the appellants.

Mr. G.S.Dhillon, Advocate
for the respondents.

Amit Rawal, J.(Oral)

The appellants-plaintiffs are aggrieved of the judgment and decree dated 16.03.1992 rendered by the Lower Appellate Court, whereby, the suit of the appellants-plaintiffs was dismissed while setting aside the judgment and decree of the trial Court.

Learned counsel appearing on behalf of the appellants-plaintiffs submits that the findings recorded by the Lower Appellate Court are erroneous and contrary in taking into consideration the documentary evidence i.e. death certificate of Harnam Kaur by way of additional evidence is not falsified, but perverse being beyond pleadings. In order to deal with the aforementioned controversy, the facts of the case would be necessary for the final outcome.

Mihan Singh was owner of the suit property. He had three sons

namely Shama, Kirpala and Kaka. Shama died issueless. Kirpala had one widow, three sons namely Gulzara Singh, Balbir Singh and Darbara Singh and three daughters namely Bholo, Jailo and Jagiro. After the death of Mihaan Singh, the property was equally partitioned between his three aforementioned sons. On 20.09.1946, the property was mortgaged by Kaka in favour of the defendants i.e. their predecessor-in-interest namely Saudagar Singh, Nazar Singh and Ujjagar Singh. Kaka vide sale deed dated 23.07.1947 also sold the land measuring 3 k 10 M to Lal Singh, predecessor-in-interest of respondents No.1 to 3 and other defendants. The aforementioned action of Kaka was challenged by Kirpala, the other brother, by filing civil suit No.454 of 1950. The said suit was decreed vide judgment and decree dated 20.03.1953 (Ex.P-18 & P-19) holding the mortgage and sale consideration to be without legal necessity as the property was said to be ancestral in nature, but the reversionary right of coparcenary was kept intact. Kirpala Singh died in 1970 and thereafter his succession opened. Kaka executed the Will Ex. Px but later on died on 24.02.1983. The beneficiaries of Will are plaintiffs No.1 to 3 namely Gulzara Singh, Balbir Singh and Darbara Singh. The appellants are now LRs of Gulzara Singh as Gulzara Singh died during the pendency of suit.

Mr. Hemant Sarin, learned counsel for the appellants submits that the mortgagees, the vendees of the mortgage deed and the sale deed were arrayed as defendants. On account of death of Kaka, succession opened and successors filed civil suit for the possession. Suit was decreed by trial court on 31.07.1987 but the lower appellate Court reversed the judgment and decree though the defendants in evidence did

not press issues No.1 to 6 and 9. The defendants in the lower appellate Court submitted that Kaka and Kirpala had one sister namely Harnam Kaur and placed on record her death certificate. In the absence of the other LRs of Kaka, the suit was maintainable. He further submits that no effort has been made by defendants or indulgence was sought under Section 50 of the Indian Evidence Act to call for the report. Even otherwise, there was no provision of Indian Evidence Act that evidence could be looked into being beyond the pleadings. Keeping in view all factors, there is gross illegality and perversity in the judgment passed by the lower appellate court.

Per contra, Mr. Dhillon, learned counsel for the respondents-defendants submits that the death certificate of Harnam Kaur showed her paternity which was sufficient requirement of law and therefore, the partition proceedings in question amongst the co-sharers could not have been instituted or filed.

He further submits that the findings arrived at by the lower Appellate Court are prefect, legal and justified, much less, do not call for any interference, in fact, Harnam Kaur, as per Death Certificate, died more than 1 ½ year of the death of Kaka Singh. The Will, aforementioned, has not been proved in accordance with law. The lower Appellate Court being last Court of fact and law, after appreciating the entire evidence, rightly dismissed the suit, thus, there is no illegality and perversity and prays for affirming the findings under challenge.

I have heard learned counsel for the parties and appraised the judgments and decrees of both the Courts below. There is no force in the contentions of learned counsel for the defendants. For the sake of brevity,

the written statement filed by the defendants are reproduced as under:

“The defendants submit the following as written statement:

Preliminary Objection:

1. Name of Kartar Singh is mentioned in para 4 as one of the Vendees. He has not been joined as a party. So suit is bad for his non-joinder.

On merits

- 1. This para is wrong and denied.*
- 2. This para is wrong and denied.*
- 3. This para is wrong and denied.*
- 4. This para is wrong and denied.*
- 5. This para is wrong and denied.*
- 6. This para is wrong and denied.*
- 7. This para is wrong and denied.*
- 8. This para is wrong and denied.*
- 9. This para is wrong and denied.*
- 10. This para is wrong and denied.*
- 11. This para is wrong and denied. Plaintiffs have no right in suit land.*
- 12. This para is wrong and denied. Plaintiffs have no cause of action.*
- 13. This para needs no reply.*
- 14. Hence it is prayed that the suit be dismissed with costs.*

Verification

Verified that the contents of above paras are true and correct to the best of my knowledge and belief.”

The judgment and decree Ex.P-18 & Ex.P-19 are not in dispute.

In my view, the defendants attempted to falsify the case of the plaintiffs by introducing the additional evidence of death certificate of Harnam Kaur.

Evidence from the office of concerned department cannot be said to be

primary evidence. It is self serving statement. Section 50 of the Indian Evidence Act is applicable and relatives of the deceased Harnam Kaur, Kaka or Kirpala Singh were required to be examined. The plea is liable to be rejected in absence of any specific pleadings.

The appellants-plaintiffs being successor and their predecessor-in-interest, heir of Kaka, were well within their right in seeking possession in pursuance to judgment and decree dated 20.03.1953 Ex.P-18 & P-19. Mortgage deed and sale deed are not in dispute.

All these facts have not been kept in mind, thus, there is an abdication. First Appellate Court was required to examine document and frame point of determination as per provision of Order 41 Rule 31 CPC.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in ***Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213***, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure, so there is need to frame the substantial questions of law or not. The Constitutional Bench of Hon'ble Supreme Court held that the decision in ***Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262*** on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back For the sake of brevity, the relevant portion of the judgment of five

learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

*“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of **Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]** cannot be sustained and is thus overruled.” [at paras 27 – 29]”.*

“27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since

Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned. For the reasons aforementioned, the findings rendered by the Lower Appellate Court are set aside. The suit of appellants-plaintiffs succeeds. The judgment and decree of the trial Court is restored.

Resultantly, the Regular Second Appeal stands allowed.

(AMIT RAWAL)
JUDGE

16.11.2016
sonia/yogesh

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| 1. Whether Speaking/Reasoned? | Yes |
| 2. Whether Reportable? | No |