

Regular Second Appeal No.102 of 2011 (O&M)

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

R.S.A.No.102 of 2011 (O&M)

Date of Decision: May 24th, 2016

Harbhajan Singh Deol

...Appellant

Versus

Avtar Singh & 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.Anil Kshetarpal, Senior Advocate with
Mr.Rohit Nagpal, Advocate,
for the appellant.

Mr.Mohd.Yousuf, Advocate,
for respondent Nos.2 and 3.

AMIT RAWAL, J. (Oral)

Appellant-plaintiff is aggrieved of the dismissal of the suit seeking challenge to the gift deed dated 12.2.2004 allegedly executed by Amar Singh-defendant No.1 (since deceased) in favour of his two sons, namely, Harmeet Singh and Satnam Singh-defendant Nos.3 and 4.

Mr.Anil Kshetarpal, learned Senior Counsel Assisted by Mr.Rohit Nagpal, appearing on behalf of the appellant-plaintiff submits that the suit was instituted on 21.4.2004. However, after 1½ months, Amar Singh-defendant No.1 left for heavenly abode. The onus for proving the Will is always on the propounder. The gift deed has not seen the light of the day. Only the certified copy of the same has been produced on record as Ex.D1 through the testimony of DW-2 Jagdish Chander and the same has been referred by the witness as original. He further submits that no application has been moved to prove the aforesaid gift deed by way of secondary evidence *de hors* of the fact that its exhibition is not disputed, but the fact remains that mere exhibition of the document does not dispense with its proof. In support of his contention, relies upon **Sait Tarajee Khimchand and other Versus Yelamarti Satyam and others**, AIR 1971 (SC) 1865. The factum of original Will having not been brought on record has also been endorsed by the trial Court. The onus has been fastened on the plaintiff, whereas it is always on the propounder and then in rebuttal the plaintiff is required to rebut the onus in case defendants succeed in discharging the same and in the absence of the gift deed, the property of late Amar Singh is to be inherited by way of natural succession. Even their mother i.e. wife of Amar Singh has also died. Defendants also propounded the original Will

dated 28.12.2001, but the same has also not seen the light of the day. Though the claim in the suit was that the property at the hands of Amar Singh was ancestral, but no evidence in this regard had been led, thus, for all intends and purposes, in case the gift deed and the Will not proved, then it is irresistibly concluded that Amar Singh died intestate and his property is devolved upon all the legal heirs by way of natural succession and, thus, urges this Court to formulate the following substantial questions of law to be determined by this Court:-

- 1) Whether the propounder of the Will can get away by producing certified copy of the same?
- 2) Whether the judgments and decrees of both the Courts below putting the onus of proving the gift deed/Will on the plaintiff when the Will is propounded by the defendants, is legal and justified?
- 3) Whether the judgments and decrees of both the Courts below suffer from illegality and perversity?

Mr.Mohd.Yousuf, learned counsel appearing on behalf of respondent Nos.2 and 3 submits that the genesis of the suit is that the property at the hands of Amar Singh was coparcenary and, therefore, he could not have alienated the same in the manner and mode as noticed above, i.e., by way of gift deed or the Will. In the absence of the

challenge to the Will, the plea of producing the original Will cannot be accepted. Mentioning of the Will in the suit itself is its acceptance and, therefore, the defendants, being propounders of the Will, were not required to bring on record its original. The judgments and decrees of both the Courts below are based upon the appreciation of oral and documentary evidence. There is no illegality and perversity in the concurrent findings and, thus, urges this Court for affirming the findings.

I have heard the learned counsel for the parties and appraised the paper book.

Before advertng to the rival contentions of the learned counsel for the parties, it would be apt to reproduce the relevant paragraphs of the plaint:-

7) *That Amar Singh has taken the law in his hand, and has made a gift deed to his two sons namely Satnam Singh and Harmeet Singh who are also attorneys of Amar Singh well knowing that all the sons are entitled in equal share to the property in dispute as the same was inherited by Amar Singh from his fore-fathers. It was also known to Amar Singh that he had not purchased any property during his life time;*

8) *That the property in dispute which is fully described in the head note of the plaint, is the joint co-parcenary property of the plaintiff and defendant nos.1 to 4. It was inherited by defendant no.2 from his fore-fathers and hence*

the plaintiff and defendants nos.1 to 4 have the interest in the disputed property by virtue of their births. The property fully detailed in the headnote of the plaint came into the hands of the defendant no.1 is the ancestral property of the plaintiff and the defendants as the plaintiff and defendants nos.1 to 4 are governed by Hindu Law. The property in dispute has not been partitioned and is the joint owners in possession between the plaintiff and defendants nos.1 to 4;

9) That the defendant no.1 has no right to make the gift of the disputed property in favour of the defendants nos.3 & 4. The plaintiff and defendants nos.1 to 4 had acquired an interest in the suit property by birth in the family and by survivalship in the coparcenary property. The 'Karta'/ Manager has no right to transfer the property by way of gift to anybody else. The declaration of the defendant no.1 is not admitted. The Gift Deed executed by the defendant no.1 in favour of the defendant 2 & 3 is illegal, null & void and without any legal necessity, without any consideration, inoperative, arbitrary and the mutation no.2175 entered into the 'Jamabandi' on the basis of the Gift Deed is void, wrong and illegal and the same is not binding on the rights of the plaintiff and defendant no.2."

DW-2 Jagdish Chander, Record Keeper Office of Sub Registrar, Jalandhar, brought on record the certified copy of the Will. For the sake of brevity, the entire statement of DW-2 including cross-examination reads thus:-

“DW2 Jagdish Chander Record Keeper office of Sub-Registrar Jalandhar

On S.A.

I have brought the summoned record pertaining to the registration of Gift deed executed by Amar Singh of village Isharwal in favour of Satnam Singh and Harmit Singh dated 12.2.2004. I have seen the certified copy of the same and the same is Ex.P1 and the same is duly registered before the then Sub-Registrar Jalandhar. Similarly I have brought the record pertaining to the registration of Will executed by Amar Singh on 28.12.2001. I have seen the certified copy and same is correct as per the record brought by me today. The said will is duly registered by the then Registrar Jalandhar (documents objected to).

Xxxxxxxxxxby the counsel for the plaintiff

I do not know the parties and witness of the document Ex.D1 & DW1. The said documents were not executed nor signed nor thumb marked nor registered in my presence. I have no personal knowledge about the contents of the documents. It is incorrect to suggest that I have deposed falsely.”

On perusal of the aforementioned statement, irresistibly it is concluded that the original gift deed has not seen the light of the day, in essence the appellant-plaintiff has been prevented to prove its authenticity and genuinity. It is settled law that the onus to prove the Will, even if it is challenged by the opposite/adverse party is upon the

propounder. Once the propounder has not discharged the onus, it would not shift to the adverse party. Even the exhibition of the documents was objected to and the objection has not been discharged. The respondent-defendants have also not filed any cross-objections vis-a-vis the finding rendered by the trial Court qua the original gift deed having not been proved on record, rather in my view, the trial Court in a fallacious and erroneous manner placed the burden upon the plaintiff. All these aspects are required to be gone into by both the Courts below. Having failed to adjudicate the aforementioned controversy, the Courts below have failed in discharging the duty. There is illegality and perversity in the impugned judgments and decrees. In the absence of the original Will, all the siblings would be entitled to succeed to the estate of Amar Singh deceased by way of natural succession, in essence they shall be entitled to respective shares.

No doubt, the appellant-plaintiff has failed to prove the character and nature of the property to be ancestral. Be that as it may, once there is no specific challenge to the gift deed, the plea of learned counsel for the defendants is not able to cut the ice. Pleadings have to be concise and precise. Defendants, being propounders of the Will, as noticed above, have failed to discharge the onus. Accordingly, the suit of the appellant-plaintiff is decreed to the extent that all the siblings, i.e.,

children of Amar Singh deceased shall be entitled to claim equal share in his estate. Suit is accordingly partly decreed. Judgments and decrees of both the Courts below are set-aside. The questions of law are answered in favour of the appellant-plaintiff and against the respondent-defendants.

Appeal stands partly allowed.

May 24th, 2016
ramesh

(AMIT RAWAL)
JUDGE