

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

R.S.A.No.1322 of 2012 (O&M)

Date of Decision: September 09, 2016

Mukand Singh Gill & another

...Appellants

Versus

Gurbachan Singh alias Bachan Singh (since deceased) through L.Rs & others

...Respondents

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

**Present: Mr.Arun Jain, Senior Advocate with
Mr.Amit Jain, Advocate,
for the appellants.**

**Mr.R.S.Sihota, Senior Advocate with
Mr.B.R.Rana, Advocate,
for respondent Nos.2 to 5 & 7 to 9.**

**Mr.Kanwaljit Singh, Senior Advocate with
Mr.Amarjit Singh, Advocate,
for respondent No.6.**

AMIT RAWAL, J. (Oral)

Appellant-plaintiff No.1 Mukand Singh Gill son of Gurbachan Singh from the first wife and appellant-plaintiff No.2 Balwant Singh son of Gurbachan Singh from the second wife are aggrieved of non-granting of the declaration of the following reliefs:-

- (i) declaration that the plaintiffs and defendants Nos.2 to 4 are the owners of the land measuring 5B-6B(?)-17B pukhta comprised in Khewat No.2284/1, Khatauni No.3121, Khasra No.1192/3 (1-3-12B), 1198/4 (0-1-11B), 1200/2 (0-8-1B), 1201/3 (1-3-2B), 1202/3 (1-8-3B), 2944/2 (1-4-8B), total land 5-8-18B Pukhta situated at village Gill No.2, Hadbast No.263m**

Tehsil and District Ludhiana shown in the jamabandi for the year 1985-86 and of land measuring 0-15-7 comprised in khewat No.1149/1, khatauni No.1676/1, Khasra No.1199/1 (0-15-2B) and also of land of one third share in land out of total land measuring 2-19-4B comprised in khewat No.2282, Khatauni No.3118, Khasra No.2919 (0-7-5B), 2935 (0-0-12B), 2936 (0-0-9B), 2934 (1-10-18B) situated at village Gill, Tehsil and District Ludhiana and the plaintiffs and defendants No.2 to 4 are entitled to one fifth share each on partition of the above said land after the death of Gurbachan Singh, defendant No.1 and

(iv) for permanent injunction for restraining the defendant No.1 from alienating the above said suit land in any manner and defendant No.6 from further alienating the land alleged to have been sold to him by the defendant No.1.

Mr.Arun Jain, learned Senior Counsel assisted by Mr.Amit Jain, representing the appellant-plaintiffs submits that Gurbachan Singh was owner of a big chunk of land as described in the suit. On 15.6.1973, a compromise was arrived at in Civil Suit bearing No.52 of 1973 titled as “Mukand Singh Gill Versus Gurbachan Singh alias Bachan Singh” decided on 26.10.1973 and as per the said compromise, land measuring 0B-5B-19B Pukhta out of khewat/khatauni No.1550/2277 out of Khasra No.884, land measuring 0B-2B-1B Pukhta out of khewat/khatauni No.1550/2277 out of Khasra No.2934, land measuring 0B-4B-2B, Pukhta out of khewat/khatauni No.1550/2277 out of Khasra No.2944 described in jamabandi for the year 1970-71 situated in Village Gill, Tehsil and District Ludhiana has been

given to them.

Mr.Jain further submits that, in fact, it was a partial partition as the contents of the compromise dated 15.6.1973 contained an element that after the death of Gurbachan Singh, particularly appellant-plaintiff No.1 would have a right to succeed to the extent of 1/5th share i.e. qua his share in the estate of Gurbachan Singh.

Gurbachan Singh, vide sale deed dated 17.5.1988, had sold land measuring 1B-5B-3B in favour of defendant No.6. Since the property at the hands of Gurbachan Singh was ancestral which has been proved through excerpt Ex.PW1/1, but the Courts below have not taken into consideration this aspect. Defendant Nos.2 to 4 had also set up a Will dated 26.5.1988, though examined the witnesses to prove the same, but there is no finding vis-a-vis the aforementioned aspect, much less no issue was framed. Gurbachan Singh died on 2.10.1992 and, therefore, succession opened. The successors-plaintiffs, being the sons, are also entitled to the share by way of natural succession, as he admitted to have died intestate, yet both the Courts below have not taken into consideration this aspect and committed illegality and perversity and, thus, urges this Court for setting-aside the concurrent findings.

Mr.Kanwaljit Singh, learned Senior Counsel assisted by Mr.Amarjit Singh, representing respondent No.6, who is a subsequent vendee, i.e., the beneficiary of land measuring 1B-5B-3B by virtue of sale deed dated 17.5.1988, submits that the appellant-plaintiffs have not been able to prove the character and nature of the land being ancestral as excerpt Ex.PW1/1 does not reflect that the property at the hands of Gurbachan Singh was inherited from 3rd generation in lineage but only reflected that he

had inherited the property from Khushi Ram, which is not as per 21st Edition of Mulla's Hindu Law, Para No.221, therefore, the sale deed in the suit filed on 20.8.2002 cannot be challenged and, thus, urges this Court for dismissal of the suit, particularly qua relief Nos. (ii) and (iii).

Mr.R.S.Sihota, learned Senior Counsel assisted by Mr.B.R.Rana, representing respondent Nos.2 to 5 and 7 to 9 submits that the Will dated 26.5.1988 has been proved through the testimony of DW-3 Palwinder Singh Sadura Advocate, the scribe of the Will and DW-4 Nanak Singh, the attesting witness. Even if the issues were not framed and the parties were alive to the situation, nothing prevented the Courts below to give findings on the Will. He further submits that the suit has rightly been dismissed as the plaintiffs have already got their share in the property and, therefore, could not stake the claim in the estate of Gurbachan Singh and rightly so, the Courts below have dismissed the suit. They even did not comply with the terms and conditions of the compromise by not contributing 1/5th share towards the expenses of the marriage of the sister and, thus, urges this Court for dismissal of the appeal.

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

The most important thing, which has escaped the notice of the Courts, is that the contents of the Will reveal mind of the testator, namely, Gurbachan Singh, who had distributed his entire estate in equal shares amongst his siblings, i.e., sons from the first marriage and sons from the second marriage.

The compromise dated 15.6.1973 vis-a-vis the land described therein, also indicated that after the death of Gurbachan Singh, appellant

No.1, i.e., plaintiff No.1 will acquire share to the extent of 1/5th share. It is the conceded position on record that Balwant Singh has born from the second marriage.

I am not able to scribe to the submission vis-a-vis the property at the hands of Gurbachan Singh being ancestral, for, the excerpt Ex.PW1/1 proved on record showed inheritance of Gurbachan Singh from Khushi Ram, which is not requirement of law. Now the question posed before this Court, is that in the absence of the property being ancestral, whether Gurbachan Singh died intestate or otherwise. The Will has not been proved on record. There is no finding given by the Courts below, though scribe of the Will and the attesting witness have been examined. Assuming for the sake of argument, though not admitting the Will to be looked into, yet as already observed, the same does not indicate this property to be inherited by his children in equal shares. I would be refraining myself to comment on the Will as there is no finding given by both the Courts below and, thus, the only irresistible conclusion, which is liable to be drawn, is that Gurbachan Singh died intestate. In such situation, all the siblings, i.e., brothers (LR's) would be having a right according to their respective shares in the estate of Gurbachan Singh.

No doubt, this Court on earlier occasions had been framing the substantial questions of law while deciding the appeal 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, whether 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. 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** applicability of Section 97(1) of CPC was not correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back and therefore, I do not intend to frame the substantial questions of law while deciding the appeal aforementioned.

In view of the fact that the appellant-plaintiffs have not been able to prove the nature and character of the land being ancestral, there would not be any force in challenging the sale deed executed in 1988 in favour of defendant No.6. Accordingly, all these aspects have escaped the notice of both the Courts below and, therefore, the concurrent findings are hereby set-aside. The suit of the appellant-plaintiffs is decreed in part vis-a-vis relief Nos.(i) and (iv) and not for relief Nos.(ii) and (iii). The prayer with regard to setting-aside of the sale deed is hereby rejected and, therefore, the appellant-plaintiffs are declared owner to the extent of 1/5th share each, leaving the parties to take appropriate measures/remedies for the purpose of either getting the property joint or separate in accordance with law. The question vis-a-vis the property left by Gurbachan Singh, who died intestate, is also answered in favour of the appellant-plaintiffs. The question regarding inheritance is decided against the appellant-plaintiffs.

Appeal stands allowed.

September 09, 2016
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable:

Yes/No