

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

R.S.A.No.5144 of 2011 (O&M)

Date of Decision: October 19th, 2016

Harshapinder Singh @ Sawinder Singh & another

...Appellants

Versus

Ajaib Singh & others

...Respondents

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

Present: Mrs.Baljit Kaur Mann, Advocate,
for the appellants.

Mr.Arun Jain, Senior Advocate with
Mr.Amit Jain, Advocate,
for respondent Nos.1 & 2.

AMIT RAWAL, J. (Oral)

Appellant-plaintiffs are aggrieved of the judgment and decree of the Lower Appellate Court, whereby the suit seeking declaration, possession and permanent injunction on the basis of the Will dated 19.12.2000 registered on 21.12.2000 claiming share to the extent of 2/3rd of defendant No.1 and 1/3rd share of the suit land, had been dismissed.

Mrs.Baljit Kaur Mann, learned counsel for the appellant-plaintiffs submits that the Lower Appellate Court has erred in misreading the testimony of DW-3 Balwinder Singh, Registration Clerk, who had clearly stated that Will Ex.P2 dated 19.12.2000 was registered on 21.12.2000 at the residence of Gurnam Kaur and in the absence of the formal application, it would not be fatal and render the Will to be surrounded by suspicious circumstances. The Lower Appellate Court has

also erred in reversing the well reasoned findings, wherein the trial Court had held that once the execution of the Will had been proved to the extent that the same was executed by the testator in the presence of the witnesses in favour of her real grandsons, the burden shifted upon the other side which has not been rebutted. She further submits that the Will carries a presumption of truth under Section 17 of the Registration Act, which has not been rebutted. The Lower Appellate Court has completely swayed away from the fact that after the demise of Gurnam Kaur on 10.4.2002, mutation of inheritance in favour of the sons was effected on 24.4.2002. Mutation does not confer any right and, therefore, the aforementioned findings are incorrect. Minor contradictions in the statements of the witnesses to the Will executed in 2000, suffered in 2006 bound to occur.

She further submits that PW-3 Surjit Kaur, Sarpanch, attesting witness to the Will, had categorically stated that Gurnam Kaur widow had executed the registered Will in favour of the plaintiffs and Hardeep Singh, her grandsons by excluding Bohar Singh, who, according to the Will had already staying away for number of years. In fact, as per the Will, grandsons of the testator and sons of two sons, namely, Ajaib Singh and Naib Singh, have been given $\frac{2}{3}$ rd and $\frac{1}{3}$ rd share as one of the brothers had two sons and other brother has one son. She corroborated the testimony of PW-1 Gurmail Singh, Naib Tehsildar and as well as PW-2 Daya Nand, Deed Writer that the contents of the Will were read over to her, who had thumb marked the same after admitting the same to be correct and, thus, urges this Court for setting-aside the findings under challenge. She further submits that if this Court forms an opinion that the registration was not properly done, but the fact remains that the execution of the Will has been proved through the

testimony of PW-3 Surjit Kaur and as well as Deed Writer Daya Nand, who have deposed in terms of the provisions of Section 63-C of the Indian Succession Act.

Per-contra, Mr.Arun Jain, learned Senior Counsel assisted by Mr.Amit Jain, learned counsel for the respondent-defendants submits that the thumb impression and the stamp of the scribe are of different ink. PW-3 Surjit Kaur, attesting witness/Sarpanch in cross-examination stated that she never appeared before the Registrar for the purpose of registration. Section 31 of the Registration Act prescribes the procedure for registration of the Will through application at the residence of the testator, but the Naib Tehsildar, who appeared as PW1 in cross-examined feigned ignorance of writing of application, which itself is a sufficient ground which weighed in the mind of the Lower Appellate Court. The testator in the first breath had stated that she had no male issue, but later on stated that whatever she possessed was to be given to her two sons and rightly so has been discarded.

He further stated that release deed Ex.DW5/A has been executed by Naib Singh on 27.3.2003 in favour of Ajaib Singh, which was witnessed by one of the plaintiffs. Even the plaintiff in cross-examination did not utter a word of strained relationship, rather stated otherwise that there was no dispute amongst the brothers. It is in this backdrop of the matter, the Lower Appellate Court reversed the findings.

In rebuttal, Mrs.Mann submits that the alleged lease deed was executed by Naib Singh, who has no right and title in the property owing to the wish of the testator.

I have heard the learned counsel for the parties, appraised the paper book and of the view that there is force and merit in the submissions

of Mrs.Mann, for, PW-2 Daya Nand Deed Writer and PW-3 Surjit Kaur have been coherent in their examination-in-chief, much less despite extensive cross-examination regarding the appending of thumb impression by deceased-testator Gurnam Kaur. I am also in agreement with the submission of Mrs.Mann that even if the Will had not been registered as per Section 31 of the Registration Act, but the execution of the same has been proved. It is not necessary that only the registered Wills have to be looked into. Once the un-registered Will has been proved as per the requirement of law, i.e., one referred to above and as well as Section 68 of the Indian Evidence Act, the same has to be respected. While executing the Will, there is mention of sons. Bohar Singh's interest had also been taken care of. Bohar Singh though was aggrieved of the judgment and decree of the Lower Appellate Court and had filed the appeal, but the fact remains that his interest has been noticed by the testator. The execution of the release deed, after demise of Gurnam Kaur, pales into significance as Naib Singh has no interest in the property to release his share in favour of Ajaib Singh. All these facts show that the sons of one brother and one son of other brother had inherited the property to the extent of 2/3rd share and 1/3rd share. In my view, these facts have not been noticed and, therefore, there is illegality and perversity.

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 and that of the trial Court is restored.

Resultantly, the Regular Second Appeal stands allowed.

October 19th, 2016
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable:

Yes/No