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

**RSA-5252-2012 (O&M)
Date of decision : 13.12.2016**

Kanwaljeet Kaur

... Appellant

Versus

Joginder Singh Badwal (deceased through LRs) and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Kanwaljit Singh, Senior Advocate with
Ms. Gurdeep Kaur, Advocate
for the appellant.

Mr. Sarbjit Singh, Advocate
for the LRs of respondent No.1 and respondent No.2.

AMIT RAWAL, J. (ORAL)

The appellant-plaintiff is aggrieved of the concurrent findings of fact, whereby the suit seeking following relief has been dismissed by both the Courts below:

“Suit for separate possession by partition of the property bearing No.1625/XIV-25, Ranjitpura, P.O. Khalsa College, Amritsar and also suit for permanent injunction restraining the defendant No.1 from forcibly dispossessing the plaintiff and defendants No.2 to 4 from joint possession of the property in dispute and further restraining the defendant No.1 from alienating the property aforesaid to any other person in any manner whatsoever.”

Mr. Kanwaljit Singh, learned Senior Counsel assisted by Ms. Gurdeep Kaur, learned counsel appearing on behalf of the appellant-plaintiff, submits that Bhagwant Kaur wife of Smittar Singh, was the owner

of the property, in dispute, who unfortunately died on 07.03.1987. The suit for separate possession by partition was sought as on her death, the property was mutated as per the natural succession. It is, for the first time in the written statement, after 17 years, came out with the unregistered Will dated 04.02.1987. No doubt Surjit Kaur daughter of Bhagwant Kaur gave no objection regarding the contents of the Will vide which the entire property has been bequeathed to Mr. Joginder Singh. Unfortunately, Mohinder Singh Badwal, the son of Bhagwant Kaur, also died and the plaintiff is the widow. The Will is purported to have been witnessed by two witnesses, namely, DW-1 Dr. Harsharan Singh and DW-2 Ravinder Singh. Only one witness, DW-1 Dr. Harsharan Singh has been examined and he has not, in examination-in-chief, deposed in terms of the provisions of Section 63 (c) of the Indian Succession Act as the first part of the provisions of law, aforementioned, had been complied with, but the second part of the provisions of law i.e. direction of the testator and the witnesses appending the signatures, is conspicuously wanting. The word/expression used as "Desire" conversation of which cannot be equated with expression "Direction".

He has also drawn the attention of this Court to the Will to point out that it had been drafted on a blank signed paper bearing signatures of Bhagwant Kaur as at the end of the contents of the Will, the name of someone else had been struck off. She alleged to have appended the signatures under the typed name of Bhagwant Kaur. Had the document been typed in her presence, she would have appended her signatures above the line. The Expert examined, in this regard, compared with specimen signatures of mother bearing on the letter and found that the signatures to be

not of Bhagwant Kaur. Even, DW-1 Dr. Harsharan Singh, in cross-examination stated that it was typed on stamp paper, but the Will is on a blank paper. In case, Bhagwant Kaur had actually executed the Will, nothing prevented the defendant(s) to get the Will registered during her lifetime or thereafter.

He further submits that he is not averse to the determination of his share in terms of "Money", as the respondent(s)-defendant(s) is residing in this house since quite a number of years, in fact, he does not want to disturb his possession.

Per contra, Mr. Sarbjit Singh, learned counsel appearing on behalf of the LRs of respondent No.1 and respondent No.2, submits that the concurrent findings of fact cannot be disturbed or upset until and unless there is gross illegality and perversity. Both the Courts below ruled out the element of the suspicious circumstances and found that the Will to be duly executed by relying upon the testimony of Dr. Harsharan Singh. The letters (Annexure P-9 to P-13) produced on record. The last letter is of 1971. In fact, Bhagwant Kaur was not in touch with her son Mohinder Singh Badwal and lost the love and affection and it is, in this backdrop of the matter, the property had been bequeathed in favour of Joginder Singh, who was looking after her. There is a compliance of the provisions of law, indicated above, specifically noticed by the Courts below.

He further submits that Surjit Kaur had candidly admitted the signatures of Bhagwant Kaur and her wish of bequeathing the entire estate in favour of his client i.e. Joginder Singh. All these factors have been taken care of by both the Courts below, thus, urges this Court for affirming the findings under challenge.

I have heard the learned counsel for the parties and appraised the paper book and of the view that there is a merit and force in the submissions of Mr. Kanwaljit Singh, for, I cannot shut my eyes in not assuming the role of Expert by taking the aid of the provisions of Section 45 of the Indian Evidence Act. On bare glance of the Will (Ex.DW-1/1), Bhagwant Kaur had allegedly appended her signatures not above the typed name, but below. When the Will finishes, there is signature of someone which had scored off. It appears that it had been typed on blank paper. If actually Bhagwant Kaur had to sign the same, the defendant(s) should not have been circumspect, rather bold enough to get the same executed and registered, during her lifetime or even thereafter. I have also an occasion to examine the examination-in-chief of DW-1 Dr. Harsharan Singh, the attesting witness of the Will, who had not deposed in terms of the provisions of Section 63 (c) of the Indian Succession Act which reads thus:-

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

There are two aspects of the matter that the Will has to be attested by two witnesses and signed by one of them and the witnesses must have been seen each other sign, but the expression on the "direction" of the testator is conspicuously wanting. The expression "desire" cannot be

equated with the expression "direction" as per the plain and simple dictionary meaning, it does not in any way indicate that a person had actually intended a person to do it. "Desire" can be imaginary, but the "direction" has to be practical and specific. All these factors, in my view, have not been looked into, much less, seen from this angle, thus, there is a gross illegality and perversity.

Mr. Kanwaljit Singh, on instructions from his client, submits that his client is also willing to get his share determined in terms of "Money" instead of getting the property by metes and bounds, provided the exercise be done as per the provisions of Sections 2 & 3 of the Indian Partition Act.

I am in agreement with the aforementioned submissions.

At this stage, Mr. Sarbjit Singh, submits that once Surjit Kaur had already given her affidavit, partition would not be 1/3rd share, but showed a different share. I am not going to delve upon it as it is the desire of Surjit Kaur to bequeath as per her intention already reflected or not.

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 V/s. 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 V/s. 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 foregoing reasons, the judgments and decrees of the Courts below are not sustainable in the eyes of law and the same are set aside.

The Court below is directed to adopt the procedure, as indicated above, in case an application for drawing a preliminary decree is filed.

In case the defendant(s) is not able to pay the share on ascertaining the market value of the property, the Court below will not be precluded to draw the final decree by metes and bounds.

With the aforesaid observations, the appeal stands allowed.

13.12.2016

Yogesh Sharma

**(AMIT RAWAL)
JUDGE**

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Whether speaking/reasoned **Yes/ No**

✓

Whether Reportable **Yes/ No**