

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

RSA No.4075 of 2014
Date of decision : 29.09.2016

Gurpyari Singh and others

...Appellants

Versus

Kamaldeep Singh alias Sonu

..Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL.

Present: Mr. G.S. Attariwala, Advocate for the appellants.

Mr. Ashok Nabhwala, Advocate for the respondent.

AMIT RAWAL, J. (Oral)

The appellant(s)-plaintiff(s) is aggrieved of the judgment and decree rendered by the lower Appellate Court, whereby the suit seeking following claim:-

“Suit for partition of properties situated in abadi of Village Hussainpur, P.O. Bhulana, Tehsil and District Kapurthala comprises of:-

(a) Residential house shown in red colour in enclosed site plan Mark-A and bounded as under:-

East:- Common Passage

West:- Sardool Singh & Kulwant Singh

North:- Khushal Singh

South:- Bhagat Singh

(b) Three rooms (used for store purpose) along with

open space shown in green colour in the enclosed site plan Mark B and bounded as under:-

East:- passage, Deouri

West:- Sawinder Singh & Naranjan Singh

North:- Amar Singh son of Ishar Singh

South:- Khushal Singh

(c) Cattle room with open area shown in yellow colour in the enclosed site plan Mark C and bounded as under:-

East:- Manmohan Singh & Khushal Singh

West:- Bhagat Singh

North:- Common Passage

South:- Sohan & Parkasho.

(d) Haveli (unconstructed) in the share of plot and passage shown in blue colour in the enclosed site plan Mark D and bounded as under:-

East:- Kewal Singh son of Amar Singh

West:- Nirmal Singh, Khushal Singh

North:- Manmohan Singh son of Sadhu Singh

South:- Nirmal Singh, Khushal Singh

Along with all affixtures and all incidental rights connected with the above detailed property and after partition by metes and bounds, whatever portion from properties shown in above detailed site plans Mark A to Mark D enclosed with the plaint, comes to the share of plaintiff, its possession be given to the plaintiff.

AND

Suit for permanent injunction restraining the defendant for ever from changing the nature by raising, demolishing any sort of construction, making alteration in any part of the above detailed properties and alienating specific portion and more than his share in the above detailed suit properties fully shown in the enclosed site

plans Mark A to Mark D, till the partition is effected in between the parties.”

has been dismissed by the lower Appellate Court, in essence, judgment and decree of the trial Court dated 30.04.2013, has been reversed.

Mr. G.S. Attariwala, learned counsel appearing on behalf of appellant(s)-plaintiff(s) submits that Santa Singh during his lifetime had executed the Will dated 04.08.1980. Santa Singh had inherited the property from his father Nihal Singh as per his share from the joint property. After his death, plaintiff and his brother as per the Will become owner in joint possession of the property in equal share as the remaining property had been bequeathed to the grandsons namely son of Prem Adhar Singh. The other brother Gurprem Singh died in the year 2001 and defendant No.1 being only son was/is entitled to inherit half share of the suit property. He never wanted share to be joint thus, sought partition of the property. He submits that trial Court on the basis of the oral and documentary evidence, much less, on examination of the pleadings, decreed the suit as the defendant admitted the execution of the Will but lower Appellate Court misdirected and misread the contents of the Will, much less, pleadings, holding that Will was emphatically denied. In fact, the lower Appellate Court remained completely oblivious of the provision of Order 14 and as well as other provision of Code of Civil Procedure. During the course of arguments, he has drawn the attention of this Court to the written statement qua part of the admission of Will. He further submits that admitted documents need not to be proved but only such documents on which parties are at variance, thus, judgment and decree of the lower Appellate Court is not sustainable in the

eyes of law and liable to be set aside.

He further submits that lower Appellate Court has also non-suited the appellant on the ground that other LR's of Prem Adhar Singh were not impleaded. He submits that there was no occasion for the lower Appellate Court to arrive at such findings, had recital in the sale deed was read in proper perspective.

Per Contra, Mr. Ashok Nabhwala, learned counsel appearing on behalf of respondent-defendant submits that written statement does not reveal any admission of the Will. The findings rendered by the lower Appellate Court is perfect, legal and justified. Onus is upon the plaintiff to discharge the same as per the provision of Section 63(c) of the Indian Succession Act and 68 of the Indian Evidence Act. Having failed to do so, particularly in view of issue No.1, rightly so, lower Appellate Court discarded the Will. He further submits that in case Will is discarded then all the three sons of Santa Singh would have 1/3rd share and sons of Prem Adhar Singh would have share qua 1/3rd share of his father. Even the said persons were also not impleaded as parties, therefore, suit for partition in their absence was/is not maintainable, thus, urges this Court for affirming the findings under challenge.

He further submits that mere exhibition of document does not dispense with its proof. In support of his contention, he relies upon the judgment rendered by Hon'ble Supreme Court in *Sait Tarajee Khimchand and others Vs. Yelamarti Satyam and others*, 1971 AIR (SC) 1865.

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

Mr. Attariwala, for, judgment and decree of the lower Appellate Court is liable to be set aside for the following reasons.

Lower Appellate Court has remained oblivious of the provision of Order 14 Rule 1 of Code of Civil Procedure, which reads thus:-

“1. Framing of issues

(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one-party and denied by the other shall form the subject of distinct issue.

(4) Issues are of two kinds:

(a) issues of fact,

(b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under rule 2 of Order X and after hearing the parties or their pleaders], ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.”

Order 14 Rule 3 of Code of Civil Procedure, reads thus:-

“3. Materials from which issues may be framed.- *The court may frame the issues from all or any of the following materials:—*

- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;*
- (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;*
- (c) the contents of documents produced by either party. ”*

Issues are to be framed where parties are at variance.

On co-joint reading of the aforementioned sub-Rule and Order, it is evident that issues are to be framed where only parties are at variance however, on going through entire written statement, there is not even a single averments denying the Will. Paragraph No.2 of the written statement, where the Will has been admitted, reads thus:-

“2. That in reply to para No.2 of the plaint that Santa Singh during his lifetime had executed a Will dated 04.08.1980 but the plaintiff has again denied this fact that he has relinquished his rights in favour of father of the defendant after receiving Rs.25,000/- from the father of the defendant and affidavit to this effect was also given by the plaintiff in favour of the father of defendant. The said affidavit dated 11.8.1980 was duly attested by Executive Magistrate, Kapurthala. It is also wrong that the father of the plaintiff had died about 20 years ago. As a matter of fact, the father of the plaintiff expired in the year 1993.”

Rather the defence of the defendants had been, that the plaintiff had asserted his right owing to the affidavit dated 11.08.1980 after receipt of the payment of ₹25,000/-. Though aforementioned plea of defendant has been discarded by both the Courts below as the said affidavit tantamounts to relinquishment such act requires registration. The question before this Court is that in view of the admission of the Will, Can the party be dispensed with

in proving the Will, Answer is “Yes”. In my view, there was no need for the Courts below to frame the issue of Will when same was admitted. It is settled law that admitted thing need not be proved. Even the judgment on admission as per the provision of Order 12 Rule 6 is permissible.

Now coming to the contents of the Will, Will specifies that sons of Prem Adhar Singh would inherit $1/3^{\text{rd}}$ and $2/3^{\text{rd}}$ share in respect of the property mentioned therein would go to the plaintiff and rest of the property would go to the defendant in equal share. The findings of the lower Appellate Court that once issue has been framed and written statement has been denied, is totally fallacious and perverse. There is no single averment in the written statement regarding the denial of the Will. The lower Appellate Court being last Court of fact and law is enjoined upon the obligation as per the provision of Section 96 of Code of Civil Procedure to deal with every aspect i.e. oral and documentary evidence, much less, pleadings. In my view exercise of framing of issue was totally otiose. Thus the compliance of provision of Sections 63(c) of Indian Succession Act and 68 of the Evidence Act would totally be redundant.

There is another aspect of the matter. As per the Order 14, the settlement of issues arises subsequent to the provision of Order 12, which deals with the admission and denial of the documents. Legislature in the wisdom had incorporated the aforementioned provision in order to curtail the protraction of the trial, in essence, the parties would be only leading evidence, where parties are at variance. In other words, no evidence is required to be lead on the admitted documents. All these aspects in my view have not been taken care. Will was submitted by way of the affidavit of the

plaintiff and on opening lines of the cross-examination, there is no objection with regard to proving of Will, much less, admission. It is settled law that when there is no denial of the said documents, it is deemed to be admitted, thus, there is no force in the submission of Mr. Nabhwala, qua proving of the same.

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 appellant-plaintiff succeeds. The judgment and decree of the trial Court is restored.

Resultantly, the Regular Second Appeal stands allowed.

29.09.2016

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**(AMIT RAWAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No