

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

**RSA No.4724 of 2014 (O&M)
Date of decision:27.10.2016**

Kulwant Singh ... Appellant
Vs.

Mohinder Singh and others ... Respondents

RSA No.4777 of 2014 (O&M)

Kulwant Singh ... Appellant
Vs.

Mohinder Singh ... Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. K.S.Khehar, Advocate
for the appellant.

Mr. Arun Jain, Senior Advocate with
Mr. Kushagra Mahajan, Advocate
for respondent No.1.

Mr. Sanjeev Patiyal, Advocate
for respondent No.2.

Mr. R.M.Sharma, Advocate
for respondent No.3.

AMIT RAWAL J.

This order of mine shall dispose of two Regular Second Appeals bearing No.4724 and 4777 of 2014.

RSA bearing No.4724 of 2014 arising out of decision of civil suit bearing No.1317 dated 23.12.2004 titled as Kulwant Singh vs. Mohinder Singh and others (hereinafter referred to as “suit no.1”), at the

instance of the appellant-plaintiff seeking declaration that he is owner in possession of house no.432, Phase-XI, SAS Nagar, being the next legal heir of his wife Surinder Kaur, deceased with a consequential relief of injunction restraining defendant No.1-Mohinder Singh from alienating and disconnecting the electricity or water supply to the said house with a further prayer restraining defendants No.2 - PUDA and 3- Punjab State Electricity Board, not to allow alienation or to withdraw the electric power to the said house at the instance of defendant No.1, has been dismissed by both the Courts below.

RSA bearing No.4777 of 2014 arising out of decision of civil suit No.1287 dated 04.01.2005 titled as Mohinder Singh vs. Kulwant Singh (hereinafter referred to as “suit no.2”) seeking mandatory injunction directing defendant-Kulwant Singh to hand over the possession of kothi no.432 Phase-XI, Mohali, measuring 262.5 square yards situated in the area of Mohali by giving description of the same after termination of license deed, vide notice dated 25.10.2004, has been decreed by both the Courts below.

Mr. K.S.Khehar, learned counsel appearing on behalf of the appellant submits that Surinder Kaur (since deceased) was married to the appellant on 06.04.1998. Prior to marriage, she had executed a Will dated 03.04.1998 in favour of Mohinder Singh, who is none-else but her father, in respect of the aforementioned property. Any Will executed before marriage in view of the provisions of Section 69 of the Indian Succession Act, 1925 (hereinafter referred to as “1925 Act”) would not be valid one and cannot be looked into, much less, taken the benefit of the same in any of the

proceedings, thus, the transfer of the property by the PUDA on 14.12.2002 was not correct. In fact, the case set out by the appellant-plaintiff was that the aforementioned house was constructed with the funds provided by him and money drawn from his GPF. The status of appellant-plaintiff, Kulwant Singh in suit no.2 cannot be branded of a licensee.

He has drawn the attention of this Court to the findings arrived at by the trial Court in paragraph 20 of the impugned judgment, wherein, it has been observed that in the presence of the husband, mother of the deceased would not be entitled to inherit the property of her daughter after her death. He further submits that there was no relationship of licensor and licensee between the parties. Revocation of license was nothing but an attempt to create a license. In fact, simpliciter suit for mandatory injunction would not be maintainable but only a suit for possession would lie. A sum of ₹2,00,000/- was spent for construction of the house. The Will set up by the defendant was nothing but a result of fraud, undue influence and misrepresentation on Surinder Kaur as no sane wife would exclude her husband, who had full love and affection with each other. The Will is surrounded by suspicious circumstances and therefore, the same cannot be looked into. Surinder Kaur was not in a state of mind to execute the Will as she died on 15.01.2002.

The Courts below have not taken into consideration that the handwriting expert has given the opinion that the word “Self Drafted” has been written by the same person, who has self-drafted the sale deed. Admittedly, the sale deed was drafted by Mohinder Singh as such the beneficiary had participated in the execution of the Will and therefore, the

Will was required to be discarded. The property in question was purchased with the joint funds and the appellant had contributed for construction of the house in dispute and thus, urges this Court for decretal of suit no.1 and dismissal of suit no.2.

In support of his contention, he relies upon the ratio decidendi culled out by the Hon'ble Supreme Court in *Suraj Lamp and Industries Pvt. Ltd. vs. State of Haryana and another 2011(4) RCR (Civil) 669*.

Per contra, Mr. Arun Jain, learned Senior Counsel assisted by Mr. Kushagra Mahajan, Advocate appearing on behalf of respondent No.1 submits that Kulwant Singh, plaintiff in suit no.1 has miserably failed to prove the alleged contribution and purchase of the house. In support of his contention, he has drawn the attention of this Court to the statement of PW2 -Jaswant Chopra, Senior Assistant appeared from the office of DPI Secondary, who had been examined at the instance of Kulwant Singh to prove the alleged contribution and to a specific question in the cross-examination, he has submitted that as per the record, there is nothing to show as to whether any loan was sanctioned or disbursed to Kulwant Singh or not, therefore, the statement suffered in the examination-in-chief was completely demolished.

He also referred to Ex.D1, a letter written by Kulwant Singh to defendant in suit no.1 and plaintiff in suit no.2, wherein, he admitted that he was unable to bear the expenses for the treatment of Surinder Kaur. In case, a person, who could not afford the treatment/expenses of medicines of his wife, cannot be believed to have spent the money for construction of the house. Even otherwise, the plea raised tantamounts to setting up a plea of

Benami which is not permissible in the eyes of law, in view of the specific bar for entering into Benami Transaction as per the Benami Prohibition Transaction Act, 1988, i.e., in view of the repealing of Act except for few provisions.

He further submits that the ratio decidendi culled out by the Hon'ble Supreme Court by relying upon the provisions of Section 69 of 1925 Act, in fact would not apply to the facts and circumstances of the present case, in view of Clause C of Section 57 of 1925 Act as the aforementioned provisions have to be read in conjunction with Schedule III of 1925 Act, wherein, applicability of Section 69 has been omitted. In essence, he submits that for the purpose of testamentary succession, the application of certain provisions of part to class of Will shall be made applicable to other territories than the prescribed in Clause A to all movable properties which provides that marriage will not revoke such Will, thus, the Will executed by Surinder Kaur before marriage would not be hit by provisions of Section 69 of 1925 Act.

He further submits that status of appellant-Kulwant Singh is none-else but that of a licensee and for seeking possession from a licensee, the suit for mandatory injunction by invoking the provisions of Section 39 of 1963 Act, is maintainable. Both the Courts below have examined the evidence, both oral and documentary, much less, threadbare, thus, there is no illegality and perversity in the findings under challenge.

I have heard learned counsel for the parties and appraised the judgments and decrees of the Courts below and of the view that there is no force and merit in the submissions of Mr. Khehar. The ratio decidendi

culled out by the Hon'ble Supreme Court in Suraj Lamp's case (supra), particularly in paragraph 14 was in context of interpretation of the Will in respect of the properties agreed to be sold on the basis of 'Power of Attorney' and execution of likewise other documents, agreement to sell, irrevocable Will and affidavit, whereas, on going through the language of provisions of Section 57 and Schedule III which read thus:-

“57. Application of certain provisions of Part to a class of Wills made by Hindus, etc.—The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply—

(a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such Wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits; 2[and

(c) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b):] Provided that marriage shall not revoke any such Will or codicil.

SCHEDULE III

*PROVISIONS OF PART VI APPLICABLE TO CERTAIN
WILLS AND CODICILS DESCRIBED IN SECTION 57*

Sections 59, 61, 62, 63, 64, 68, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 95, 96, 98, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189 and 190. Restrictions and modifications in application of foregoing sections. 1. Nothing therein contained shall authorise a testator to bequeath property which he could not have alienated inter vivos, or to deprive any persons of any right of maintenance of which, but for the application of these sections, he could not deprive them by will. 2. Nothing therein contained shall authorise any Hindu, Buddhist, Sikh or Jaina, to create in property any interest which he could not have created before the first day of September, 1870.

3. Nothing therein contained shall affect any law of adoption or intestate succession.

4. In applying section 70 the words "than by marriage or" shall be omitted.

5. In applying any of the following sections, namely, sections seventy-five, seventy-six, one hundred and five, one hundred and nine, one hundred and eleven, one hundred and twelve, one hundred and thirteen, one hundred and fourteen, one hundred and fifteen, and one hundred and sixteen to such wills and codicils the words "son," "sons," "child," and "children" shall be deemed to include an adopted child; and the word "grand-children" shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son."

it is evident that all the Wills executed by a testator before marriage shall not be held invalid or automatically revoked, thus, argument of Mr. Khehar with regard to applicability of provisions of aforesaid Section is hereby repelled.

As regards the plea qua seeking declaration and defending the suit for mandatory injunction, I am of the view that appellant has miserably failed to lead any evidence with regard to contribution made towards the purchase of house.

As a matter of fact, Surinder Kaur was earlier married, whose husband died in the year 1999. Unfortunately, she contracted a deadly disease and with the strong Will and treatment, was cured realizing that disease may not re-occur, she married to the appellant.

It is a matter of record that the aforementioned house was purchased by Mohinder Singh on 22.08.1997. The marriage with appellant was performed on 08.04.1998. Unfortunately, Surinder Kaur died on 15.01.2002. On the basis of the Will, the respondents, i.e., defendants in suit no.1 and plaintiff in suit no.2, submitted an application to the Punjab Urban Development Authority, Mohali (PUDA) for transfer of the plot, which was transferred and a legal notice dated 25.10.2004 was also sent to Kulwant Singh for vacation of the premises by revoking the license.

In the absence of ownership, the status of the appellant is merely of a licensee and after revocation that of a trespasser. In view of law laid down by the Hon'ble Supreme Court in **Th. Milka Singh and others vs. Th.Diana and others 1964 AIR (J&K)**, the suit for mandatory injunction, if filed with promptitude, by invoking the provisions of Section 39 of 1963 Act, has been held to be maintainable, therefore, the argument of Mr. Khehar, *vis-a-vis* maintainability of the suit, is also hereby rejected.

Both the Courts below have rendered a finding of fact on the basis of the appreciation of oral and documentary evidence. I am of the view that appellant has miserably failed to prove the averments made in the plaint. Even witness PW2 as noticed above, replied that as per the record, loan was never sanctioned. The appellant has failed to prove the alleged contribution made for purchase of the house/construction.

For the aforementioned reasons, I am of the view that there is merit in the appeals. The judgments and decrees of both the Courts below are based upon the pre-ponderance of evidence and do not require any interference and the same are upheld.

Accordingly, the appeals are dismissed.

(AMIT RAWAL)
JUDGE

October 27, 2016
savita