

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

RSA No.4103 of 2009(O&M)
Decided on: 15.12.2017

Balwinder Kumar and others

.....Appellants

versus

Janak Raj(deceased) through LRs and others

.....Respondents

Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr. Satinder Khanna, Advocate
for the appellants.

Mr.Amarjit Markan, Advocate
for respondents No. 1 to 3.

Mr. Hitesh Kaplish, Advocate
for respondent No. 4.

Rajbir Sehrawat, J.(Oral)

This is the second appeal filed by the plaintiff, challenging the concurrent judgments and decrees against the dismissal of the suit.

It deserves mention here that the original suit was filed by Prem Pal son of Gurdas Ram against Janak Raj and others. However, after the decision of the appeal by the lower Appellate Court, the plaintiff Prem Pal expired and the present appeal has been filed by his legal representatives who are the sons and daughters of Prem Pal. However, for convenience, the parties herein would be referred to as the plaintiff and the defendant; as they were described in the original suit.

The brief facts of this case are that the plaintiff filed a suit for declaration to the effect that he was joint owner to the extent of $\frac{1}{2}$ share in the properties mentioned in the head note of plaint which were, one Plot-

cum-Shop, one House, one Shop and one Taur, all situated at Mehli Gate, Phagwara, District Kapurthala. Further a declaration was sought that sale deeds executed qua the properties mentioned above are wrong, null and void. These sale deeds were executed, first by defendant No. 1, namely, Janak Raj in favour of defendants No. 2 and 4, and thereafter one sale deed was further executed by defendant No. 2 in favour of defendant No. 3. The facts as pleaded in the plaint are that, previously, one Narain Dass was ancestor of the plaintiff and defendants No. 1 and 4 to 13. He was the owner of the suit property. Narain Dass had two sons namely, Jiwan Mal and Khushi Ram. However, Khushi Ram died unmarried and issue less. Therefore, the properties came to Jiwan Mal. Jiwan Mal had further two sons, namely, Mela Ram and Nathu Ram. It was further pleaded that the plaintiff belonged to the lineage of Nathu Ram; being his grand-son; whereas defendant No. 1 belonged to lineage of Mela Ram being his great-grand-son. Since after the death of Jiwan Mal; the properties were to go in half share to the lineage of Mela Ram and Nathu Ram each, therefore, the plaintiff was entitled to the half share in the properties mentioned in the head note of the plaint; which were left behind by Jiwan Mal. It was further claimed that since half share in the property belonged to the plaintiff, therefore, the sale deeds executed by Janak Raj in favour of defendants No. 2 and 4; and further sale of the property by defendant No. 2 in favour of defendant No. 3; are totally illegal and void because Janak Raj could not have transferred title qua half share of the property. It was further pleaded that the plaintiff came to know about the factum of the execution of sale deed in favour of defendants No. 3 and 4 when defendant No. 2 has further delivered the possession of the suit property to the purchasers without

getting the same partitioned. It was further pleaded that since the properties are joint but the defendants have been raising construction and creating hindrances in the proper use of the properties, therefore, an injunction was prayed for against them.

On getting notice, defendant No. 1 filed written statement taking preliminary objection that the suit is barred by Order 2 Rule 2 of the CPC. On merit, it was denied that Narain Dass was the owner of the suit property. It was pleaded that, in fact, Jiwan Mal was the exclusive owner of the suit property. It was further pleaded that Jiwan Mal had not inherited the suit properties and the properties were self-acquired properties of Jiwan Mal. It was further pleaded that Jiwan Mal inherited from Narian Dass; only a Haveli; which is situated in Mohalla Tambakoo Kuttan, Mehli Gate, Phagwara which is in the possession of the plaintiff himself. Although the plaintiff is owner only qua half share in that Haveli as well. Remaining half share in that Haveli; situated in Mohalla Tambakoo Kuttan, Mehli Gate, Phagwara is also belonging to defendant No. 1 Janak Raj. It was further pleaded that Jiwan Mal was having two sons namely, Mela Ram and Nathu Ram. Nathu Ram was vagabond type person of dubious character and same was the situation with his son Gurdas Ram. On the other hand, Mela Ram son of Jiwan Mal was having a son; Durga Dass. Out of love and affection and to protect the properties from being wasted; Jiwan Mal executed a legal and valid Will on 14 Jeth, 1990 B.K. with regard to his movable and immovable properties in favour of Durga Dass, his grandson. The said Will was got registered. It was further pleaded that the said Will is also recorded in the Register of Deed Writer, Harkishan Dass at Sr. No. 34 of B.K.1990. In this Will Gurdas Ram was totally disinherited from the property except

half share in the ancestral Haveli situated in Mohalla Tambakoo Kuttan, Mehli Gate, Phagwara; as mentioned above. After death of Jiwan Mal, Durga Dass came into the possession as owner of the entire property left by Jiwan Mal except half share in the Haveli mentioned above. After Durga Dass became owner in possession of the suit property; he made an oral gift of the properties in favour of his wife Lajwanti in the year, 1956; making her full and absolute owner of all the properties. Defendant No. 1 is the grand son of Lajwanti and Durga Dass, being the son of their son Ram Parkash. Since the father and mother of defendant No. 1 had died in early days of his infancy, he was brought up by his grand father and grand mother. Other sons of Durga Dass and Lajwanti i.e., uncle of defendant No. 1 stood permanently settled at Shimla and they had lost connection with Kapurthala. Therefore, Lajwanti, the grand mother of defendant No. 1; executed a legal and valid Will in favour of defendant No.1 on 20.03.1983 thereby bequeathing her properties to defendant No.1. After the death of his grand-mother the defendant No.1 became the absolute owner of the properties left behind by his grand-mother on the basis of the Will executed by her. It was further claimed that the defendant No. 1 has been letting out the properties to the tenants; being owner thereof. Out of these shops; one shop was let out to Om Parkash. Defendant No. 1 had also filed ejectment application against him and got back the possession of the property under the ejectment order on 24.11.1990. It was further claimed that properties are also assessed to the house tax in the name of defendant No.1. Defendant No. 1 had spent huge amount on the construction of house; mentioned in para No. B of the head note of the plaint; in which he is living with his family. The said house was constructed by him on the vacant plot in the

year 1974. Still further it was claimed that defendant No. 1 had sold the some part of properties to defendant Nos. 2 to 4 and the vendees are in possession thereof. It was further pleaded that the plaintiff had been having full knowledge of all these facts; all through. Hence the properties have rightly been sold by defendant No. 1.

Defendant No. 2 filed separate written statement in which he claimed that he was the owner in possession of the 'Taur' in dispute, which was purchased by him vide sale deed dated 15.04.1991, since the possession of the same was also delivered to him by defendant No. 1 after selling the same. He admitted that defendant was exclusive owner of this property before selling the same, under a Registered Will dated 20.03.1983 executed by Lajwanti wife of Durga Dass. It was further pleaded that defendant No.2 had also sold this 'Taur' to defendant No. 3 vide sale deed dated 31.05.1993. Similarly, defendant No. 3 had also filed written statement in which he had stated that he had purchased the suit property from defendant No. 2 vide sale deed dated 31.05.1993, for valuable consideration. Similarly defendant No. 4 had also stated that he purchased the suit property from defendant No. 1 vide registered sale deed dated 09.01.1997 for valuable consideration and had also received the possession of the same at the time of purchase itself.

After pleading of the parties, the Trial Court framed the issues in the suit which are as under:-

- “1. Whether the plaintiff is the joint owner of ½ share of the suit properties?OPP*
- 2. Whether the sale deeds dated 15.4.1991 and 31.5.1993 are wrong, null, void, incorporative and without consideration, without authority?OPP*
- 3. Whether the plaintiff is entitled for the*

separate possession of ½ share of the suit properties?OPP

4. *Whether the suit is not maintainable in the present form?OPD*
5. *Whether the suit is time barred? OPD*
6. *Whether the plaintiff is debarred from filing the present suit by his facts, conduct, admission? OPD*
7. *Whether the suit is bad for mis-joinder and non-joinder the courts have erred in law of necessary parties? OPD*
8. *Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD*
9. *Whether the suit is hit by order 2 rule 2 CPC? OPD”*

Parties led their evidence.

The plaintiff himself did not appear in the witness box. Rather his attorney Balwinder Kumar appeared as PW-1. PW-2 Avtar Singh and PW-3 Rajwinder Singh were also examined by him. Beside this copy of bandobast Ex.PX and Ex.PY were also placed on record. On the other hand, defendant No. 1 examined DW-1 Amrik Singh Bedi, DW-2 Daljit Kaur as Registration Clerk from the office of Deputy Commissioner, Kapurthala. DW-3 Sewa Singh, DW-4 Tara Singh who were present at the time of execution of the Will in favour of Durga Dass on 14th Jeth, 1990B.K, DW-5 Inderjit Soni, DW-6 Narinder Singh, record keeper of Deputy Commissioner office, Kapurthala, DW-7 Raj Rani one of the purchasers. Janak Raj himself appeared as DW-8, beside this other persons were also examined as DW-9 to DW-13.

After hearing the parties and appreciating the record the Trial

Court dismissed the suit filed by the plaintiff. While dismissing the suit, the Trial Court recorded a finding that the plaintiff claimed the suit properties to be ancestral property. However, he has failed to prove the ancestral nature of the property. It was held by the Trial Court that the plaintiff examined PW-1 Balwinder Kumar and PW-2 Avtar Singh to substantiate the character of the property left behind by Jiwan Mal as ancestral property. However, PW-2 Avtar Singh himself admitted that suit property is self-acquired property of Jiwan Mal and only ancestral property got by Jiwan Mal was one Haveli situated at Mohalla Tambakoo Kuttan, Mehli Gate, Phagwara. Furthermore, this witness was also admitted that Janak Raj is the owner of the suit property and he has validly sold the same to defendants No.2 to 4. Accordingly, the Trial Court held that suit property is proved to be self-acquired property of Jiwan Mal.

Trial Court also recorded that on the other hand, defendant had examined DW-6 Narinder Singh who is the record keeper of Deputy Commissioner office, Kapurthala and who has proved the entries in Wasika register with regard to the Will dated 14 Jeth, 1990 B.K., Ex:D, having been executed by Jiwan Mal in favour of Durga Dass. Furthermore DW-3 Sewa Singh has proved the gift made by Durga Dass in favour of his wife Lajwanti and DW-5 was the attesting witness of the Will dated 20.03.1983 in favour of defendant Janak Raj. Still further DW-9 Raj Kumar, clerk from Municipal Committee, Phagwara has proved the entries in the T.S.I register in the name of Janak Raj for payment of house tax pertaining to the suit properties. Hence the Trial Court recorded that the Will Ex:DX has been proved to have been executed by Jiwan Mal in favour of Durga Dass on 14 Jeth 1990 B.K.. In this Will Jiwan Mal had specifically disinherited Nathu

Ram and Gurdas Ram from his properties except one Haveli in Mohalla Tambakoo Kuttan, Mehli Gate, Phagwara on the ground that Nathu Ram and Gurdas Ram were vegabonds. Thereafter, the gift in favour of Lajwanti and further the Will of Lajwanti in favour of defendant No. 1 Janak Raj also stand proved. Hence, defendant No. 1 Janak Raj had every authority to sell these properties and the sale executed by defendant No. 1 was also held to be validly executed. Resultantly, the suit filed by the plaintiff was dismissed. Aggrieved against this judgment and decree, the plaintiff filed the appeal before the lower Appellate Court.

However, the lower Appellate Court also dismissed the appeal filed by the plaintiff. Before the lower Appellate Court the plaintiff raised the argument that specific issue regarding the Will executed by Jiwan Mal in favour of Durga Dass was not framed by the Trial Court. Therefore the Will could not be deemed to have been proved. However, the lower Appellate Court held that since right from the day of filing of the written statement the defendant had taken the plea that Will was executed by Jiwan Mal in favour of Durga Dass and the complete details were also given, therefore, the parties were very much alive to the fact that the Will of Jiwan Mal is involved in the case. Hence it is immaterial whether any issue was framed or not. The lower Appellate Court further held that otherwise also the Will stands proved by testimony of DW-4 Tara Singh; who was present at the time of execution of the Will. This witness has duly proved that the Will was executed by the Jiwan Mal in the presence of the witnesses and witnesses had signed the Will in presence of Jiwan Mal and Jiwan Mal had signed the said Will in presence of the witnesses. This witness has said that he had seen all the persons signing the Will. It was further held that Daljeet

Kaur, DW-2 has proved the subsequent Will by Lajwanti in favour of Janak Raj. Likewise the gift deed by Durga Dass in favour of Lajwanti also stand proved by witness to the gift. The lower Appellate Court further upheld the finding of the Trial Court that the municipal record have also shown the ownership and possession of the plaintiff over the suit property. Still further the lower Appellate Court held that, in any case, since the Will of Jiwan Mal in favour of Durga Dass is more than 30 years old and thus, having come from proper custody needs to be accepted as having been duly proved. The lower Appellate Court still further recorded that the claim of the plaintiff was that the suit property is the ancestral property. However, the plaintiff has failed to prove the ancestral nature of the suit property. His own witness had admitted the property to be not an ancestral property. Accordingly, it was held by the lower Appellate Court that the plaintiff has failed to prove on record that the property is ancestral property. Hence the plaintiff failed to substantiate his claim. Therefore, the suit has rightly been dismissed.

While arguing the case learned counsel for the appellant/plaintiff has submitted that the suit property is ancestral property. His submission is that since the property was owned by Jiwan Mal and it is coming to his sons/great-grand-son, therefore, it shall be deemed as a property coming through ancestors only. Hence the property shall retain the character of ancestral property, despite the fact that any Will is there. Still further his argument is that since property was ancestral property, therefore, Jiwan Mal was not entitled to execute any Will in favour of his grandson Durga Dass by excluding other branch of lineage from his another son Nathu Ram. In support of his argument learned counsel for the appellant has

relied upon the judgment of this Court rendered in **2009(4) R.C.R(Civil) 820** titled as ***Darshan Lal vs. Balwant Rai and others***. It is argued by learned counsel for the appellant that the Will has not been proved on record by examining the attesting witness of the Will. Still further it is argued by learned counsel for the appellant that presumption of Section 90 of the Evidence Act is not applicable to the deed of Will. His submission is that in any case a Will has to be proved by the person who is setting up the Will in accordance with Section 63 of the Indian Succession Act and Section 68 of the Evidence Act. In support of his argument learned counsel for the appellant has relied upon the judgment of the Hon'ble Supreme Court reported in **2013(2) Civil Court Cases 640** titled as ***M.B.Ramesh(D) by Lrs. vs. K.M.Veeraje Urs(D) by Lrs & Ors***. Further argument of learned counsel for the appellant is that the witness examined by the defendant to prove the Will is not an attesting witness, therefore, the Will can not be said to have been proved in accordance with Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act. Hence the sale deeds executed by defendant No. 1 on the basis of title obtained through this Will are not sustainable.

On the other hand, learned counsel for the respondent has relied upon the judgment of the Privy Council reported in **A.I.R.(34) 1947 Privy Council 15** titled as ***Munnalal, minor and others vs. Mst. Kashibai and others*** to contend that if the Will is more than 30 years old then the presumption under Section 90 of the Indian Evidence Act would be applicable even to a Will. Learned counsel relies upon the judgment of the Hon'ble Supreme Court rendered in **AIR 1968 Supreme Court 947** titled as ***Kalidindi Venkata Subbaraju and others vs. Chintalapati Subbaraju and***

others to contend that the presumption under Section 90 in respect of the original Will is available and the Court can draw this presumption if the original Will is there. In the present case, learned counsel submits that the original Will has been duly proved on record. Hence the presumption of Section 90 of the Evidence Act has rightly been applied by the lower Appellate Court. Still further it is submitted by learned counsel that since in the present case, it has been proved on record that none of the attesting witnesses were available, therefore, the Will has been proved as per requirement of Section 69 of the Indian Evidence Act. DW-4, Tara Singh has been duly examined to prove the signatures of the attesting witnesses and the signature of the executant of the Will. This witness has duly deposed that he was present on the scene when the Will was executed and that he had seen the witnesses and the executant of the Will putting their signatures on the Will. He has identified the signatures on the Will as such. Hence, the Will stands duly proved. Still further it is the submission of learned counsel for the respondent that the appellant/plaintiff has failed to lead any evidence to show the ancestral nature of the property. Hence the property being self-acquired property in hand of Jiwan Mal, he had every right to execute the Will qua his properties. It is further submitted that the plaintiff has to stand on his own legs to succeed in his case. He can not solely rely upon the weakness of the evidence of the defendant. Therefore, it is argued by the learned counsel for the appellant that sale deeds have rightly been executed by defendant No. 1. He had every title to sell the land at the time of the execution of the sale deed; as proved by the evidence led on the file.

Having heard the learned counsel for the parties and perusing

the record with their able assistance, this Court is of the considered opinion that the appellant has not been able to substantiate his case as claimed by him. The very basis of the claim raised by the plaintiff was the character of the suit property; as being the ancestral property. However, he has not led any evidence to prove the ancestral nature of the suit property. To prove the nature of the suit property to be ancestral, the plaintiff was required to prove that the property in the hand of Jiwan Mal had come from three decrees of male succession without any intervention of any other mode of transfer of title of the suit property upon Jiwan Mal. However, no such evidence has been led by the plaintiff.

At the same time, plaintiff himself has not appeared as a witness in the case. His attempt to avoid scrutiny through cross-examination also leads to a suggestion that he was not sure of his stand taken by him in the suit. Even the attorney who appeared on behalf of the appellant as PW-1 and another witness PW-2 examined by the plaintiff has not been able to prove the character of the property as ancestral property. They have rather admitted that the suit property is not ancestral property. They have admitted the possession of defendant No. 1 since long time. In view of the above, the judgment cited by learned counsel for the appellant on the nature of the property is of no help to him. Hence, the plaintiff have failed to prove the ancestral character of the property.

Faced with this situation, the plaintiff had tried to dispute the proof of the Will before the lower Appellate Court on the ground that no issue was framed on this point. However, the lower Appellate Court has rightly held that since parties were alive to the controversy and the evidence has been led on this point, therefore, mere non framing of the issue was

totally irrelevant. So far as the validity of the Will executed by Jiwan Mal in favour of Durga Dass is concerned, the same is proved as per the requirement of the law. Admittedly, none of the attesting witnesses of the Will was alive at the time when the evidence was being recorded. This fact has come on record also. Therefore, the defendant could not have examined any witness as required under Section 68 of the Indian Evidence Act to prove the requirements of Section 63 of the Indian Succession Act. However, law has not left him remedy-less in this situation. Section 69 of Evidence Act provides that in case none of the attesting witnesses is alive then Will can be proved by proving the signatures or hand writing of the executant and those of the attesting witnesses. In the present case, this burden has been duly discharged by the respondent/defendant by examining DW-4 Tara Singh. This witness has deposed that he was present at the time when the said Will was executed. He has further deposed that he had seen the witnesses and the executant of the Will signing the Will. He has identified the signatures of the executant as well as the witness on the Will. Still further he has also detailed the execution of the Will as seen by him. Therefore, despite the fact that this witness is not an attesting witness to the Will, his testimony can not be excluded. His testimony is very much relevant as provided under Section 69 of the Indian Evidence Act. Hence the defendant/respondent has been able to prove the execution of the Will by the Jiwan Mal in favour of Durga Dass.

Otherwise also, since the Will is dated 14 Jeth, 1990 B.K. When converted to English Calendar it comes to be of the year 1933. Therefore, the Will is much older than 30 years on the date of filing of the suit in the year, 2001. Hence the lower Appellate Court has rightly held that

the Will shall also draw presumption of validity on the part of the Court. Hence the Trial Court had rightly attached the presumption of validity to the Will. The judgment relies upon by learned counsel for the appellant in the case of ***M.B.Ramesh(D)by Lrs(supra)*** is not helpful to the case of the appellant as the same is distinguishable on its facts. In that case, the attesting witness of the Will was very much alive. Despite that he was not examined by the persons setting up the Will. Hence the Hon'ble Supreme Court has held that in this situation; since the Will is required to be proved in accordance with Section 68 of the Indian Evidence Act by proving the ingredients of Section 63 of the India Succession Act, therefore, mere lapse of 30 years would not make it valid and proved. Hence it was held that presumption of validity is not available to the Will in that case.

On the other hand, in the present case, it has been proved on record that both the attesting witnesses and the scribe of the Will have already expired. Therefore, the respondent/defendant had no occasion to examine the attesting witnesses. He has examined the person who was otherwise present on the spot when the Will was executed. This witness has proved the execution of the Will in terms of Section 69 of the Indian Evidenced Act. However, as an additional aspect; lower Appellate Court has also attached the presumption of correctness to the Will as prescribed under Section 90 of the Indian Evidence Act. The judgment of the Privy Council reported in ***Munnala, minor and others(supra)*** and the judgment of the Hon'ble Supreme court rendered in ***Kalidindi Venkata Subbaraju and others(supra)*** fully support the case of the appellant. Still further a judgment of Division Bench of Delhi High Court reported in ***2013(2)PLR (Delhi) 12*** titled as ***Subhash Nayyar vs. Registrar University of Delhi and***

others has also held that if the attesting witnesses are not available then the presumption of validity of a document under Section 90 of Evidence Act shall be applicable to the Will as well. This judgment also clearly covers the case of respondent in the present case. Hence the Will executed by Jiwan Mal in favour of Durga Dass stands proved on the record. In the present case also none of the attesting witness was, admittedly, alive. Hence the presumption of correctness and validity of document under Section 90 of Evidence Act shall be applicable to the deed of Will also.

The entire case of the plaintiff was that the property was ancestral in the hand of Jiwan Mal and therefore, the grandfather of the plaintiff would be his successor to the extent of half share. But once the property is not found to be ancestral and the Will is found to have been executed by Jiwan Mal in favour of Durga Dass, then the grand father, and the father of the plaintiff shall not have any concern with the suit property. Therefore, the plaintiff can also not claim any right or interest qua the suit property. Hence all the events subsequent to this Will can not be questioned by the plaintiff in the present case. Otherwise also, the record shows that subsequently the property was gifted by Durga Dass to his wife Lajwanti. Since the father and mother of defendant No. 1 had expired and other sons of Durga Dass and Lajwanti were already settled elsewhere, therefore, Lajwanti had executed the Will in favour of defendant No. 1. Thereafter, defendant No. 1 is also duly recorded as owner of the property in the municipal records. All these sequence of facts have been duly proved on record by the respondent/defendant by leading positive evidence. Hence, defendant No. 1 had every right to transfer the suit property to anybody else or to deal with the property as considered fit by him.

No other argument was raised by learned counsel for the parties.

In view of the above, there is no illegality or perversity in the judgment and decree passed by the Courts below and the same are upheld. Hence the present appeal fails and the same is hereby dismissed.

15th December, 2017
Shivani Kaushik

[RAJBIR SEHRAWAT]
JUDGE

Whether speaking/reasoned *Yes/No*

Whether Reportable *Yes/No*