

RSA No. 3899 of 2015(O&M)

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

RSA No. 3899 of 2015(O&M)

Date of Decision: 27.7.2017

Partap Singh

.....Appellant

Vs.

Swinder Singh and others

.....Respondents

CORAM : HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

Present : Mr. Harpreet S. Rakhra, Advocate
for the appellant.

RAMESHWAR SINGH MALIK J. (ORAL)

Plaintiff is in regular second appeal against the concurrent findings of facts recorded by both the learned courts below, whereby his suit for declaration was dismissed by the learned trial court vide its impugned judgment and decree dated 21.7.2010 and his first appeal also came to be dismissed by the learned District Judge, vide its impugned judgment and decree dated 15.1.2015.

Brief facts of the case, as recorded by the learned first appellate court in para 2 of its impugned judgment, are that plaintiff, Shri Partap Singh son of Shri Harnam Singh, resident of House No. 4692/24, Gali No.4, Guru Nanak Wara, Near Khalsa College, Amritsar, had filed a suit for declaration against defendants; Swinder Singh son of Shri Roor Singh, resident of House No.4492/20, Uttam Nagar, Sultanwind Road, Amritsar, Raj Kumar, Darshan Lal and Vijay Kumar sons of Shri Banarasi Lal, residents of House No. 4344, Gali No.4, Uttam Nagar, Sultanwind Road, Amritsar, to the effect that mutation No. 15318, sanctioned in favour of defendant No.1 with respect of area measuring Marlas, khasra No. 1082/855, was illegal, null,

void and non-existence and the plaintiff was owner in possession of House bearing No. 4492/20, situated in Uttam Nagar, Gali No.4, Sultanwind Road, Amritsar, bearing khasra No. 855/2 min, khata khatauni No. 50/50, private plot No. 8, as shown in jamabandi for the year 1946-47, new khasra No. 1082/855, khata khatauni No. 52/54 as entered in jamabandi for the year 1996-97 as regards area measuring 4 Marlas i.e 100 sq. yards situated in Uttam Nagar, Gali No.4, Sultanwind Road, Amritsar, bounded as East-Bazaar Uttam Nagar, West-House of Jai Singh now in possession of Brij Mohan, North-House of Harnam Singh now house of Thakar Singh and South-Street, on the basis of Will dated 18.3.2000 executed by Shri Gian Singh son of Shri Roor Singh, deceased husband of Gurdeep Kaur and plaintiff was also entitled to sale consideration from defendant No.2, with consequential relief of permanent injunction, restraining the defendants from interfering into peaceful possession of the plaintiff or dispossessing the plaintiff forcibly and illegally and except in due course of law, on the averments that Gurdeep Kaur wife of Gian Singh was owner in possession of house, in dispute, having purchased vide sale deed dated 29.11.1971.

Gurdeep Kaur and Gian Singh were living in the said house and defendant No.2 Raj Kumar, got prepared a forged and fabricated agreement alleged to be executed by Smt.Gurdeep Kaur and on the basis of which, he filed a suit for specific performance in respect of said house, which was decreed by the court of Shri Gurjant Singh, the then Civil Judge (Junior Division), Amritsar vide judgment and decree dated 18.2.1999. Gurdeep Kaur died. Shri Gian Singh was brought being LR of deceased Gurdeep Kaur. Gian Singh filed appeal against such judgment and decree, but during pendency of such appeal, he also died. Then, plaintiff filed an application to be impleaded as L.R of Gian Singh. Defendant No.1 also filed an application

to be impleaded as L.R of Gian Singh. Both the applications were allowed by the then learned District Judge, Amritsar. However, learned District Judge gave no finding as to who was the real owner in possession on the basis of Will. Both the Wills were brought on record. Appeal was ultimately dismissed, holding that deceased had executed a Will in favour of defendant No.1, who got the mutation No. 15318 sanctioned in the absence of the plaintiff, whereas Gian Singh executed a Will in favour of plaintiff dated 18.3.2000 in a sound disposing mind. So, the plaintiff was entitled to retain possession in respect of the disputed house until any decision or possession was got delivered through court or till sale deed executed by L.R of deceased by the court.

Defendant No.1, in connivance with other defendants, was trying to dispossess the plaintiff from the house in dispute although they had got no right, title or interest in the disputed house. The Will allegedly executed by Gian Singh in favour of defendant No.1 was not an act of sound disposing mind since the deceased was admitted in Civil Hospital during that period and was unable to distinguish between good or evil. Gian Singh never lived with the defendant No.1 nor he had any love or affection with him. Since Gurdeep Kaur was real sister of plaintiff and during her life time, Gurdeep Kaur requested Gian Singh to execute a Will in favour of plaintiff. The plaintiff requested the defendants many times to admit his claim, but, they refused to do so. Hence, on accrual of a cause of action, the present suit was filed.

Upon notice, defendants No.2 to 4 appeared and filed their contesting written statement, raising more than one preliminary objections. Defendant No.1, despite service, did not appear and he was proceeded against ex parte. On completion of pleadings of the parties, learned trial

court framed the following issues:-

- 1) Whether the mutation No. 15318 sanctioned in favour of defendant No.1 regarding suit land is illegal, null and void ?OPP
- 2) Whether the plaintiff is owner in possession of house No.4492/20 on the basis of Will dated 18.3.2000 executed by Gian Singh ?OPP
- 3) Whether the plaintiff is entitled to sale consideration from defendant No.2 ?OPP
- 4) Whether the plaintiff is entitled to permanent injunction as prayed for ?OPP
- 5) Whether the suit is not legally maintainable?OPD
- 6) Whether the plaintiff has no locus standi and cause of action to file the present suit ?OPD
- 7) Whether the plaintiff is estopped by his own act and conduct from filing the suit ?OPD
- 8) Whether the suit is bad for misjoinder and non joinder of necessary parties ?OPD
- 9) Whether the suit is barred by limitation ?OPD
- 10) Whether the suit is barred by principles of res-judicata and Order 2 Rule 2 CPC ?OPD
- 11) Relief.

In support of their respective stands taken in their pleadings, both the parties brought on record voluminous documentary as well as oral evidence. After hearing learned counsel for the parties and going through the evidence brought on record, the learned trial court came to the conclusion that plaintiff has failed to prove his case. Accordingly, his suit for declaration was dismissed by the learned trial court vide its impugned judgment and decree dated 21.7.2010. Plaintiff felt aggrieved and filed his first appeal which also came to be dismissed by the learned District Judge, vide his impugned judgment and decree dated 15.1.2015. Hence this regular second appeal at the hands of unsuccessful plaintiff.

Heard learned counsel for the appellant.

It is a matter of record that there was an earlier litigation qua the suit property. Defendant No.2 had filed a suit for possession by way of specific performance which was decreed vide judgment and decree dated 18.2.1999 (Ex.D1 and D2). This suit was filed by defendant No.2 against Smt. Gurdeep Kaur who died and her husband namely Sh. Gian Singh was brought on record as her legal representative. First appeal of Sh. Gian Singh was dismissed by the learned District judge vide judgment and decree dated 2.8.2002 (Ex.D3). Thereafter, even the regular second appeal was dismissed by this Court vide judgment and decree dated 23.11.2002 (Ex.D4). Once earlier litigation attained finality in favour of respondent No.2 qua this very suit property, plaintiff-appellant had no case either on facts or in law. Having said that, this Court feels no hesitation to conclude that the learned courts below committed no error of law, while passing their respective impugned judgments and decrees and the same deserve to be upheld.

The entire case of the plaintiff was based on Will dated 18.3.2000 allegedly executed by late Sh. Gian Singh in favour of the plaintiff. Once suit of defendant No.2 for possession by way of specific performance of the agreement to sell had been decreed by the learned trial court vide judgment and decree dated 18.2.1999 (Ex.D1 and D2), Gian Singh was neither owner, nor competent to execute the Will dated 18.3.2000 in favour of the plaintiff. It is so said, because Smt. Gurdeep Kaur-wife of Gian Singh purchased the suit property from Harbans Kaur vide sale deed dated 29.11.1971. Smt. Gurdeep Kaur being exclusive owner of property, entered into agreement to sell with defendant No.2. He sought specific performance of the abovesaid agreement to sell and remained successful up to this court. In such a situation, once the executant

of the Will himself was not the owner, he would not be in a position to pass on any better title in favour of the plaintiff by way of Will dated 18.3.2000. Since the learned courts below were well within their jurisdiction to pass the impugned judgments and decrees, the same deserve to be upheld, for this reason also.

Further, plaintiff being propounder and beneficiary of the Will, onus would be on him to prove the Will in accordance with law. However, plaintiff-appellant miserably failed to prove his pleaded case for want of sufficient and cogent evidence. Unless the plaintiff, propounder of the Will in the present case, proved the Will to be a valid and genuine document, he would not be in a position to draw any benefit therefrom. In this regard, reliance can be placed on the following judgments of the Hon'ble Supreme Court as well as this Court:-

Rani Purnima Debi and another Vs. Kumar Khagendra Naryan Deb and another, 1962 AIR (SC) 567 (SC)

Ramchandra Rambux Vs. Champabai and others, 1965 AIR (SC) 354 (SC)

Apoline D' Souza Vs. John D' Souza, 2007 (7) SCC 225 (SC)

Om Parkash and others Vs. Shiv Kumar and others, 2006 (12) SCC 369 (SC)

Bharpur Singh and others Vs. Shamsher Singh, 2009 (1) RCR (civil) 826 (SC)

Baltej Singh Vs. Hamir Kaur, 2001 (3) RCR (Civil) 134 (P&H)

Mangal Singh and another VS. Kartara and others 2004 (3) RCR (Civil) 524 (P&H)

Kartar Kaur etc. Vs. Gurdeep Kaur etc. 2010 (5) RCR (civil) 279. (P&H)

Nazar Singh and others Vs. Karam Singh and others, (RSA No. 452 of 2016 decided on 20.3.2017).

Raj Kumari Vs. Ramesh Kumar @ Kuki and others,

(RSA No. 1990 of 2017 decided on 7.4.2017)

Before arriving at a judicious conclusion, the learned District Judge rightly examined, considered and appreciated true facts of the case as well as the evidence available on record, in correct perspective. Relevant and cogent findings recorded by the learned first appellate court in para 11 of its impugned judgment, which deserve to be noticed here, read as under:-

“It is an admitted fact between the parties that the disputed house was the ownership of Gurdeep Kaur, who was wife of Gian Singh. Though it has been contended on behalf of the appellant that Gian Singh had executed a valid Will dated 18.3.2000 in his favour, bequeathing the property in his favour during his life time, but then, it is not proved by leading a cogent and convincing evidence as to how Gian Singh had acquired such property. No mutation of inheritance as regards property in dispute, in favour of Gian Singh has been proved on record. It has been admitted by the plaintiff Partap Singh during his cross examination that Gian Singh was not having any title deed in his favour, however, he inherited the same after the death of his sister. He further stated that he does not know as to whether Gian Singh obtained a decree from the court on the basis of inheritance or not. So, Gian Singh was not legally competent to execute the impugned Will in favour of plaintiff, as regards property in dispute, when he was not having any title or mutation of inheritance in his favour after the death of Gurdeep

Kaur. Though it has been contended by the counsel for the appellant that the impugned agreement to sell was the result of fraud played by the defendant No.2 upon Gian Kaur, but, no particulars of such fraud have been mentioned in the plaint. Even otherwise, this plea of fraud is not available to the plaintiff, as admittedly, the defendant No.2 had filed a suit for possession by way of specific performance of impugned agreement to sell which was ultimately decided by the court of Shri Gurjant Singh, the then Civil Judge (Junior Division), Amritsar vide judgment and decree dated 18.2.99 certified copies of which have been proved on record as Ex.D1 and Ex.D2 and appeal having been preferred by Gian Kaur was also dismissed by the court of Shri M.R.Batra, the then District Judge, Amritsar vide judgment and decree dated 2.8.2002, certified copy of which has been proved on record as Ex.D3. A perusal of testimony of DW1 Raj Kumar goes to show that plaintiff had also preferred appeal against the judgment and decree passed by the court of Shri M.R.Batra, the then District Judge, Amritsar, in the Hon'ble High Court and such appeal had also been dismissed by the Hon'ble High Court vide judgment dated 23.11.2002, copy of which is proved on record as Ex.D4. Appeal so filed by Sawinder Singh against such judgment, was also dismissed by the Hon'ble High Court vide order dated 19.2.2007, copy of which is proved on record as Ex.D5.

So, when such litigation involving agreement to sell in favour of Raj Kumar, defendant No.2 has attained finality, now by way of filing the present suit, plaintiff is estopped from filing the present suit, claiming the suit property on the basis of Will dated 18.3.2000 and contending that agreement in question was a result of fraud. The defendant No.2 has also examined Darshan Lal as DW2, who has tendered in evidence certified copy of warrant of possession issued by the court of Smt.Hareet Kaur, the then Additional Civil Judge (Senior Division), Amritsar with regard to the disputed property in execution proceedings as Ex.DX and report on warrant as Ex.DX/1 and also tendered certified copy of statement of Raj Kumar, defendant No.2 being Ex.DX/3, to prove that Raj Kumar had already taken possession of the property in dispute and the execution was fully satisfied. So, in the given set of circumstances, it does not lie in the mouth of plaintiff that mutation sanctioned in the favour of defendant No.1 with regard to suit property was illegal, null void and he is not entitled to any declaration or any consequential relief. As such, I am of the view that the findings recorded by the lower court in that regard, are correct and do not call for interference of this court.”

During the course of hearing, learned counsel for the appellant failed to point out any patent illegality or perversity in either of the impugned judgments passed by the learned courts below. He also could not refer to any question of law much less substantial question of law, which is

sine qua non for entertaining a regular second appeal at the hands of this Court, while exercising its appellate jurisdiction under Section 100 of the Code of Civil Procedure. In this regard, reliance can be placed on the law laid down by the Hon'ble Supreme Court in **Naryanan Rajendran and another Vs. Lekshmy Sarojini and others, 2009 (2) RCR (civil) 286** and **Santosh Hazari Vs. Purshottam Tiwari, 2001 (3) SCC 179.**

No other argument was raised.

Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that the present appeal is misconceived, bereft of merit and without any substance. Thus, it must fail. No case for interference has been made out.

Resultantly, with the abovesaid observations made, instant regular second appeal stands dismissed, however, with no order as to costs.

27.7.2017
Ak Sharma

(RAMESHWAR SINGH MALIK)
JUDGE

Whether speaking/reasoned Yes/No
Whether reportable: Yes/No