

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

**RSA No.1472 of 2017 (O&M)**

**Date of Decision:-16.03.2017**

Nirvail Singh

...Appellant

Versus

Balbir Singh and others

...Respondents

**CORAM:- HON'BLE MR. JUSTICE HARI PAL VERMA**

Present:- Mr. Nirmal Singh, Advocate,  
for the appellant.

**HARI PAL VERMA J.**

**CM-3527-C-2017**

Prayer in the application filed under Section 5 of the Limitation Act is for condonation of delay of 52 days in filing the appeal.

For the reasons stated in the application, same is allowed and the delay of 52 days in filing the appeal is condoned.

**RSA No.1472 of 2017**

The appellant/defendant (hereinafter called 'the defendant') Nirvail Singh has filed the present regular second appeal against the judgment and decree dated 03.02.2016 passed by learned Additional District Judge, Tarn Taran whereby the appeal filed by the respondent/plaintiff (hereinafter called 'the plaintiff') was partly allowed.

Briefly stated, the plaintiff had filed a suit for declaration, joint possession and for permanent injunction to the effect that plaintiff is owner in possession of land measuring 16 Kanals 14-½ Marlas being 1/4<sup>th</sup> share out of total joint Khata of land measuring 66 Kanals 18 Marlas, which bears Khata No.18, Khatauni Nos.65 to 73, comprising of Khasra No.153(1-0), 1141(3-12), 1443 (0-11), 228 (3-16), 229 (3-0), 143 (8-0), 142 (6-3), 154 (7-11), 233/1 (4-0), 233/2 (1-8), 151 (7-11), 230 (1-4), 140 (4-0), 152 (7-2), 231 (7-2), 231 (8-0) as per the jamabandi for the year 1997-98 situated in the revenue estate of Village Naurangabad, Tehsil and District Tarn Taran, out of estate of deceased Sewa Singh and Kehar Singh, who are the sons of Boor Singh son of Sawan Singh. Further, a declaration of mutation Nos.3502 and 3503 sanctioned in favour of defendants No.1 and 2 as illegal, null and void and, therefore, liable to be set aside. Plaintiff has claimed joint possession over the suit land to the extent of 16 Kanals and 14-½ Marlas. It is the case of the plaintiff that Sewa Singh and Kehar Singh were co-sharers in possession of land measuring 33 Kanals 9 Marlas being half share out of total land of 66 Kanals 18 Marlas in equal shares as mentioned in jamabandi for the years 1992-93 and 1997-98 situated in the revenue estate of Village Naurangabad, Tehsil and District Tarn Taran. Both Sewa Singh and Kehar Singh were residing in Malaysia since the year 1947-48 and had never come to India and they have never been heard or seen by anyone since then, therefore, presumed to be dead. Both Sewa Singh and Kehar Singh

were unmarried and issueless during their lifetime. The plaintiff and defendants No.1, 2 and 4 are the sole legal heirs of Sewa Singh and Kehar Singh regarding their inheritance/estate left behind by them in the equal shares. Initially the suit was filed by the plaintiff along with co-plaintiff Balwinder Singh, however vide order dated 18.08.2007, Balwinder Singh has transposed himself as defendant No.4 because he withdrew his suit qua him, but as said Balwinder Singh is the real brother of plaintiff and defendants No.1 and 2, he has been transposed as defendant No.4 vide order dated 18.08.2007 by the learned trial Court. As per the plaintiff, Joginder Singh, Mahender Singh and Suwinder Singh sons of Milkha Singh @ Gurbax Singh son of Chet Singh have also died. They were unmarried and issueless. In this manner, the plaintiff and defendants No.1, 2 and 4 are the only legal heirs of deceased Sewa Singh and Kehar Singh and, therefore, they are entitled to inherit their estate in equal shares. Hardeep Singh son of Teja Singh (one of the legal heir of said Teja Singh and brother of plaintiff) had also died unmarried and issueless and after his death, his share in the joint khata is inherited by defendant No.3-Phino, being his mother and sole legal heir. The plaintiff inherited the suit land measuring 16 Kanals 14-½ Marlas being 1/4<sup>th</sup> share out of total joint khata of land measuring 66 Kanals 18 Marlas and has become co-sharer in possession thereof being legal heir of Sewa Singh and Kehar Singh. But defendants No.1 and 2 are alleging and asserting that they are owners in possession of the entire share i.e. land measuring 33

Kanals 9 Marlas left by deceased Sewa Singh and Kehar Singh on the basis of mutations No.3502 and 3503. Mutation does not create or confer any right, title or interest and the plaintiff and defendants No.1, 2 and 4 are equally entitled to the estate/inheritance of said Sewa Singh and Kehar Singh. The defendants No.1 and 2 have alleged that Sewa Singh and Kehar Singh had executed a Will in their favour and on the basis of the same, mutations No.3502 and 3503 were sanctioned in their favour. Now, defendants No.1 and 2 are threatening the plaintiff to alienate the suit land forcibly and in illegal manner, hence, the plaintiff has filed the suit.

Defendants No.1 to 3 have filed their joint written statement taking preliminary objections that the suit of the plaintiff is not maintainable and time-barred. Plaintiff knew that Sewa Singh and Kehar Singh during their lifetime have executed a legal and valid Will dated 24.03.1987 in favour of defendants No.1, 2 and deceased Hardeep Singh. Thus, on the basis of the said Will, mutation was sanctioned in their favour. However, on merits, it has been pleaded that Sewa Singh and Kehar Singh had love and affection with the defendants and for this reason they (Sewa Singh & Kehar Singh) have executed a Will in their favour. The entry of inheritance has been recorded in the jamabandi. The plaintiff has no right, title or interest to the act of Sewa Singh and Kehar Singh. It has been denied that Sewa Singh and Kehar Singh never came to India since the time of partition of the country or they have never been heard or seen since then. Both

Sewa Singh and Kehar Singh used to come to India and used to stay with the defendants. Since Sewa Singh and Kehar Singh have executed a Will dated 24.03.1987 in their favour, therefore, the defendants are owner of the suit land and the plaintiff is not entitled for the suit land under law of succession because during their lifetime, Sewa Singh and Kehar Singh have executed a legal and valid Will in favour of defendants No.1, 2 and Hardeep Singh.

Vide order dated 17.09.2003, on the basis of pleadings of the parties, the trial Court formulated the following issues :-

- “1. Whether Shri Sewa Singh and Kehar Singh have not been heard of by any one for the period of more than 7 years as alleged, if so its effect ? OPP
2. Whether the plaintiffs are entitled to declaration decree for joint possession and permanent injunction as alleged ? OPP
3. Whether Sewa Singh and Kehar Singh have executed a will dated 24.3.1987 in favour of defendants No.1 and 2 and deceased Hardeep Singh ? OPD
4. Whether the suit is not maintainable in the present form ? OPD
5. Relief”

The suit was dismissed by the trial Court vide judgment and decree dated 27.08.2012. The plea raised by the plaintiff that Sewa Singh and Kehar Singh have not been heard for the last about 45 years and, therefore, both these persons declared to be dead as these persons were not heard for the last more than 7 years in Malasiya, was not accepted by the trial Court. Though the statement made by PW1-Balbir Singh has been corroborated with the statement of PW2-Kala Singh, that itself is not sufficient to prove that Sewa Singh and Kehar Singh

have died intestate and the plaintiff is entitled to inherit the property along with defendants No.1, 2 and 4 in equal shares. So, the trial Court held that the Will dated 24.03.1987 executed by Sewa Singh and Kehar Singh in favour of defendants No.1, 2 and the deceased-Hardeep Singh has been proved on record and, therefore, the plaintiff cannot be held entitled for the relief of declaration and permanent injunction as prayed in the suit.

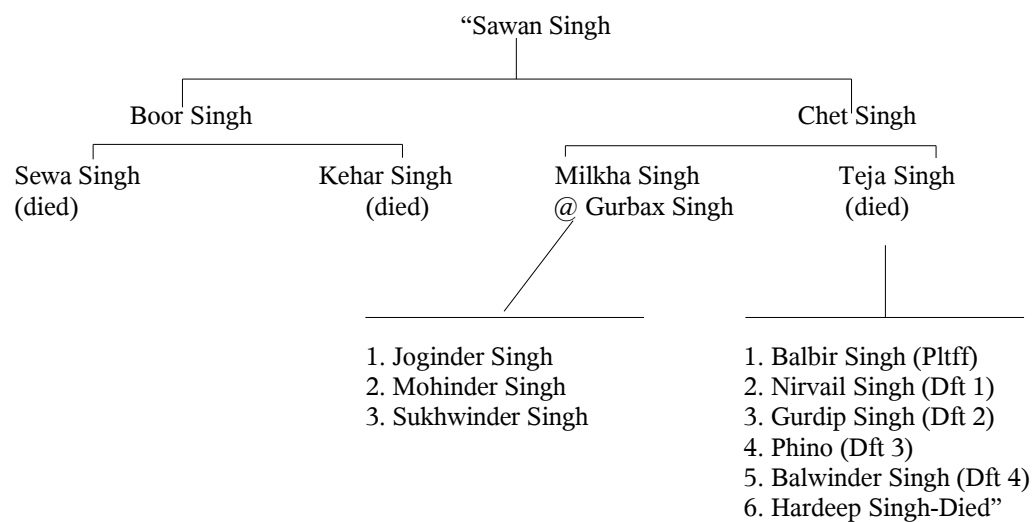
Aggrieved against the judgment and decree dated 27.08.2012 passed by the Civil Judge (Senior Division), Tarn Taran, the appellant-plaintiff has filed an appeal and the learned Lower Appellate Court has partly allowed the appeal filed by the appellant-plaintiff. The Lower Appellate Court held that the Will dated 24.03.1987 as propounded by the respondents-defendants has not been proved in accordance with law. As per Section 68 of the Indian Evidence Act, which postulates that if a document is required by law to be attested, it shall not be used as evidence unless one attesting witness has been examined to support execution of the document, if an attesting witness is alive, and subject to the process of the Court and capable of giving evidence. The proviso to said Section further provides that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied. While allowing

the appeal filed by the respondent-plaintiff, the Lower Appellate Court held that the plaintiff deserves to be declared as an owner to the extent of 1/4<sup>th</sup> share in the estate left by Sewa Singh and Kehar Singh he being a son of Teja Singh. The learned Lower Appellate Court did not upset the presumption recorded by the trial Court that both the persons, namely, Sewa Singh and Kehar Singh can well be expected to have died away.

It is in the aforesaid circumstances, the appellant has filed the present appeal.

Learned counsel for the appellant has argued that the impugned judgment and decree passed by the learned Lower Appellate Court dated 03.02.2016 reversing the trial Court judgment and decree dated 27.08.2012 is illegal, perverse and suffer from illegal infirmity and, therefore, not sustainable in the eyes of law. Learned Lower Appellate Court has recorded the findings beyond pleadings of the parties and has only relied upon the testimony of respondent/plaintiff that he is entitled to the estate left by deceased Sewa Singh and Kehar Singh ignoring the duly executed registered, legal and valid Will. Vide two Wills dated 24.03.1987 executed by Sewa Singh and Kehar Singh, who were the parental uncle of the parties, the executor were happy with the services of Nirvail Singh appellant/defendant No.1, Gurdeep Singh-defendant No.2 and Hardeep Singh (since deceased). They bequeathed their entire estate i.e. 33 Kanals 9 Marlas of land by virtue of the said Wills. Therefore, the appellant/defendant No.1, 2 and

deceased Hardeep Singh became absolute owner in joint possession and the respondent/ plaintiff was having no right, title or concern with the property of Sewa Singh and Kehar Singh in any manner. He has referred the following pedigree table to substantiate his case :-



On the basis of the aforesaid table, learned counsel for the appellant has argued that Sewa Singh and Kehar Singh sons of Boor Singh were co-owners to the extent of half share in the total land measuring 66 Kanals 18 Marlas as per jamabandis Exhibits P-1 and P-2 for the years 1992-93 and 1997-98. Since Sewa Singh and Kehar Singh had executed a Will, therefore, on the basis of the Will, mutations No.3502 and 3503 (Ex.P-3 and Ex.P-4) were sanctioned and the property had devolved upon the beneficiaries namely appellant/defendant No.1 Nirvail Singh, Gurdeep Singh (defendant No.2) and Smt. Phinow (defendant No.3) through Hardeep Singh (since deceased). The learned Lower Appellate Court has also overlooked the fact that the attesting witnesses to both the Wills have already expired and it is, therefore, not possible for the appellant to produce the deceased witnesses in the Court. Therefore, the 'Wills'

dated 24.03.1987 cannot be discarded.

I have heard learned counsel for the appellant.

The crucial issue, which requires to be considered in the case is the execution of the Wills by Sewa Singh and Kehar Singh. On the basis of pedigree table as reproduced above, it is clear that the property in dispute was owned by Sewa Singh and Kehar Singh sons of Boor Singh. Sewa Singh and Kehar Singh, both were unmarried and issueless. They had migrated to Malasiya in the year 1947-48. The appellant/defendants had stake their claim on the basis of the Wills dated 24.03.1987 executed by Sewa Singh and Kehar Singh. The Wills in question were never proved as provided under Section 68 of the Indian Evidence Act. In fact, unregistered Wills were executed by Sewa Singh and Kehar Singh in favour of the appellant/defendant No.1 and other defendants No.2 and Hardeep Singh (since deceased). None of the marginal witnesses of the said Wills were examined by the appellant/defendant No.1, who are the propounder. The Will executed by a person, is a document, which necessarily required to be attested by two or more persons and witnesses are required to be examined by the beneficiary, if he wants to rely upon the said execution of the Will. The plaintiff has denied both the Wills. Therefore, it has become important for the defendants to prove the Wills as per requirement of Section 68 of the Indian Evidence Act. Looking to the stand adopted by the contesting defendants, both the registered Wills, of which photocopies have been brought on record, were allegedly executed by the testator in

the presence of two attesting witnesses, namely, Lambardar Birinder Singh and Panch Banta Singh, but surprisingly none of these witnesses have been examined by the appellant/defendant. In the absence of such proof, it was not open for the Civil Court to observe that defendants No.1 and 2, who happen to be propounder of the registered Wills have succeeded in proving the same. In this manner, the Lower Appellate Court did not endorse the findings recorded on issues No.2, 3 and 4 by the trial Court. When the contesting defendants, who have propounded the Will dated 24.03.1987 allegedly executed by Sewa Singh and Kehar Singh, failed to prove these depositions, therefore, the contesting defendants along with defendant No.4-Balwinder Singh cannot be expected to have succeeded that inheritance of their uncles single handedly to the exclusion of plaintiff i.e. Balbir Singh.

No substantial question of law arises in the present regular second appeal.

In view of above, this Court does not find any any illegality in the well reasoned impugned judgment and decree dated 03.02.2016 passed by the learned Lower Appellate Court and accordingly, the appeal filed by the appellant-defendant stands dismissed.

March 16, 2017  
Vijay Asija/sanjeev

( HARI PAL VERMA )  
JUDGE

Whether speaking/reasoned

Yes / No

Whether Reportable

Yes / No