

116

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

**RSA No. 3817 of 2017 (O&M)
Decided on: 07.12.2017**

Pawan Kumar and others

.....Appellants

versus

Hari Krishan (deceased) through LRs and another

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Dr. Anmol Rattan Sidhu, Senior Advocate with
Mr. Rajesh Narang, Advocate
for the appellants.

Mr. O.P.Goyal, Senior Advocate with
Mr. Gurcharan Dass and Ms. Ritika Gupta, Advocates
for the respondents.

Rajbir Sehrawat, J.(Oral)

CM No. 9451-C of 2017

This is an application for bringing on record the legal representatives of the appellant/defendant No. 4.

For the reasons mentioned in the application, the same is allowed; subject to just exceptions and for the limited purpose of this appeal only. Legal representatives of the appellant/defendant No. 4 mentioned in para 2 of the application are ordered to be brought on record.

Amended Memo of Parties filed along with this application is also taken on record.

RSA No. 3817 of 2017 (O&M)

1. The present appeal has been filed by the defendants challenging the concurrent judgments and decrees passed by the Courts below.

2. For convenience, the parties would be referred herein as the plaintiffs and the defendants; as they were described in the original suit.
3. The brief facts of this case are that the plaintiffs filed a suit for separate possession of $\frac{1}{4}$ th share each; by way of partition of the property No. B-XII-482, Jail Road, Opp. Kucha No. 9; field Ganj, Ludhiana and also for recovery of Rs. 1,80,000/- as damages on account of exclusive use of the said property by the defendants. It was claimed in the suit that the property in dispute was purchased by plaintiffs; along with Vaishnu Dass Kochhar, the father of the plaintiffs and Hans Raj, brother of the plaintiffs. It was claimed that Vaishnu Dass Kochhar died but he had executed a legal and valid Will dated 28.04.1994 in favour of the plaintiff No. 2, Dharamvir Kochhar. The plaintiff No. 1 has $\frac{1}{4}$ th share in property in dispute. The defendants are also having their share to the extent of $\frac{1}{4}$ th share in the property in dispute. The plaintiff no. 2 has $\frac{1}{2}$ share, since he has the Will in his favour. It was pleaded that the disputed property has three storied building. The defendants are in possession of the entire ground floor and entire first floor, along with some portion of the second floor. Whereas, the plaintiffs are in possession of very meager portion of the suit property. Since the defendants who are using the property much more than their share, therefore, for usage of the same, the plaintiffs claimed damages. Regarding the property, the partition was prayed for.
4. Upon notice, the defendants appeared and filed the written statement. Besides taking routine preliminary objections, it was averred that the suit of the plaintiff was barred by Order 2 Rule 2 of the Code of Civil Procedure; as the plaintiffs had already filed a suit for permanent injunction qua the suit property. It was contended that Vaishnu Dass Kochhar, father of the plaintiffs and predecessor-in-interest of defendants; had divided all the four properties owned by him,

partition) dated 25.07.1994. The existence of the Will in favour of the plaintiff No. 2 was denied.

5. Parties led their respective evidence.

6. After hearing the parties and appreciating the evidence, the learned trial Court decreed the suit and passed a decree for separate possession by way of formal partition and giving half share to the plaintiff No. 2 and 1/4th share to plaintiff No. 1 and 1/4th share to the defendants; as detailed in the headnote of the plaint. Still further, the suit qua recovery of damages was partly decreed. The decree for proportionate recovery of Rs. 3,000/- per month, for the period of three years preceding from the date of filing of the suit and for future mesne profit at the rate of Rs. 3,000/- per month from the date of filing of the suit; till the date of partition were also passed in favour of the plaintiffs. While decreeing the suit, the trial Court recorded a finding that the Will, Ex. P3 stands proved in favour of the plaintiff No. 2. So far as alleged family partition deed is concerned, that was held to be not proved. It was recorded that Rakesh Kumar, DW-4, was stated to be a witness to this family partition deed but he has admitted during the cross-examination that it was not entered in any register. Still further, it was held that the said document is not a registered document and, therefore, the same cannot be read as evidence. Still further it was held that the said document was not even the part of the pleadings. The trial Court also held that the Handwriting Expert, PW-6, Varun Gagneja, examined by the plaintiffs have proved that the signatures on the alleged partition deed; do not tally with the admitted signatures of the signatories to this partition deed. It was further held that the witnesses i.e. DW-1-Darshan Kumar and DW-4 Rakesh Kumar; examined by the defendants; to prove this document; do not inspire confidence. Therefore, the Court discarded this document. Aggrieved against

the judgment and decree, the defendants filed the appeal before the lower

Appellate Court.

7. After hearing the parties and perusing the record the lower Appellate Court also dismissed the appeal filed by the defendants/present appellants. While dismissing the appeal, the lower Appellate Court held that Will in favour of plaintiff No. 2 has been duly proved by examining the witnesses. It was further held that the defendants failed to elicit anything in the cross-examination of these witnesses to doubt the veracity of the Will. Therefore, the findings regarding the Will recorded by the trial Court was upheld. Dealing with the alleged family partition deed, the lower Appellate Court held that the same has also not been proved by the defendants. The lower Appellate Court held that even the witness of the defendants, namely, DW-1, Darshan Kumar has, admitted, that the suit property; except one room, bathroom and kitchen are in possession of plaintiff No. 1. It was further clarified that this witness has admitted that the said partition deed does not bear his signatures and signatures of his brother, namely, Sharat Kumar. Still further it was held that the defendants claimed that they came across this document just about 1 ½ years back and the same was found in the record kept in an almirah; after the death of their grandfather. But it is not a natural conduct that the grandfather of the defendants died in 1995 and the almirah was not checked till 2011. Therefore, the version of the defendants was not true. Still further; the lower Appellate Court held that; a bare perusal of the document shows it to be a relatively afresh document; which cannot be considered to be a document of the year 1994. In the end, the lower Appellate Court also recorded that since the document has not been registered, therefore, the same cannot be taken into evidence; because it creates and extinguishes the rights of certain persons qua the property. The plea taken by the appellants regarding the adverse possession; had also not found favour in the lower Appellate Court.

8. While arguing the case, learned counsel for the appellants submitted that the Will has not been proved by the plaintiffs as per the requirement of the law. His submission is that although, the son of the attesting witness has been examined, however, that does not prove the contents of the Will. Second contention of the learned counsel for the appellants is that the family partition deed does not require any registration because the same is only an arrangement between the family members. To buttress his claim, learned counsel relied upon the judgment of the Hon'ble Supreme Court rendered in case of *AIR 1976 SC 807* titled as *Kale and other versus Deputy Director of Consolidation and others* and another judgment of the Hon'ble Supreme Court in the case of *Tek Bahadur Bhujil Versus Debi Singh Bhujli and others, AIR 1966 SC 292*. Therefore, it is submitted by the learned counsel for the appellants that the findings recorded by the Courts below are perverse.
9. On the other hand, learned counsel for the respondents/caveator has submitted that the Will stands duly proved. It is submitted by him that one of the attesting witnesses of the Will stood expired. Therefore, to prove the Will, the scribe was examined; who proved the contents of the Will. Still further, it is submitted by him that in compliance of Section 69 of the Indian Evidence Act, the son of the deceased attesting witness to the Will has been duly examined by them; to prove the attestation of the same. So far as the alleged family partition claimed by the defendants is concerned, learned counsel for the respondents has submitted that this is a fraudulent document. It is his submission that it has been proved on record that the signatures of the plaintiffs and their father, Vaishnu Dass Kochhar on this deed; do not tally with the admitted signatures, as per the report of the Handwriting Expert, PW-6. Still further, learned counsel submitted that the perusal of the alleged partition deed reflects that it involves

extinguishing of rights of some persons and creating new rights in favour of the some other persons. Therefore, it is submitted by the learned counsel that the document is necessarily required to be registered under Section 17(1) of the Registration Act. Since it has not been registered, therefore, the same cannot be read in evidence. Hence, this has rightly been rejected by the Courts below. To buttress his argument, learned counsel relies upon the judgment of the Hon'ble Supreme Court in ***Kale and others' case (supra)***. Learned counsel for the respondents further relied upon two judgments of this Court rendered in **2003 (2) RCR Civil 756** titled as ***Harpal Singh and others Versus Mohinder Singh and others*** and another judgment of this Court reported in **1986 (1) PLR 26** titled as ***Shrimati Shanti Devi and another Versus Jagdish Parshad and another***. Seeking support from these judgments, learned counsel contended that, in any case, the family partition is reduced into writing; creating a document to extinguish title of some persons and creating title of other persons qua the property, hence, it is required to be registered mandatorily.

10. Having heard learned counsel for the parties and perused the record with their able assistance, this Court is of the considered opinion that the arguments of the learned counsel for the appellants are not sustainable. So far as, the Will is concerned, the same has rightly been held to be proved by the Courts below. Scribe of the Will has been duly examined by the plaintiffs; who has deposed that the executant had signed the Will in his presence and in the presence of the witnesses and the witnesses signed in the presence of the executant. Still further, admittedly, the attesting witness has expired. To prove his signatures and the attestation of the Will by the attesting witnesses, in compliance of the provision of Section 69 of the Indian Evidence Act, the plaintiffs have examined PW-5, Avtar Singh, the son of the expired witness. He has proved the

signatures of his father in the attestation. Therefore, the attestation of the Will also stands proved as per the mandate of Section 69 of the Act.

11. So far as, the documents of the said family partition, Ex. D/1 to D/21 are concerned, the same have already not been relied upon by the Courts below. The Courts have rightly held that it is not the natural conduct on the part of the defendants to claim that they did not check the almirah of their deceased grandfather from 1995 till 2011. Still further, the Court has rightly held that these documents have not been proved on record, as per the requirement of law also. It has been admitted by the defendants that the possession is still with the plaintiff No. 2 also, whereas these documents claimed that the possession has been given to the predecessor-in-interest of the defendants, namely, Hans Raj.

12. Otherwise also, a perusal of the document shows that father of the parties have tried to distribute the properties between his sons. Admittedly, the father was not the joint owner of all the properties mentioned in this alleged partition deed. Neither all the persons involved in this family partition/settlement were joint owners of all the properties. Hence, this family settlement deed, which is recorded in the form of document, created titled in favour of the parties afresh qua those properties in which they had no title earlier. Hence, this document is in the nature of relinquishment of the title by one person in favour of the another and acquisition of the title by the another qua the said properties; with which he had no concern. Hence, this document does not reflect the pre-existing rights of all the parties qua the properties involved in the deed. Hence, since the family settlement has been reduced in writing, therefore, it is required to be registered necessarily. The reliance of the learned counsel for the appellants upon the judgment of the Hon'ble Supreme Court rendered in ***Kale and others' case (supra)***, is only qua the explanatory aspects of the judgment. However,

the legalities of the same judgment go in favour of the submissions of the

- learned counsel for the respondents/plaintiffs. Hence, the judgment of the Hon'ble Supreme Court supports the case of the respondents instead of the case of the appellants. Still further, the judgments relied upon by the learned counsel for the respondents in the case of *Harpal Singh and others'(supra)* and another judgment of this Court rendered in the case of *Shrimati Shanti Devi and another' (supra)*; fully cover the case of the respondents.
- 13.In view of the above, this Court does not find any illegality or perversity in the findings recorded by the lower Appellate Court.
- 14.No other argument was raised by the learned counsel for the parties.
- 15.In view of the above, the present appeal fails and the same is dismissed, being devoid of any merits.

7th December, 2017
shabha

[RAJBIR SEHRAWAT]
JUDGE

Whether speaking/reasoned	-	Yes
Whether reportable	-	Yes