

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Date of Decision: September 05th, 2018

1. RSA No.1138 of 1992 (O&M)

Jit Singh alias Surjit Singh

...Appellant

Versus

Parshan Singh & others

...Respondents

2. RSA No.590 of 1993 (O&M)

Pritam Singh (since deceased) through L.Rs

...Appellants

Versus

Parshan Singh & others

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

Present: Mr. Vikas Singh, Advocate,
for the appellants in both the appeals.

Mr. Surinder Garg, Advocate,
for respondent Nos.1 & 2 in both the appeals.

AMIT RAWAL, J.

This order of mine shall dispose of two Regular Second Appeals bearing No.1138 of 1992 and 590 of 1993 as the common question of law and fact are involved.

Appellant- Jit Singh alias Surjit Singh (plaintiff in Civil Suit No.247 dated 15.6.1983 titled as Jit Singh Versus Parshan Singh & others) is aggrieved of the judgment and decree dated 3.4.1992 rendered by the Additional District Judge, Faridkot in appeal preferred by the defendants,

who were aggrieved of the judgment and decree dated 1.6.1988, whereby the suits aforementioned were decreed, which has been now set-aside.

The controversy in the present appeals is with regard to the estate of Nihal Kaur widow of Gian Singh, who, as per the evidence on record, died on 26.12.1977, leaving behind four sons and a daughter. Jit Singh alias Surjit Singh filed Suit No.247 of 1983, whereas other son Pritam Singh and daughter Jagdish Kaur filed Civil Suit No.83 dated 4.2.1986. Defendants Parshan Singh and Darshan Singh were the contesting one, who had propounded the unregistered Will dated 4.6.1974 of Nihal Kaur in respect of the land measuring 39 kanals 7 marlas. The plaintiffs in both the suits sought respective share in the aforementioned land on the premise that Nihal Kaur had died intestate and, therefore, mutation No.3191 entered in the jamabandi for the year 1979-80 regarding the inheritance of Nihal Kaur in favour of defendants No.1 and 2 was illegal and void. The defendants relied upon the Will on the premise that plaintiffs had participated in the mutation proceedings and did not object to the Will, much less mutation, therefore, they are estopped as per the provisions of Section 115 of the Indian Evidence Act from racking up the issue. In such circumstances, the trial court in both the suits framed the following issues:-

“Issues of Suit No.247 of 15.6.1983

- 1) *Whether the plaintiff is the owner of 1/4th share out of the suit land? OPP*
- 2) *Whether the plaintiff is entitled to possession of 3 kanals 7½ marlas of land out of the suit land? OPP*
- 3) *Whether the plaintiff is entitled to declaration prayed for? OPP*
- 4) *Whether the suit of the plaintiff is not maintainable in the present form? OPD*
- 5) *Whether the plaintiff is estopped to file the suit by his act*

and conduct? OPD

6) *Whether the suit of the plaintiff is barred by time? OPD*

7) *Whether the suit is bad for non-joinder of necessary parties? OPD*

8) *Whether Nihal Kaur had executed a will in favour of defendants No.1 and 2? OPD*

9) *Whether defendant No.18 is a bonafide purchaser? OPD*

Additional issues

9-A) *Whether the suit is not properly valued for the purposes of court fee and jurisdiction? OPD*

9-B) *Whether Harjinder Singh defendant No.19 purchased plot measuring 625 sq.yards out of Kh.No.7154 on 2.5.84 from Parshan Singh defendant No.1 and he is bonafide purchaser for consideration? OPD (19).*

10) *Relief.*

Issues framed in Suit No.83 of 4.2.1986

1) *Whether the plaintiffs are estopped by their act and conduct from filing the suit? OPD*

2) *Whether the suit is not properly valued for the purposes of court fee and jurisdiction? OPP*

3) *Whether the suit is within time? OPP*

4) *Whether the suit is bad for non-joinder of necessary parties 1.2 Nachhatar Singh and Mohinder Kaur? OPD.*

5) *Whether defendants No.1 and 2 got redeemed 24 kanals 7 marlas land out of the suit land vide order of the Collector dated 10.12.82? If so its effect? OPD*

6) *Whether the plaintiffs are defendants No.1 to 3 are entitled to inherit the state of Nihal Kaur and the plaintiffs are thus owner of 2/5th share in the suit land in equal shares? OPD*

7) *Whether Nihal Kaur executed will dated 4.6.74 in favour of defendants No.1 and 2 and they are her sole legal heirs? OPD*

8) *Whether the plaintiffs are entitled to possession of the suit land to the extent of 2/5th share? OPP*

Additional issues

8A) *Whether defendant No.18 is a bonafide purchaser for value without notice if any body else's title in the suit land? If so its effect OPD 18).*

9) *Relief.”*

The trial Court noticing the fact that the original Will had not seen the light of the day and only photo copy mark D1 proved on record, discarded the Will and decreed the suits. The Lower Appellate Court by discarding the statement of PW-2 Dewan K.S.Puri, Document Expert and relying upon the statement of DW-8 Jagdip Singh Jatana Advocate, who compared signatures on the photo copy of the Will with the other signatures, reversed the findings. It is in these circumstances, present appeals have been filed.

Mr. Vikas Singh, learned counsel appearing on behalf of the appellants in both the appeals submitted that the respondent-defendants have not been able to prove the Will aforementioned as the original Will has not seen the light of the day. No application under Section 65 of the Indian Evidence Act for leading secondary evidence was moved, thus, the plaintiffs have been deprived to get the thumb impressions of Nihal Kaur compared with the admitted ones. The best evidence has been withheld and in these circumstances, the trial Court had no other choice but to decree the suits by granting the share holding that Nihal Kaur had died intestate. Lower Appellate Court has given a credence to the statement of Advocate than Dewan K.S.Puri, Document Expert, who opined that thumb impressions of Nihal Kaur were smudged. Even the loss or existence of the Will had not been proved as the story coined was that the original Will was given to the revenue authorities for the purpose of sanctioning of the mutation, but no

application had come forward with regard to its existence or loss. Even if the steps under Section 65 of the Indian Evidence Act have been taken, the same would not have been allowed.

It was next contended that DW-6 Scribe Mela Ram Gupta and DW-7 Anokh Singh have not proved the execution of the Will. There is categorical admission of defendants that they used to quarrel with Nihal Kaur. In such circumstances, there was no occasion for Nihal Kaur to show extra love and affection by bequeathing her estate in favour of the defendants. There is no compliance of provisions of Section 63-C of the Indian Succession Act, therefore, the Will was surrounded by suspicious circumstances. DW-6, the Scribe of the Will had not correctly mentioned the name of testator as Nihal Kaur but instead wrote as Gian Singh.

It was next contended that DW-8 Jagdip Singh Jatana Advocate, in cross-examination, admitted that he had not undertaken any examination of examining the finger prints and thumb impressions. In essence, he had not taken any training from any institute nor had any diploma or decree in particular science. The statement of Pritam Singh recorded before the Court of Sub Divisional Magistrate in mutation proceedings had not been proved as they were objected to and, thus, urged this Court for setting-aside the findings.

Mr. Surinder Garg, learned counsel representing respondent Nos.1 and 2 in both the cases submitted that the plaintiffs were estopped to claim the share in the property by way of declaration, for, they had participated in mutation proceedings vis-a-vis mutation of inheritance on the basis of the Will in favour of defendants No.1 and 2. In support of the aforementioned contention, reference has been made to the judgment of the

Division Bench of this Court in **Smt. Sewti Devi Versus Kanti Parshad and others,** AIR 1973 Punjab & Haryana 126. In other words, he submitted that there was no cause of action in favour of the plaintiffs to claim the right once the mutation proceedings were lost before the quasi judicial authorities.

It was further submitted that DW-1 Jagdish Kaur had suffered statement Ex.D2 dated 23.1.1979 regarding existence of the Will of Nihal Kaur, therefore, was estopped to assail the mutation proceedings to claim the share in the property on the basis of the natural succession. Similar is the statement of Karnail Singh. The findings arrived at by the Lower Appellate Court on fact and law on the basis of preponderance of the evidence by taking into consideration statement of DW-8 Jagdish Singh Jatana Advocate. Requirement of Section 68 of the Indian Evidence, much less 63-C of the Succession Act had been complied. Noticing the aforementioned provisions of law, Lower Appellate Court rightly set-aside the judgment and decree of the trial Court. One line here and there in the cross-examination with regard to the quarrel with Nihal Kaur cannot be a ground for rejecting the Will. The Will was not surrounded by suspicious circumstances and had been proved to the hilt.

I have heard the learned counsel for the parties, appraised the paper book, records of the Courts below, judgment cited at bar and of the view that there is force and merit in the submissions of Mr.Vikas Singh. The reason is not one but many:-

- 1) The original Will had not seen the light of the day. Photo copy of the same has been proved as mark D1;
- 2) No application for secondary evidence was ever

submitted to prove its prerequisite, i.e., existence and loss;

3) Statement of Jagdish Kaur, plaintiff No.2, in second suit, would pale into insignificant as the party has an independent right for claiming declaration under Section 9 of Civil Procedure Code;

4) No official from the revenue department had been examined to prove the existence of the Will and its loss;

5) Defendant, in cross-examination, had admitted that Nihal Kaur used to quarrel with him. In such circumstances, no extra love and affection had been proved on record in depriving the plaintiffs from the line of succession;

6) There is also admission that written statement was bereft of the pleadings with regard to the Will;

7) Photo copy of the document cannot be treated as secondary evidence in the absence of existence of the Will;

8) There is statement of an Advocate vis-a-vis the submission of the report of the Documents Expert Dewan K.S.Puri relied upon by the Lower Appellate Court, in my view is a great act of perversity and illegality;

9) No evidence had been placed on record to show that Nihal Kaur, at the time of death, was residing with the defendants;

10) Against four sons and one daughter, two sons and one daughter are on one side and two sons are on other side;

11) The Lower Appellate Court should have discarded the Will and kept the line of succession by natural inheritance as

held by the trial Court intact;

There is another aspect of the matter. There is no compliance of the provisions of Section 63(c) of the Act as attesting witness had not deposed that he had signed under the direction of the testator which is essential requirement of law. 63(c) of Indian Succession Act, 1925. Section 63 reads as under:-

“63 Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:—

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

The aforementioned provisions of the Act envisaged three situations: one Will has to be attested by two or more witnesses and each of them had seen the testator to either append his signatures or thumb impressions or mark or has seen the other person sign the Will in the

presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person; and third situation, each of the witnesses signed in the presence of the testator. However, on perusal of the statements of DW6 and DW7, none of the witnesses have deposed that they have appended the signatures or thumb impressions on the “Direction of The Executant”, i.e. Nihal Kaur which is one of the essential requirement to be complied with. The aforementioned view of mine is derived from the ratio decidendi culled out by the Hon'ble Supreme Court in **Janki Narayan Bhoir Vs. Narayan Namdeo Kadam, 2003(1) RCR (Civil) 409** and by this Court in **RSA No.1875 of 2013 titled as Surender Kumar Vs. Subhash Chander and others decided on 4.12.2015.**

Cumulative reading of the aforementioned evidence leads to an irresistible conclusion that the Lower Appellate Court has not adverted to the aforementioned reasoning and set-aside the judgment and decree, which is wholly fallacious.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in **Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing the substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **Kulwant Kaur and others Vs. Gurdial Singh**

Mann (dead) by LRs and others 2001(4) SCC 262 on applicability of Section

97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back. For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

*“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of **Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]** cannot be sustained and is thus overruled.” [at paras 27 - 29]”*

“27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

For the reasons stated above, the judgment and decree of the Lower Appellate Court is set-aside and that of the trial Court is restored. Resultantly, the appeals are allowed.

September 05th, 2018
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned	Yes/No
Whether Reportable:	Yes/No