

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

**X Obj No.16-C of 1994 and
RSA No.1767 of 1994
Date of Decision.28.03.2018**

Dayan (since deceased) through LR

.....Appellant

Vs

Ram Kishan and others

.....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. A.K. Jain, Advocate
for the appellant.

Mr. Malkeet Singh, Advocate
for respondent No.3 and 4.

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AMIT RAWAL J.(ORAL)

C.M. No.3637-C of 1994

For the reasons stated in the application, respondent No.5 is ordered to be transposed as legal heir of deceased-appellant, Dayan, subject to all just exceptions.

The application is allowed and the registry is directed to carry out amendment in the memo of parties.

C.M. No.10600-C of 2017

The prayer in the application submitted under Order 1 Rule 10 CPC is for impleading Achhar Pal Singh, Gurdev Singh sons of Beli Ram and Bimla Devi wife of Charanjit Kataria as co-appellants on the premise that the plaintiff at the time of filing the suit concealed the material facts and not arrayed the mother of applicants late Daya wife of Arjan Dass. The mother of the applicants died on 15th July, 1997 and on enquiring the knowledge of the pendency of the appeal, they sought indulgence of this

I have gone through the application and of the view that the application has not been filed by giving correct particulars. Even otherwise, it should have been filed under Order 22 Rule 3 CPC for impleading them as legal representatives of Daya, who is stated to have died on 15.07.1997 as per the averments made in the application accompanied by an affidavit dated 25.08.2017 of Achhpar Pal Singh, aged 66 years. In my view, provisions of Order 1 Rule 10 CPC would not apply to the regular second appeal. At the best, provisions of Order 22 Rule 10 CPC could have been invoked that too in situation where right had been assigned to a subsequent purchaser but it is not the position in the present application. In fact, it was Class I heir of Daya or in the absence of Class I heirs, Class II heirs were required to be impleaded as legal representatives but not in the manner and mode adopted by the applicants i.e. under Order 1 Rule 10 CPC.

In view of the aforementioned, the application stands dismissed.

C.M. No.7341-C of 2017

In view of the decision taken by this Court in the main case, the application is dismissed.

RSA No.1767 of 1994 (O&M)

The appellant-defendant No.5 is in regular second appeal against the judgment and decree of the lower Appellant Court dated 22.04.1994 whereby the finding on issue No.7-A rendered in favour of the appellant-defendant vide judgment and decree dated 3.5.1990 passed by Sub Judge 1st Class, Garhshankar dismissing the suit of the respondent-plaintiff for declaration, permanent injunction and joint possession had been reversed.

It would be in the fitness of things to refer to the facts emanated from the pleadings of the parties. Ram Kishan son of Arjan Dass son of Kirpa Ram instituted a suit claiming declaration that he and defendant No.4 Som Nath were owners in possession of the land measuring 15 kanals 5 marlas as described in the plaint i.e. 13 marlas $1/3^{\text{rd}}$ share out of 2 kanals and 14 kanals 12 marlas $1/6^{\text{th}}$ share of 87 kanals 11 marlas, which were owned and held by Hari Chand situated in village Karmpur Chahwala vide jamabandi for the year 1983-84 on the premise that Hari Chand husband of Satya son of Arjan Dass, brother of plaintiff and defendant No.4 had executed a Will dated 22.11.1983 in their favour. He was in a sound and disposing mind but since the defendant No.1 to 3 and 5 interfered into the possession, gave cause of action for filing the suit. In the alternative, prayer for joint possession of the property was also asked for. It was averred that defendant No.1 Satya widow of Hari Chand was of unsound mind and for the last 8 years was not in position to protect her rights. She was under the constant care and protection of her brother Madan Lal, who had no adverse interest against defendant No.1. Hari Chand was looked after by the plaintiff and defendant No.4 as defendant No.1, Satya had left the village Karimpur Chahwala and settled in Beetan, Tehsil Una, Himachal Pradesh i.e. her parental house. It is on account of service, the Will aforementioned was executed as Hari Chand died on 25.2.1984 leaving behind the plaintiff and defendant No.4 as his legal heirs.

The defendants No.1 to 3 and 5 contested the suit. Defendant No.1 in her written statement admitted that Hari Chand was owner in possession of the suit property but denied all other averments in the plaint.

was also emphatically denied. If at all, the Will was proved, it was averred that the same was an outcome of fraud and misrepresentation. The mutation of inheritance bearing No.1118 of Hari Chand was sanctioned in her favour and she had already sold her share to defendant No.2 and 3.

Defendant No.2 and 3 filed separate written statement admitting that Hari Chand was owner of the land and the mutation on demise of Hari Chand was entered in favour of defendant No.1. They purchased the property from defendant No.1 vide sale deed dated 21.3.1986 for a valuable consideration of ₹15,000/- and were handed over possession of the same. The Will was stated to be a false, forged and fabricated document.

Defendant No.5 filed the written statement and admitted the claim of the plaintiff.

Defendant No.4 was proceeded ex parte.

The trial Court on the basis of the pleadings framed the following issues:-

- “1. Whether Hari Chand executed a valid Will dated 22.11.1983 in favour of the plaintiff and defendant No.4? OPP*
- 2. Whether the plaintiff is stopped by his act and conduct from filing the present suit? OPD*
- 3. Whether the suit is not properly valued for the purposes of court fee and jurisdiction? OPD*
- 4. Whether the suit is not maintainable in the present form? OPD.*
- 5. Whether Satya has not been properly sued? OPD-1*
- 6. Whether the plaintiff has no locus standi to file the present*

suit? OPD

7. Whether the defendant No.2 and 3 were bona fide purchasers for value of the suit land? OPD2 and 3.

7-A. Whether the sale deed dated 21.3.1986 is void and has no effect on the rights of defendant No.5? OPD-5

8. Relief.”

The plaintiff in support of his case brought on record following witnesses as well as documents in evidence:-

PW1	-	Plaintiff himself.
PW2	-	Tarlok Chand son of Daya Ram.
PW3	-	Tirath Ram
Ex.P2	-	Jamabandi for the year 1983-1984.
Ex.P3	-	Khasra Girdawari from Sauni 1983 to Harri 1986.

On the other hand, the defendant No.1 brought on record following witnesses and documents:-

DW1	-	Madan Lal
DW2	-	Shamsher Singh
DW3	-	Dr. H.K. Goel

Defendant No.2 and 3 examined Gurmukh Singh as DW8, Sita Ram deed writer, court compound, Balachaur as DW4, Mohan Lal Tehsildar, Garhshankar as DW5, Sultana Ram son of Tulsi Ram as DW6, Gurdev Lal son of Thakur Dass as DW7 and closed the evidence.

Defendant No.5 did not lead any evidence.

The trial Court on the basis of the evidence brought on record disbelieved the Will set up by the plaintiff for the reason that once Hari Chand had read upto 7th class and he knew Urdu script, there was no

occasion for thumb marking the same. While rendering the finding on issue No.7-A, it held that defendant No.1, Satya had sold the entire property to Hari Chand but she could only sell half share in the suit land as the other half share was to devolve upon the mother of Hari Chand namely Dayan. Keeping in view that fact, the sale deed dated 21.03.1986 was held to be void to the extent of half share. In the appeal preferred by the plaintiff, the lower Appellate Court dismissed the suit by reversing the finding on issue No.7-A on the premise that the mother had not challenged the sale deed and therefore, the trial Court could not have rendered the finding on issue No.7-A in favour of defendant. It is in that background, the present regular second appeal at the instance of defendant No.5-Dayan, mother of Hari Chand has been filed.

In the present case, cross objection baring No.16-C of 1994 has also been filed on behalf of Ram Kishan, respondent No.1 with regard to dismissal of the suit.

Mr. A.K. Jain, learned counsel appearing on behalf of the appellant submitted that the lower Appellate Court had wrongly decided issue No.7-A on the basis of presumption that the mother of Hari Chand namely Dayan did not take any steps against the mutation nor she challenged the alienation made by her daughter-in-law i.e. wife of deceased Hari Chand. The fact is that on demise of father, who died intestate particularly when the Will was disbelieved, as per Schedule 1 of Section 8 of the Hindu Succession Act, mother is the class I legal heir and therefore, Satya could not have inherited the entire share. It was not the case of Satya that she had become absolute owner as per Section 14 of the Hindu Succession Act as she was not found to be in possession of the property,

which was one of the ingredients by including the provisions aforementioned. Mutation does not confer title and should not have been weighed in the mind of the lower Appellate Court in reversing the finding on issue No.7A. The lower Appellate Court has abdicated in not noticing the provisions of Hindu Succession Act.

In the cross-objection, it has been stated that the Will has been proved through the testimony of the witnesses i.e. the attesting witnesses namely Tarlok Chand and Tirath Ram as PW2 and PW3 respectively and the mother could not have filed the appeal as she was not the plaintiff. Nobody had challenged the mutation, much less, the sale deed.

Per contra, Mr. Malkeet Singh, learned counsel appearing on behalf of respondent No.3 and 4 submitted that Satya had become owner of the property as nobody had challenged the mutation. The subsequent purchasers were bona fide purchasers as they had purchased the property for valuable consideration and after verifying the revenue record. Revenue Record reflected the absolute ownership of Satya and after enquiring the same, the sale deed dated 21.03.1986 was executed in respect of entire property which could not have been set aside by the trial Court and the finding rendered by the lower Appellate Court is perfectly legal and justified. Dayan had not challenged the sale deed and therefore, the lower Appellate Court reversed the finding of the trial Court, thus, urges this Court upholding the finding rendered by the lower Appellate Court on issue No.7A.

I have heard learned counsel for the parties, appraised the paper book and of the view that there is force and merit in the submissions of Mr. Jain. For understanding the controversy, it would be apt to reproduce

Schedule I of Section 8 of the Hindu Succession Act, which is as under:-

“CLASS I

Son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre-deceased son; son of a predeceased daughter; daughter of a pre-deceased daughter; widow of a pre-deceased son; son of a predeceased son of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre-deceased son of a pre-deceased son”

On perusal of the same, concededly Daya, mother of Hari Chand was alive at the time of his death on 25.02.1984. The Will dated 22.11.1983 had not been executed by Hari Chand as he was aged 45 years at the time of execution of the alleged Will, therefore, the same was suffering from suspicious circumstance as there is no reference of his wife, thus, rightly rejected by the trial Court. The plaintiff and defendant No.4 have not been able to prove that they had been serving Hari Chand during his life time, resulting into bequeathing his entire share in their favour.

No explanation had come forth as to why Hari Chand had thumb marked the Will when he studied upto 7th class and knew Urdu. This fact came on record in the statement of Tarlok Chand, PW2 that Hari Chand had studied upto 7th class. Defendant No.4 did not step into the witness box. No medical record had been brought on record to believe the statement of Ram Kishan that right arm of Hari Chand had become weak. Concededly Satya and Dayan are natural heirs of Hari Chand. Tirath Ram, scribe of the Will categorically stated that he never scribed any Will and this fact was told to the plaintiff but still he insisted him to scribe the same. The Will had seen light of the day only at the time when the suit was filed. If at

all, Hari Chand had executed the Will, the beneficiaries of the Will would have produced the same for recording the mutation, which was regarded in favour of Satya-defendant No.1, thus, the cross objection of Ram Kishan is hereby rejected.

Now coming to the finding on issue No.7A rendered by the lower Appellate Court on the premise that the mother had not challenged the Will, therefore, she could not have inherited the property, in my view, such finding is not only contumacious but fallacious. It is evident that the mother is Class I heir of deceased son, who died intestate and she along with Satya were left behind. The property was mutated in half share in favour of mother and Satya. Satya could not have alienated the entire property vide sale deed *ibid* in favour of defendant No.2 and 3. The finding of the trial Court with regard to setting aside the sale deed to the extent of half share was fully justified and equitable in law. The reasoning assigned by the lower Appellate Court is not sustainable in the eyes of law, for, Daya was arrayed as defendant No.5 and she could always assail the finding of the trial Court by taking the aid of provisions of Order 41 Rule 33 CPC as the appeal has been filed by her only before this Court, now being represented by legal heirs. Her right had been taken away vide impugned finding on issue No.7A rendered by the lower Appellate Court.

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.

As an upshot of my finding, the finding rendered by the lower Appellate Court on issue No.7A is set aside and the finding of the trial Court on issue No.7A is restored. Resultantly the second appeal stands allowed.

(AMIT RAWAL)
JUDGE

March 28, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No