

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

RSA No.762 of 1991 (O&M)

Date of decision:03.05.2018

Didar singh (deceased through LRs)

...Appellant

Vs.

Gram Panchayat of village Meghowal, Hoshiarpur and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. K.G.Chaudhary, Advocate
for appellant No.1(i).

Mr. Shivam Malhotra, Advocate, for
Ms. Balpreet Sidhu, Advocate
for appellant No.1(ii).

Mr. Sarwan Singh, Senior Advocate with
Mr. N.S.Rapri, Advocate
for the respondents.

AMIT RAWAL J.

Legal representatives of appellant-plaintiff/Didar Singh are in Regular Second Appeal against the judgment and decree dated 13.02.1991 render by the Lower Appellate Court, whereby, the appeal has been allowed by setting aside the judgment and decree of the trial Court.

Succinctly, the facts as emanates from the pleading of the parties and records of the Courts below are that Didar Singh (since deceased) represented through LRs instituted a suit bearing No.213 of 1986 against Gram Panchayat Meghowal, Smt. Dhan Kaur widow of Gian Singh

and Smt. Banti wife of Mehar Singh on the premise that he was the sole owner and in possession of suit land as described in the head note of the plaint (hereinafter called as “suit land”) with a consequential relief of permanent injunction restraining the defendants from interfering in his possession. The claim of the plaintiff was that suit land was owned and possessed by Chanan Singh, his real brother. Chanan Singh was bachelor and issueless. He executed a Will dated 2.6.1985 bequeathing all moveable and immovable property in his favour. The sisters of plaintiff, Banti and Dhan Kaur did not have any objection to the execution of the Will, aforementioned. It is however alleged that Hari Singh, Sarpanch of village Meghowal fraudulently propounded a Will dated 29.5.1985 and on the basis of aforementioned Will, i.e. on demise of Chanan Singh, threatened to dispossess the plaintiff.

Defendant No.1-Gram Panchayat appeared and contested the suit by raising numerous objections. On merit, it was stated that Chanan Singh had executed a registered Will dated 29.5.1985 in favour of Gram Panchayat in sound and disposing mind and in this regard, mutation was also sanctioned in favour of Gram Panchayat by the Court of Assistant Collector Ist Grade, Hoshiarpur on 16.5.1986. The Will propounded by the plaintiff was stated to be forged and fabricated. It was further pleaded that as per the contents of the Will, income out of the property of Chanan Singh had to be incurred on the Government School of village Meghowal.

Replication was filed by reiterating the averments made in the plaint and controverted the pleas taken in the written statement.

Since the parties were at variance, the trial Court framed as many as 8 issues including the issue of Relief.

The plaintiff examined as many as five witnesses and brought on record revenue records, Ex.P1 to Ex.P3. PW2 Ram Parkash was the witness to the Will dated 2.6.1985 and Bawa Singh was scribe of the Will. On the other hand, defendants brought on record the documentary evidence.

The trial Court on the basis of evidence decreed the suit by declaring him to be owner in possession of suit land to the extent of 1/3 share on the general rule of inheritance by rejecting both Wills, aforementioned.

Aggrieved against the aforementioned judgment and decree, the Gram Panchayat preferred an appeal before the Lower Appellate Court. The Lower Appellate Court reversed the findings of the trial Court dismissing the suit. It is in that background, the present appeal has been filed.

Vide order dated 12.12.1991, in the presence of both the counsel for the parties, the appeal was admitted and while noticing the contention of the parties, none of the parties to the litigation was in possession of the property, directed the Sub-Divisional Officer (Civil) Hoshiarpur to lease out the disputed property by auction, initially for a period of five years with a condition that lessee would deposit the lease money in advance and would further deposit in a schedule bank in fixed term deposit for a period of five years in the name of trial Court. The amount already deposited in the Bank will be withdrawn by the Sub-

Divisional Officer (Civil), Hoshiarpur and will be re-deposited in the name of trial Court.

Mr. K.G.Chaudhary, learned counsel appearing on behalf of the appellant submitted that judgment and decree of the Lower Appellate Court suffers from illegality and perversity, for, defendants failed to prove the Will dated 29.05.1985, Ex.D1 as it was surrounded by suspicious circumstances which had not been proved, for, testator on the same date had executed a sale deed in favour of one Swaran Singh but the alleged sale deed was without consideration. On the other hand, appellant-plaintiff fully proved the execution of Will, Ex.P1. Deceased was appellant's real brother, therefore, being collateral had a right to inherit the property. The witnesses of the Will Ex.D1, are none else but Hari Singh-Sarpanch and Khushia Singh-DW2, both were beneficiary of the Will, therefore, Will was surrounded by suspicious circumstances and thus, urged this Court for setting aside the findings rendered by the Lower Appellate Court.

Per contra,, Mr. Sarwan Singh, learned Senior counsel assisted by Mr. N.S.Rapri, Advocate for the respondents submitted that judgment and decree of the Lower Appellate Court is perfectly legal and justified and do not call for any interference being the last Court of fact and law, for, Will had been proved through the testimony of Khushia Singh, DW2 being attesting witness and DW1-Ashok Kumar, Deed Writer, who scribed the Will on the instructions of Chanan Singh. Even the entire trend of cross examination proved that plaintiff admitted the execution of the Will. The ingredients of fraud and undue influence being played upon Chanan singh

have not been proved. There was no iota of evidence of suspicious circumstances in discarding the Will. On the same date, testator had executed a sale deed and in case, consideration at the time of registration before the Registrar was not passed, sale deed would not be rendered nonest in the eyes of law and thus, urged this Court for upholding the findings under challenge.

I have heard the learned counsel for the parties, appraised the judgments and decrees as well as record of both the Courts below and of the view that there is force and merit in the submissions of Mr. Chaudhary.

It is settled law that participation of beneficiary is one of the strongest suspicious circumstances, for, leaves to irresistible conclusion that they must have prevailed upon the testator for deriving the benefit. On the other hand, appellant-plaintiff was none else but brother of Chanan Singh.

The trial Court discarded the Will but the Lower Appellate Court reversed the finding by holding that Will, Ex.D1 had been proved but I am afraid the aforementioned finding is not sustainable as the witnesses of the Will did not depose in terms of provisions of Section 63 (c) of Indian Succession Act. There is not a single iota of statement that he appended the signature on the Will on the instructions of deceased Chanan Singh. In the impugned Will, Ex.D1, no reasons were assigned as to why Chanan Singh had dis-inherited his line of natural succession, i.e., brother, Class-II heir or with regard to previous Will. The findings of Lower Appellate Court are based upon the fact that DW2-Khushia and DW1 Ashok Kumar proved the execution of Will but there is no reference to the provisions of

aforementioned Act. For the sake of brevity, the provisions of Section 63(c) of Indian Succession Act, 1925 read 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 acknowledgement 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 acknowledgement 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.

The aforesaid 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**. Since Will set up by the defendants has been disbelieved by this Court as a necessary corollary, suit property would devolve upon appellant(s) by natural succession being Class II heir.

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.

In view of the aforementioned observations, the judgment and decree of the Lower Appellate Court is hereby set aside and that of trial Court regarding share in the suit property is restored. Owing to interim order, *ibid*, ownership of land is with Sub-Divisional Officer (Civil) Hoshiarpur, he is directed to hand over the possession of land to appellant

or his successor and render accounts. The appeal stands allowed.

May 03, 2018

savita

Whether Speaking/Reasoned

Whether Reportable

(AMIT RAWAL)

JUDGE

Yes/No

Yes/No