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

**RSA No.4957 of 1999 (O&M)
Date of decision : 14.09.2018**

Nihal Kaur and others

... Appellants

Versus

Balwant Kaur and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. B.S. Bedi, Advocate for the appellants.

Mr. A.S. Dhindsa, Advocate for the respondents.

AMIT RAWAL, J.

The appellants-defendants are in regular second appeal against the concurrent findings of fact, whereby the suit of the plaintiff-Santokh Singh (deceased) through LRs, bearing No.325 of 1996 claiming declaration and relief of joint possession to the extent of 1/3rd share in the total land measuring 104 kanals 7 marlas, as described in the plaint, on the basis of the unregistered Will dated 13.11.1981, has been decreed by the trial Court and affirmed by the lower Appellate Court.

The suit, aforementioned, was filed by Santokh Singh on the premise that Kapoor Singh, Piara Singh and Kartar Singh sons of Mangal Singh were owners in possession of the equal share of land, aforementioned. Piara Singh had no wife or children, whereas Santokh Singh-plaintiff was his nephew. Piara Singh treated Santokh Singh from the childhood as his son from the childhood and even defrayed the expenses of education, marriage etc. During illness of Piara Singh and in old age, the plaintiff used

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to manage and look after him and owing to the aforementioned services, he, on 13.11.1981, executed the Will, though he died on 16.11.1981. It was averred that Piara Singh was, at the time of execution of the Will, in proper disposing mind. In a suit for permanent injunction filed by the defendants, the plaintiff raised the plea of Will, but the same was not adjudicated as the injunction was granted in favour of the defendants.

In pursuance to the notice, the defendants contested the suit and raised various preliminary objections qua jurisdiction, principle of *res judicate*, Courts fee, etc. On merits, it was denied that the plaintiff-Santokh Singh was not nephew of Piara Singh or he rendered his services, much less, any defrayment expenses qua education and marriage. He was not in sound-disposing mind at the time of death as he was quite frail and not agile to execute the Will. On demise of Piara Singh, the mutation of the land was sanctioned in favour of his brothers Kapoor Singh and Kartar Singh, being Class-II heirs.

The trial Court on the basis of the pleadings and after noticing the contentions in the replication, framed the following issues:-

1. Whether the plaintiff is a nephew of Sh. Piara Singh? OPP
2. Whether Shri Piara Singh executed a valid Will in favour of plaintiff on 13.11.81? OPP
3. Whether the suit is barred by the principle of *res judicate*? OPD
4. Whether the plaintiff has got no locus standi?
5. Relief.

It is a matter of record that Santokh Singh, during the pendency of the suit, had died, but had already appeared as his own witness PW6.

The plaintiff examined six witnesses i.e. PW1-Dalip Kumar,

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Election Kanoongo, PW2 Khazan Chand, Deed Writer, PW3 Dalip Singh, Notary Public Karnal, PW4 Bhupinder Singh, PW5 Sawaran Singh, Inspector, Food & Supply, Jhundla and Santokh Singh, plaintiff himself as PW-6 and tendered in evidence the following documents:-

- i) Voter lists in the year 1975-80 & 1980 (Ex.P1 to Ex.P3),
- ii) Will (Ex.P4),
- iii) Ration Card (Ex.P5),
- iv) Jamabandi (Ex.P6).

On the other hand, the defendants examined Kulwant Singh as DW1, Darshan Singh as DW2 and Bir Singh as DW-3 and brought on record various documents (Ex.D1 to Ex.D4).

On the basis of the evidence brought on record, the trial Court, despite observing that the plaintiff was not the real nephew of Piara Singh, decreed the suit. The appeal laid before the lower Appellate Court was also dismissed.

On 21.12.1999, while issuing notice of motion, operation of the impugned judgment and decree was stayed and that order continued after admission of the appeal.

Mr. B.S. Bedi, learned counsel appearing on behalf of the appellants-defendants submitted that the Will was surrounded by suspicious circumstances, particularly the fact that Santokh Singh (since deceased) had not been found to be nephew of Piara Singh, but yet the trial Court, while rendering findings on issue No.1, observed that there was no need to frame the issue. There were many suspicious circumstances, which have escaped the notice of both the Courts below. Piara Singh was admitted in a hospital, but he was not sound-disposing mind to execute the Will dated 13.11.1981

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as he died on 16.11.1981. The plaintiff actively participated in the execution of the Will as he had brought the deed writer and notary public. It was not at the instance of Piara Singh because he was not in sound-dispose mind. The Will did not mention about the brothers, much less, no reason of disinheritance was assigned. The suit was filed after seven years, whereas the mutation (Ex.D4) immediately after the demise of Piara Singh, was sanctioned. The defendants have been in possession of the suit property in view of the judgment and decree of the injunction suit (Ex.D1 and Ex.D2). He referred the cross-examination of PW-2, who admitted that at the time of writing of the Will, the deceased was 83-84 years of age and was admitted in the hospital of Dr. Monga. By pointing out the admission with regard to discharge of Piara Singh, it was submitted that no documentary evidence has been placed on record or any doctor has been examined. No evidence as per the provisions of Section 50 of the Indian Evidence Act, 1872 (in short 'the 1872 Act') to establish that plaintiff was nephew of Piara Singh was led, therefore, Piara Singh could not bequeath his entire property i.e. 1/3rd share to a third party as compared to his real brothers being Class-II heirs. All these circumstances lead to an irresistible conclusion that the Will was surrounded by suspicious circumstances. PW4-Bhupinder Singh, witness of the Will, did not depose in terms of the provisions of Section 63(c) of the Indian Succession Act, 1925 (in short 'the 1925 Act'). In support of the aforementioned contentions, reliance had been laid to the following judgments:-

1. *Kalyan Singh V/s Smt. Chhoti*” 1990 AIR (SC) 396; 1990 CivCC 590;
2. *“Janki Narayan Bhoir Vs. Narayan Namdeo Kadam”*

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2013(1) RCR (Civil) 409.

3. *“Gurdial Kaur and others V/s Kartar Singh and others” JT 1998 (3) S.C. 37;*
4. *“Nimbo and others V/s Satyabir Singh” 1995 (1) Civil Court Cases 224 (P&H);*
5. *“Harbans Singh V/s Hardyal Singh and others” 1996 (2) Civil Court Cases 401 (P&H);*
6. *“Bhagwan Kaur V/s Gurbax Singh and another” 1993 Civil Court Cases 710 (P&H);*
7. *“Shri Kishan Chand and another V/s Smt. Basanti Devi (died) through her LRs” 1996 PLJ 66;*

All these aforementioned submissions, in case, had not been noticed as the appellants-defendants had been able to create genuine, reasonable and *bona fide* doubt regarding execution of the Will, in this view of the matter, the suit was liable to be dismissed, thus, urges this Court for setting aside the judgments and decrees of the Courts below.

Per contra, Mr. A.S. Dhindsa, learned counsel appearing on behalf of the respondents-plaintiffs submitted that the concurrent findings of fact cannot be interfered with until and unless there is a gross illegality and perversity. Voters lists and ration card (Ex.P1 to Ex.P3) proved that Santokh Singh was having a joint mess with Piara Singh. The Will was attested by Notary. The ingredients of Section 68 of the 1872 Act had also been complied with. If at all, Piara Singh was not well, the defendants did not care or come forward to examine doctor as they were afraid of surfacing of truth. The photocopy of ration card was not objected to and therefore, has been looked into. Even the mutation does not confer any title and in these circumstances, the suit was filed, thus, urges this Court for dismissal of the present regular second appeal.

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I have heard learned counsel for the parties, appraised the paper book as well as records of the Courts below and of the view that there is force and merit in the submission of Mr. Bedi. The reason is not only the one, but many:-

1. Once the trial Court has though observed that issue No.1 was not required to be framed, but yet gave a finding that plaintiff-Santokh Singh, since deceased, was not nephew of Piara Singh.
2. The Legal Representatives have failed to lead any evidence as per the provisions of Section 50 of the 1872 Act. No relative other than the defendants, who were the real brothers of Piara Singh had been examined. For the sake of brevity, the provisions of Section 50 of the 1872 Act read thus:-

"Section 50 of the Indian Evidence Act, 1872

50. Opinion on relationship, when relevant.—When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, or any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact: Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869) or in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860). Illustrations

(a) The question is, whether A and B were married. The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(b) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant. Comments Contradiction in

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evidence of relationship of witness of trifle nature, not material in a partition suit; Gowhari Das v. Santilata Singh, AIR 1999 Ori 61."

3. There is a categoric admission of Santokh Singh that Piara Singh was admitted in hospital and he was aged about 83-84 years and he brought the notary and scribe.
4. Active participation of the plaintiff in the execution of the Will itself is a suspicious circumstance, which has not been rebutted by leading direct and cogent evidence. In order to support the aforementioned evidence, the plaintiff should have examined medical record, much less, doctor, who attended Piara Singh (testator).
5. The Will does not disclose that Piara Singh had living brothers i.e. defendant Nos.1 and 2, namely, Kapoor Singh and Kartar Singh. As per Schedule of Section 8 of the Hindu Succession Act, 1956, brothers are the Class-II heirs.

All these factors had totally been brushed aside by the Courts below, therefore, there is gross illegality and perversity in decreeing the suit.

There is no dispute to the *ratio decidendi* culled out by the judgments, aforementioned, for, the plaintiff has miserably failed to dispel suspicious circumstances brought on record through arguments and otherwise by the appellants-defendants.

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

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Court in **“Pankajakshi (dead) through LRs and others V/s. 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 substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **“Kulwant Kaur and others V/s. 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,*

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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.

Keeping in view the aforementioned facts and circumstances, the judgments and decrees of the Courts below are not sustainable in the eyes of law and the same are hereby set aside and the suit of the plaintiff is dismissed.

The regular second appeal is, resultantly, allowed.

14.09.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned **Yes**

Whether Reportable **No**