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

RSA No.2810 of 2007 (O&M)
Date of Decision.01.05.2018

Man Singh (since deceased) through LRs and others .....Appellants

Vs

Sukhraj Kaur and others .....Respondents

2. **RSA No.3046 of 2007**

Man Singh (since deceased) through LRs and others .....Appellants

Vs

Sukhraj Kaur and others .....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Vikas Bahl, Senior Advocate with
Ms. Balpreet Sidhu, Advocate
for the appellants.

Mr. Harsh Aggarwal, Advocate
for the respondents.

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AMIT RAWAL J.(ORAL)

This order of mine shall dispose of two regular second appeals. RSA No.2810 of 2007 titled as "Man Singh (since dead) and others Vs. Sukhraj Kaur and others" arising out of Civil Suit bearing No.648 of 1992 (hereinafter called as suit No.1). RSA No.3046 of 2007 titled as "Man Singh (since dead) Vs. Sukhraj Kaur and other" arising out of Civil Suit bearing No.338 of 1993 (hereinafter called as suit No.2). Concededly, both the suit were consolidated. The suit No.1 was dismissed and the suit No.2 was decreed. The appeals preferred against the aforementioned judgments and decree were dismissed.

In the civil suit bearing No.648 of 1992, Man Singh, Nishan Singh, Sujan Singh and Chhatar Pal Singh sons of Karnail Singh and

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Gurlabh Kaur claimed declaration to the effect that the plaintiffs are owners in possession in equal shares in respect of land measuring 102 kanals 15 marlas by giving number of khasra numbers (hereinafter called as the "suit property") situated in village Gandiwind, Tehsil Tarn Taran with consequential relief of permanent injunction restraining the defendants from forcible dispossession and transferring the electric connection against Sukhraj Kaur, Bikramjit Singh, Baldev Singh and Sukhdev Singh, mortgagees whereas in suit No.2, Sukhraj Kaur filed suit along with her son Bikramjit Singh against Man Singh, Nishan Singh, Sujan Singh and Chatterpal Singh for declaration that they had become joint owners in possession of land measuring 126 kanals 19 marlas to the extent of 1/3rd share on the premise that Gurlabh Kaur, mother of Sukhraj Kaur was owner of land measuring 126 kanals 19 marlas. She became owner of khasra No.98/17(4-14) by virtue of exchange of land. In lieu thereof, Gurlabh Kaur gave her 36 kanals 7 marlas of land as owner to her daughter Jagrajpal Kaur, who was unmarried. Mutation of exchange bearing No.2083 was, therefore, sanctioned on 12.6.1982 and also claimed possession of land measuring 36 kanals 7 marlas. Both the suits were consolidated.

In suit No.1, the trial Court on the basis of pleadings framed following issues:-

"*i) Whether Jugrajpal Kaur executed valid Will dated 23.2.1991 in favour of the plaintiffs? OPP*

ii) Whether Jugrajpal Kaur executed Wills dated 18.7.1993 and 19.12.1990 in favour of defendants No.1 and 2? OPD

iii) Whether the plaintiffs are in possession of land in dispute? OPP

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iv) Whether Jugrajpal Kaur mortgaged the land in dispute in favour of defendants No.3 and 4 and if so, its effect? OPD

Besides above issues, following additional issues were also framed:-

v-A) Whether Gurlabh Kaur was owner of Khasra No.98/17 situated at village Gandiwind? OPP

v-B) Whether Jugraj Pal Kaur was owner of 36 kanals 2 marlas of land at the time of her death? OPP

v-C) Whether any valid decree dated 22.2.1991 was passed in favour of defendants No.1 and 4 and against Jugraj Pal Kaur. If so, its effect? OPD

6. Relief."

In case of Sukhraj Kaur Vs. Man Singh etc., following issues and additional issues were framed:-

"*1) Whether Jugrajpal Kaur had executed Will dated 18.7.83 and 19.12.91 in favour of the plaintiffs? OPP*

2) Whether the plaintiffs are the owners in possession to the extent of 1/3 share of the suit land? OPP

3) Whether the plaintiff is entitled to a decree for joint possession to the extent of 1/3 share in the suit land? OPP

4) Whether the plaintiffs are entitled to the injunction as prayed for? OPP

5) Whether the plaintiffs have no locus standi and cause of action to file the present suit? OPD

6) Whether the suit is not properly valued for the purposes of court fee and jurisdiction? OPD

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7) Whether the suit is liable to be stayed under Section 10 CPC? OPD

8) Whether Gurlabh Kaur had executed a Will dated 30.12.1986 in favour of her sons as alleged in the written statement? OPD

9) Whether the defendants are entitled to special costs under Section 35A CPC? OPD

Additional issues:-

1) Whether Jugrajpal Kaur had executed Wills dated 8.7.1983 and 19.2.90 in favour of the plaintiffs? OPP

2) Whether Jugrajpal Kaur had executed a valid Will dated 23.2.1991 in favour of the defendants? OPD

3) Whether the suit is liable to be stayed? OPD

4) Relief."

Common evidence had been led in both the aforementioned suits.

Sukhraj Kaur and Bikramjit Singh propounded two Wills i.e. first registered Will dated 18.07.1983 executed by Jugrajpal Kaur, who was unmarried and died on 06.03.1991 and another unregistered Will dated 19.12.1990 executed by Jugrajpal Kaur. In both the afore-mentioned Wills, one Kundan Singh attesting witness was common, however, the other attesting witness in the first Will was Dalip Singh, who died and in the second Will Harsharan Singh, who appeared as DW24. On the other hand, Man Singh and others relied upon a consent decree dated 22.02.1991 executed by Jugrajpal Kaur during her life time by virtue of which she had given the land measuring 41 kanals 1 marla to the brother and she remained owner of balance 36 kanals 7 marlas of land and unregistered Will dated

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23.02.1991. Sukhraj Kaur had also challenged the Will dated 30.12.1986 executed by Gurlabh Kaur propounded by the sons being beneficiaries in respect of land measuring 126 kanals 19 marlas.

On the preponderance of evidence brought on record, the trial Court dismissed the suit No.1 and decreed the suit No.2. Two appeals were preferred bearing No.159 of 1999-2007 titled as "Man Singh and others Vs. Sukhraj Kaur and others" and Civil Appeal bearing No.160 of 1999-2007 titled as "Man Singh and others Vs. Sukhraj Kaur" against the dismissal of suit No.1 and decretal of suit No.2. Both the appeals have been dismissed. It is in this background, the present regular second appeals have been filed.

Mr. Vikas Bahl, learned Senior Counsel assisted by Ms. Balpreet Sidhu appearing for the appellants submitted that the judgments and decrees of the Courts below are not sustainable as they have ignored the consent decree dated 22.02.1991, Ex.PY, for, that had attained finality vide Ex.PX, the judgment and decree dated 21.01.1998 rendered by Additional District Judge, Amritsar whereby Sukhraj Kaur and Bikramjit Singh filed an appeal being third party but the same was dismissed and even RSA bearing No.1728 of 1998 was dismissed being not maintainable vide order dated 03.05.2001.

If at all, the defendants in Suit No.1 and the plaintiffs in Suit No.2 were aggrieved of the finding rendered by this Court, they could have approached the Hon'ble Supreme Court as the third party appeal is always maintainable nor did they file a separate suit asserting any right in the property.

The Will dated 23.02.1991 executed by Jugrajpal Kaur has been proved through the testimony of PW-3 Tarlok Singh and PW-4

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Joginder Singh. They have deposed in terms of provisions of Section 68 of the Indian Evidence Act and Section 63(c) of the Indian Succession Act but yet it has been discarded without assigning any reasons.

Both the Courts below have committed illegality and perversity in relying upon the testimony of Harsharan Singh, DW24, being an attesting witness to the unregistered Will dated 19.02.1990. Even the Will of Gurlabh Kaur dated 30.12.1986, Ex.P2, whose attesting witness were Tarlok Singh and Joginder Singh has also been ignored, thus, urges this Court for setting aside the finding under challenge.

Per contra, Mr. Harsh Aggarwal, learned counsel appearing on behalf of the defendants in Suit No.1 and plaintiffs in Suit No.2 submitted that Tarlok Singh and Joginder Singh, being the attesting witnesses in both the Wills propounded by the plaintiffs i.e. Will dated 23.02.1991, Ex.P1 executed by Jugrajpal Kaur and 30.12.1986 executed by Gurlabh Kaur, Ex.P2, did not depose of another Will and therefore, their testimony was discarded. Another ground of discarding the Will was that the Will contained the left thumb impression of Gurlabh Kaur whereas in the testimony it has come that it was right thumb impression. Witnesses were, thus, found to be telling lies and the Wills aforementioned were rightly discarded as they were suffering from suspicious circumstances.

Sukhraj Kaur and Bikramjit Singh cannot be prevented to assail the consent decree dated 22.02.1991, Ex.PY, which was upheld by the Court below vide Ex.PX in view of the finding given by this Court on 03.05.2001 in RSA No.1728 of 1998 *de hors* of the fact that the plaintiffs in Suit No.2 did not challenge the decree by independent suit, who can always raise the plea as per provisions of Order 41 Rule 33 CPC. The decree pertained to 41

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kanals 1 marla. The decree could not have been treated for 41 kanals 1 kanal as she had already given 4 kanals 14 marlas in exchange to Gurlabh Kaur, therefore, she was having a title in respect of 36 kanals 7 marlas only. Harsharan Singh, DW-24, had deposed in terms of provisions of Section 68 of the Indian Evidence Act and 63(c) of the Indian Succession Act and rightly so, has been accepted.

By concluding his arguments, he submitted that the plaintiffs in Suit No.1, therefore, are not entitled to second claim in respect of land measuring 41 kanals 1 marla or 36 kanals 7 marlas, thus, urges this Court for dismissal of the appeal.

I have heard learned counsel for the parties, appraised the paper book and records of the Courts below. Filing of appeal bearing No.75-A of 1995 (Ex.PX) against the consent decree i.e. judgment and decree dated 22.2.1991 (Ex.PY) and the order dated 03.05.2001 qua non maintainability of the appeal before this Court are not in dispute. The order dated 3.5.2001 passed by this Court in RSA No.1728 of 1998 reads as under:-

> "*This appeal has been filed by a person who is not a party to the suit. The judgment rendered in the suit by the trial Court or the first Appellate Court only binds the party to the suit and not the appellant. In case appellant is directly or indirectly being affected by the judgment rendered in the suit or a cloud has been cast on his title, then the remedy of appellant is not by way of this second appeal. Appellant, if so advised, may take appropriate proceedings in this behalf.*
>
> *This second being not maintainable, is hereby dismissed."*

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In view of the aforementioned order, a fresh cause of action had accrued in favour of the plaintiffs in Suit No.2 to assail the decree dated 22.02.1991, Ex.PY in the independent proceedings but having failed to avail the chance, in my view, the argument of Mr. Harsh Aggarwal is devoid of merit, for, now he cannot be permitted to assail the same by taking the aid of provisions of Order 41 Rule 33 CPC.

Now the point to be pondered upon by this Court is whether the Will dated 19.02.1990, Ex.D11 containing the recital of the previous Will dated 18.07.1983, Mark A was executed by Jugrajpal Kaur, who died unmarried and was valid and legal or not. In order to appreciate the controversy, it would be apt to refer to the statement of Harsharan Singh, DW24. The aforementioned witness stated that the Will dated 19.02.1990 was executed by Jugrajpal Kaur in his presence and in the presence of other witness Kundan Singh, who unfortunately died. Even the Will was scribed in his presence and that of Kundan Singh. Kundan Singh read over the contents of the Will to Jugrajpal Kaur and she signed and thumb marked the Will after admitting the same to be correct. Both the witnesses attested and signed the Will in the presence of Jugrajpal Kaur. The entry of the Will was recorded in the register of the scribe. She was in sound disposing mind at the time of execution of the Will. It also surfaced that she used to reside in the house of her sister Sukhraj Kaur at Amritsar at that time.

In cross-examination, the tenor and mode of cross-examination rather supported the case of the plaintiffs in Suit No.2 as to the specific question, the aforementioned disclosed that scribe was Satnam Singh Pahwa and Jugrajpal Kaur was able to walk with the help of crutches. No suggestion was put to as to whether the Will was not scribed by Jugrajpal

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Kaur or she was not competent to execute the same. To a specific question he also gave answer that Jugrajpal Kaur did not mention in the Will regarding debarring of her other legal heirs.

The Scribe Satnam Singh Pahwa stepped into the witness box as DW9. He was candid and coherent in the cross-examination and even testified that at Sr. No.729 of the register, he made an entry regarding the Will which also bore thumb impression of Jugrajpal Kaur. The aforementioned register was also brought in the Court but the witness could not ascertain any falsehood or doubt to establish whether he had actually scribed the Will or not. Though an attempt was made to confuse him with regard to Sr. No.727 to 742 but the pith and substance of the examination-in-chief and the cross-examination leads to irresistible conclusion that the plaintiffs in the suit No.1 were not able to ascertain any lacuna in the evidence or suspicious circumstance for enabling this Court to form a different opinion, thus, in my view, the challenge laid down by the plaintiffs in Suit No.1 *vis-à-vis* share of Jugrajpal Kaur as bequeathed in favour of the defendants in Suit No.1 and plaintiffs in Suit No.2 i.e. Sukhraj Kaur, Bikramjit Singh and others was rightly rejected by the Courts below being the last court of fact and law. In other words, argument of Mr. Bahl has not been able to cut ice enabling this Court to form a different opinion than the one already arrived at by bringing the judgments and decrees under the realm of illegality and perversity.

Now coming to the point of consent decree dated 21.02.1991 as noticed above, the same had attained finality but was not challenged by the respondents till date. The aforementioned decree had already got nod of the Court vide Ex.PX, therefore, with regard to bequeathing of the property

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referred to in the aforementioned Will in favour of the appellants-plaintiffs in Suit No.1, the Courts below ought to have granted declaration vis-à-vis aforementioned property in favour of the appellants-plaintiffs in Suit No.1 and defendants in Suit No.2.

The attention of this Court is also drawn to Ex.D94 i.e. mutation bearing No.2083 dated 12.06.1982 whereby Gulabh Kaur had given land measuring 36 kanals 7 marlas to Jugrajpal Kaur in lieu of land in exchange measuring 4 kanals 14 marlas comprised in khasra No.98/178. However, this fact was also reflected in the jamabandi Ex.D95. In this view of the matter, the decree dated 22.02.1991 cannot be held to be valid for 41 kanals 1 marla. Therefore, claim of the plaintiffs in Suit No.1 is confined only to 36 kanals 7 marlas and not 41 kanals 1 marla.

I cannot remain unmindful of the fact that the Will dated 18.07.1983 pertained to land measuring 89 kanals 2 marlas along with some other land whereas the Will dated 19.02.1990 pertained to 13 kanals 13 marlas. Therefore, the judgments and decrees of the Courts below conferring title upon the plaintiffs in Suit No.2 pertaining to 122 kanals 5 marlas is the correct finding and does not call for interference or can be said to be perverse.

Both the Courts below had not adverted to the aforementioned proposition that the consent decree remained valid and therefore, right accrued in favour of the beneficiaries in pursuance of the aforementioned judgment and decree remained un-challenged but with a caveat that it would not pertain to 41 kanals 1 marla but to 36 kanals 7 marlas.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the

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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*

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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 judgments and decrees of the Courts below are modified to the above extent and the second appeals are partly allowed. Rest of the findings of the Courts below are upheld. Decree sheet be prepared accordingly.

(AMIT RAWAL)
JUDGE

May 01, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No

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