

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

R.S.A.No.3870 of 2010 (O&M)

Date of Decision: March 26, 2018

Suraj Bhan & others

...Appellants

Versus

Radha Devi & another

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

Present: Mr.A.K.Chopra, Senior Advocate with
Mr.Akshit Chaudhary, Advocate,
for the appellants.

Mr.Naveen S. Bhardwaj, Advocate,
for respondent No.1.

AMIT RAWAL, J. (Oral)

Appellant-defendants No.1 to 3 and 5 are in Regular Second Appeal against the judgment and decree dated 19.8.2006, whereby the suit of the respondent-plaintiff for declaration was decreed in part and the Civil Appeal No.70 of 2006 preferred against the partial decretal of the suit has also been dismissed by the Lower Appellate Court vide judgment and decree dated 9.11.2009.

It would be in the fitness of things to give brief background of the suit as emanated from the pleadings.

Respondent-plaintiff Radha Devi daughter of Thandu Ram instituted the suit on the premise that she was daughter of Thandu Ram and Kanhi and the defendant-appellants are the grand sons of Thandu Ram and sons of Ramji Lal and Gharsi Ram sons of Thandu Ram. Thandu Ram died

on 19.4.1980, whereas Kanhi died on 1.3.1991. Thandu Ram, during his life time, executed an unregistered Will dated 12.3.1962 in favour of the plaintiff in respect of his $\frac{1}{2}$ share in the land measuring 418 kanals 14 marlas, situated in Village Madhosinghana, Tehsil and District Sirsa. Besides that, she also inherited $\frac{1}{5}$ th share in the land which was owned by Kanhi, her mother and, thus, she was rightful owner of $\frac{7}{10}$ th share in the land in dispute.

It was also alleged that defendant No.1, who was the Lambardar of the Village, by taking the advantage of illness of his grandfather, got the decree dated 18.2.1980 rendered in Civil Suit No.142-C of 1980 titled as "Suraj Bhan etc. Versus Thandu Ram etc." in respect of land measuring 262 kanals 6 marlas. The aforementioned decree was also challenged on the ground that it was illegal, against the facts, void and could not have taken away her right as no family settlement had taken place, resulting into passing of the decree nor Thandu Ram and Kanhi ever visited the court premises or availed the services of the Advocates. Thandu Ram was the Lambardar of the village and used to sign the receipts in discharge of his duty and, therefore, he could have very well signed the Vakaltnama and written statement, therefore, the thumb impressions are of some body else as the defendants managed to get some other person to impersonate Thandu Ram. During all this time, the plaintiff had been visiting Village Madhosinghana, but was not apprised the aforementioned decree or family settlement. Thandu Ram inherited the suit land in Villages Madhosinghana, Baruwali and Liwallwati from his father Magna, therefore, it was a big chunk of land and there was no necessity to suffer the decree.

The aforementioned suit was contested by the defendants by

filing joint written statement and raised the objections qua maintainability, suit being time barred etc. They also denied the execution of the aforementioned Will and averred that mutation No. 1736 was sanctioned on 3.5.1980 in respect of land measuring 418 kanals 14 marlas and as well as land measuring 262 kanals 6 marlas. The plaintiff had no share as claimed in the aforementioned suit and prayed for dismissal of the suit. On merits, the preponderance of the Will was disputed and judgment and decree was defended.

Respondent-plaintiff filed replication denying the averments made in the written statement and reiterating that of the plaint.

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

- 1) *Whether the plaintiff is owner of the suit as alleged? OPP*
- 2) *Whether the impugned mutation No.1736 sanctioned on 3.5.1980 is contrary to the impugned decree dated 18.2.1980, as alleged, if so, its effect? OPP*
- 3) *Whether the impugned decree dated 18.2.1980 passed by Shri J.K.Sood, the then S.S.J.Sirsa in civil suit no.142-C of 1980 titled as Suraj Bhan etc. Vs. Thandu Ram etc. is the result of fraud, misrepresentation and liable to be set aside, as alleged? OPP*
- 4) *Whether Thandu Ram executed a valid will dated 12.3.1962 in favour of the plaintiff, if so, its effect? OPP*
- 5) *Whether the suit of the plaintiff is not maintainable in the present form? OPD*
- 6) *Whether the suit is time barred? OPD*
- 7) *Whether the plaintiff is estopped from filing the present suit by her own act and conduct? OPD*
- 8) *Whether the plaintiff has no locus-standi to file the suit? OPD*

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

10) *Relief.*

The respondent-plaintiff in order to prove the execution of the unregistered Will examined one Mahabir Singh as PW-5 and brought on record the Will dated 12.3.1962 Ex.PW5/A and also led evidence in support of the averments vis-a-vis the suffering of the decree. The record of the Civil Suit No.142-C of 1980 was also brought on record enabling the Court to form an opinion and ultimately the trial Court upheld the judgment and decree dated 18.2.1980 in respect of land measuring 262 kanals 6 marlas, but also upheld the unregistered Will dated 12.3.1962, therefore, the suit in part was decreed and as noticed above, two appeals were filed.

Mr.A.K.Chopra, learned Senior Counsel assisted by Mr.Akshit Chaudhary, learned counsel representing the appellant-defendants, in support of the memorandum of appeal, raised the following submissions:-

- a) During the pendency of the suit, an application was submitted by the defendants for examination of Pritam Singh, for, it came to the knowledge that he was the Deed Writer and was alive, but the said application was dismissed;
- b) The Will had not seen the light of the day. It was expected from Radha Devi, who had the Will in her favour, to come forward for the actual sanction of the mutation immediately after the demise of Thandu Ram;
- c) If at all, Thandu Ram executed the actual Will, decree dated 18.2.1980 would have reflected about the same, much less there was another decree dated 4.11.1969 (Ex.PW4/A) executed by him in favour of his wife Kanhi in respect of land

measuring 538 kanals 5 marlas. The said decree was also silent with regard to the Will;

d) The contents of the Will revealed that the same was executed on the basis of some decision taken in the Panchayat and the same was enclosed, but that document has not seen the light of the day;

e) The beneficiary Radha Devi, as per the testimony of PW-5, participated in the Will and, therefore, the Will was liable to be discarded. All these factors have not been taken into consideration by the Courts below and, therefore, there is illegality and perversity.

f) The respondent-plaintiff had not chosen to file the appeal vis-a-vis the finding rendered in favour of the appellant-defendants qua the decree having suffered out of his own will, without any fraud and misrepresentation, therefore, the said finding of the trial Court had attained finality;

g) Radha Devi had two sisters, Sama and Vidya and two brothers, i.e., Ramji Lal and Gharsi Ram, but there is no reference of the same or reason for depravity. All these facts, if looked into cumulatively, it would have entailed into dismissal of the suit, but the Courts below committed abdication, much less illegality and perversity.

Mr.Naveen S.Bhardwaj, learned counsel appearing on behalf of respondent No.1-plaintiff submitted that the Will has been proved as per the provisions of Section 68 of the Indian Evidence Act as examination of one of the witnesses was sufficient requirement of law. No complete evidence

has been placed on record to contend that Pritam Singh, the alleged Deed Writer, was alive and the application was, thus, a ploy to create impression upon the Court. The decree dated 4.11.1969 could not have been looked into as the same was not assailed and was in respect of some other property. It was not subject matter of the suit property. Kanhi was given a life interest in the Will in case the husband predeceases her, but the fact of the matter is that he died before Kanhi. The Will was quite old and, therefore, it carried presumption as per Section 90 of the Evidence Act. Even if the aggrieved party has not challenged the finding vis-a-vis upholding of the decree by filing a Regular Second Appeal, the provisions of Order 41 Rule 33 CPC can also be pressed into service.

I have heard the learned counsel for the parties, appraised the paper book, records of the Courts below and of the view that there is force and merit in the submissions of Mr.Chopra for the following reasons:-

- 1) Mahabir Singh PW-5, the testator of the Will, in the first opening line stated that Radha Devi, at the time of execution of the Will written by Pritam Singh, was present and this fact has also been reiterated by PW-3 Balbir Singh, her husband. The aforementioned piece of evidence on going through the judgments and decrees of the Courts below, has not been adverted to. Thus, in my view, there is glaring illegally and perversity;
- 2) It is settled law that beneficiary of the Will, if having found to have participated, the Will is liable to be discarded. Though there is no dispute to the aforementioned law, but I would not refrain myself in citing the judgment rendered in

**Niranjan Umeshchandra Joshi Versus Mrudula Jyoti Rao
and Ors., 2006 (13) SCC 433.**

3) There is another aspect of the matter. If at all, Thandu Ram had actually executed the Will, Radha Devi would not have remained silent for all years as the suit, aforementioned, was filed on 24.12.1991, though the mutation was effected as way back on 3.5.1980 in respect of the entire land. The claim was regarding ½ share in respect of land measuring 418 kanals 14 marlas. No sane person would sit idle if he/she had been a beneficiary independent to the wish of the testator. He/she would have definitely approached the revenue authorities for getting the mutation sanctioned, therefore, the argument of Mr.Bhardwaj that the Will, being 19 years old, carries presumption of truth and does not carry weight as the parties are required to file independent suit by virtue of Section 68 of the Indian Evidence Act and as well as Section 63 of the Indian Succession Act. The judgments and decrees of the Courts below, thus, in my view are result of misdirection vis-a-vis upholding the Will dated 12.3.1962. In case the Will is discarded, question arises for determination that Radha Devi along with other sisters and brothers, if Thandu Ram had died intestate, would have a right to succeed or not.

4) Since the decree of 18.2.1980 is in respect of land measuring 262 kanals 6 marlas out of the total land measuring 418 kanals 14 marlas, all the children of Thandu Ram would have share in respect of the balance land 156 kanals 8 marlas to

the extent of 1/5th share.

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 the 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 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.

Therefore, I hereby grant the declaration of 1/5th share vis-a-vis the respondent-plaintiff and other children. The judgments and decrees of the Courts below are modified to the aforementioned extent. Resultantly, the appeal stands allowed in the aforementioned terms. Decree-sheet be prepared accordingly.

March 26, 2018
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable:

Yes/No