

205

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

**RSA-2233-2011 (O&M)
Date of decision : 14.03.2018**

Jaswant Kaur (deceased through LRs) and others

... Appellant(s)

Versus

Gurdish Singh and others

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. K.S. Boparai, Advocate
for the appellants.

Mr. S.S. Rangi, Advocate
for respondent Nos.1 and 2.

AMIT RAWAL, J. (ORAL)

The appellants-defendants, being the daughters and widow of Inder Singh, are in regular second appeal against the judgment and decree dated 03.09.2010, whereby the suit of the respondents-plaintiffs being grand-sons of Inder Singh, claiming declaration to the effect that they had become owner of the property belonging to Inder Singh by virtue of the Will dated 21.03.1972 dismissed by the trial Court vide judgment and decree dated 03.02.2005, has been upset by the lower Appellate Court, in essence, the suit, aforementioned, has been decreed.

It would be apt to give preface of the matter before adverting to the rival contention of learned counsel for the parties.

The respondents-plaintiffs instituted the suit for declaration that the plaintiffs are the owners in joint possession in equal share of the land

measuring 59 kanals 11 marals along with electric connection, electric motor and all other rights appurtenant thereto on the basis of the registered Will dated 21.03.1972 executed by Inder Singh-deceased in their favour, by challenging the Will dated 08.04.1992 and mutation No.10579 sanctioned on 06.11.1992, on the premise that Inder Singh son of Amar Singh was the owner of land measuring 58 kanals 10 marals situated at Village Pakhowal, District Ludhiana, who died on 29.06.1992, leaving behind the plaintiffs and defendants as natural heirs. The plaintiffs are the sons of pre-deceased son of Inder Singh, whereas defendant No.1 is widow and defendant Nos.2 to 4, are his daughters. It was averred that Inder Singh during his life time executed the registered Will dated 21.03.1972 bequeathing the entire estate in favour of the plaintiffs in equal share i.e. half share each to the exclusion of the defendants and after the death of Inder Singh, plaintiffs approached the Halqa Patwari for the purpose of sanctioning of the mutation, but were astonished to know that the defendants had already got the mutation sanctioned in pursuance to the registered Will dated 08.04.1992 by decreasing the share of the plaintiffs to the extent 1/5th. The Will was forged and fabricated. In that backdrop of the matter, the suit, aforementioned, was filed.

The appellants-defendant Nos.1, 3 and 4 contested the aforementioned suit by taking preliminary objection qua maintainability, *locus standi*, but admitting the death of Inder Singh. It was averred that the Will dated 21.03.1972 was revoked by virtue of subsequent registered Will dated 08.04.1992 and the mutation was sanctioned as per the wish and desire of the testator expressed in the subsequent Will of 1992. The plaintiffs admitted the execution of the Will at the time of sanctioning of the

Mutation No.10579. Defendant No.2 admitted the claim of the plaintiffs and gave a statement that she had no objection, in case, the suit was decreed. Replication was filed by controverting the averments.

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

1. *Whether Inder Singh deceased executed a registered Will dated 21.03.1972 in favour of the plaintiffs? OPP*
2. *whether Inder Singh deceased executed a Will dated 08.04.1992 in favour of Jaswant Kaur etc.? OPD*
3. *Whether the plaintiffs have got no locus standi to file this suit? OPD*
4. *Whether the suit of the plaintiff is maintainable in the present form? OPD*
5. *Whether the plaintiffs are estopped by their acts and conduct from filing this suit? OPD*
6. *Whether the suit of the plaintiff has not been properly valued for the purposes of Court fee and jurisdiction? OPD*
7. *Whether the plaintiff is entitled to the declaration prayed for? OPD*
8. *Relief.*

However, Issue No.2 was re-framed as per order dated 07.03.1996 passed by this Court in CR No.2375 of 1996. The amended issue No.2 reads thus:-

2. *Whether Inder Singh deceased executed a revocation-cum-Will dated 08.04.1992 in favour of Jaswant Kaur etc. throughout which the earlier Will dated 21.03.1972 was revoked? OPD*

The respondents-plaintiffs in order to prove their case examined Pawan Kumar, registration Clerk as PW1, herself appeared as

PW3, H.S. Mander, document expert as PW-4 and closed the evidence. On the other hand, defendants examined Ajaib Singh, accountant as DW1, Madan Lal as DW2, Krishan Gopal, Clerk as DW3, Ranbir Chand as DW4, Hari Kishan as DW5, Rajesh Kumar as DW6, Gurnam Singh, Tehsildar as DW7, Rajesh Kumar as DW9, Malkit Singh as DW8, Anil Kumar Gupta, document expert as DW9, Malkit Singh as DW10, Bharpur Singh as DW11 and Mehar Singh as DW12.

The trial Court rendered the finding on issue No.1 regarding the Will of 1972 in favour of the plaintiffs on the premise that the defendants did not deny the execution of the Will dated 21.03.1972. However, on the rest of the issues, gave the finding in favour of the appellants-defendants and dismissed the suit. The appeal taken before the lower Appellate court by the respondents-plaintiffs had been allowed, as indicated above, whereby the Will dated 08.04.1992 has been discarded by accepting the Will dated 21.03.1972.

Mr. K.S. Boparai, learned counsel for the appellants-defendants submitted that DW-5 Hari Kishan was attesting witness of both the Wills and when he appeared in the witness-box, he categorically stated that he had appended his thumb-impressions in '*Urdu*' in the subsequent Will of 1992 and did not deny the existence of the first Will of 1972. Once the contents of the second Will reveal that first Will was revoked, the first Will could not have been looked into by the lower Appellate Court. The lower Appellate Court committed illegality and perversity in observing that since the defendants had admitted the execution of the previous Will, therefore, the onus to prove the execution of first Will had been discharged, which is not the correct appreciation of law, for, the second Will itself proved that the

testator had revoked the previous Will and he had appended his thumb-impressions, though he used to sign it owing to the health conditions and fragility. Even if, the Court below was to discard the statement of Hari Kishan, for, the aforementioned witness was not sure as to whether the testator had appended his signatures on which document, but discharged the onus by examining DW-7 Gurnam Singh, Tehsildar and DW-4 Ranbir Chand, Deed Writer. In support of his contentions, he relies upon the *ratio decidendi* culled out by this Court in **“Lila Dhar V/s Smt. Badho and another” 1994 (1) PLR 525** and the judgment rendered by Hon'ble Andhra Pradesh High Court in **“Pulipati Rajarao V/s Gondrala Sithamahalakshmi and others” 2000(1) CivCC 318.**

He further submits that in fact there was a compliance of Section 68 of the Indian Evidence Act, therefore, the lower Appellate Court ought not to have disbelieve the Will dated 08.04.1992 to form an opinion that thumb-impressions of the Inder Singh were smudged. The Court also failed to notice that the appellants were granted an opportunity to prove the Will by way of secondary evidence and in that regard, the original Will available in the record of the Registrar was summoned and put to Gurnam Singh, Tehsildar, who acknowledged to have read over and explained the contents of the Will to testator-Inder Singh. He also testified that the other two witnesses i.e. Amar Singh and Hari Kishan, witnessed and attested the Will dated 08.04.1992. In view of such evidence, the lower Appellate Court has abdicated in discarding the Will. It was further submitted that the second Will was actually wish of the testator as the property at his hands had equally been distributed amongst all the siblings including the widow, whereas in the first Will, only grand-children were given the property

without giving any reason as to why the widow was not given any share on his demise. All these factors, if read in cumulative, results into perversity and dismissal of the suit, thus, urges this Court for allowing the appeal.

Mr. S.S. Rangi, learned counsel appearing on behalf of the respondents-plaintiffs submitted that DW-5 Hari Kishan was also the attesting witness of the previous Will and acknowledged to have attested the same. The Will dated 21.03.1972 was also registered one and the certified copy of the same had been produced on record. PW1- Pawan Kumar, Registration Clerk, after examining the Will, found that the same was correct as per entry in the Register. No doubt the aforementioned Will was objected to on the ground of admissibility, but the fact of the matter is that once the defendants had admitted the execution of the first Will, though came out with a story of revocation, there was no necessity for the respondents-plaintiffs to prove the Will in view of the provisions of Order 14 Rule 3 CPC. In support of his contentions, he relies upon the *ratio decidendi* culled out by this Court rendered in **“Gurpyari Singh and others V/s Kamaldeep Singh” 2017 (2) Law Herald (P&H) 1501** as well as **“Jaswant Singh V/s Jaspal Kaur @ Rani and others” 2015 (17) RCR (Civil) 219** and the same lines rendered by Hon'ble Supreme Court in **“Balathandayutham and another V/s Ezhilarasan” 2010 (2) RCR (Civil) 821.**

He further submitted that the original Will dated 08.04.1992 has not seen the light of the day. The Handwriting Expert examined by the plaintiffs, namely, H.S. Mander, stated that the thumb-impressions of Inder Singh were smudged and despite extensive cross-examination, nothing contrary surfaced. The lower Appellate Court correctly found that the Will

of 08.04.1992 was suffering from suspicious circumstances and the reason assigned in paragraph 48 is liable to be affirmed. The defendants did not examine any other attesting witness i.e. Amar Singh as they were afraid that truth may not surface. The reasonings assigned by the lower Appellate Court in discarding the Will are perfectly legal and justified and does not call for interference, thus, urges this Court for dismissal of the appeal.

I have heard the learned counsel for the parties, appraised the paper book and seen the records of the Courts below with their able assistance shown to me during the course of the hearing and of the view that both the Wills, aforementioned, are liable to be discarded, for, DW-5 Hari Kishan was the attesting witness of both the Wills and he did not deny the factum of the execution of the first Will of 1972, much less, admitted the second Will. Both the Wills are registered one. The second Will specifically mentioned that the testator after giving a proper thought revoked the first Will, but in cross-examination, he did not know as to on which document, Inder Singh appended his signatures.

The first Will of 1972 bore the signatures, whereas the Will of 1992, thumb-impressions and the explanation given in the second will was that he was not keeping good health, but no evidence has been led to show his fragility or agility or ill health. The Will of 1972 did not assign any reason as to how the living wife had been left out in respect of her right in the property, particularly when it was executed 20 years back to the subsequent Will. None of the parties lead an evidence to show that there was any in-cordial or discord between the husband and wife. The defendants are the real daughters viz-a-viz respondents-plaintiffs being grand-sons i.e. children of deceased son. No husband would deprive his

wife or the daughters, though in the subsequent Will, he wanted to equally distribute the property between the wife and grand-sons i.e. sons of late Darshan Singh son of Inder Singh. The finding of the lower Appellate Court that once in the second Will dated 08.04.1992, there was admission of the first Will, the plaintiffs discharged from proving the Will in view of the admission, is not a correct appreciation of law.

There is no dispute to the *ratio decidendi* culled out in the judgment cited by Mr. Rangi, but the facts and circumstances of each case have to be examined, for, in the First Will of 1972, this Court is not able to gather any circumstance or digest why the wife with whom Inder Singh had been enjoying the companionship, was left out. All these factors, if looked into cumulative, lead to irresistible conclusion that the property of Inder Singh was required to be inherited by way of natural succession by treating him to have died intestate.

There is no dispute to the *ratio decidendi* culled out in the judgments cited by Mr. Boparai, but the fact of the matter is that both the parties have made an attempt for proving the Will by examining the Registrar. For the reasons aforementioned, I am of the view that both the Wills are required to be discarded for the purpose of striking the equity, as indicated above.

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 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, 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 findings, the judgment and decree of the lower Appellate Court is not sustainable and the same is hereby set aside. The suit is dismissed. The mutation bearing No.10579 sanctioned on 06.11.1992, which had been set aside by the lower Appellate Court, is ordered to be restored as per natural succession and not as per Will dated 08.04.1992. The decree sheet is ordered to be prepared.

The regular second appeal stands disposed of.

14.03.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned **Yes/ No**

Whether Reportable **Yes/ No**