

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

**RSA No.2339 of 2012
Date of Decision:17.01.2018**

Devinder Singh

...Appellant

Versus

Fateh Jung Singh and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.Kanwaljit Singh, Sr. Advocate with
Mr.Abhinav Aggarwal, Advocate for the appellant.
Mr.Akshay Bhan, Sr. Advocate with
Mr.Santosh Sharma, Advocate for respondents No.1 to 4.

ANIL KSHETARPAL, J. (ORAL)

The plaintiff-appellant is in the regular second appeal against the concurrent finding of fact arrived at by the courts below.

Following substantial questions of law are arisen for consideration of this Court:-

(i) Whether a registered testamentary document duly proved on the file, in accordance with the provisions of Section 68 of the Indian Evidence Act, 1872, can be ignored by the courts on the ground that such testamentary document was part of a “sale transaction” (General Power of Attorney, agreement to sell and Registered Will)?

(ii) Whether after the judgment of the Hon'ble Supreme Court in **Suraj Lamp and Industries Pvt. Limited, 2012 (1)**

SCC 656, documents like Agreement to Sell, General Power of

Attorney and Will etc. have become unenforceable?

Late Shri Mahender Singh purchased a plot No.R-230 in a public auction situated in Model Town, Urban Estate, Ratia in the year 1982 for a sum of Rs.72,000/- out of which Rs.18,000/- was paid being 25% of the total amount as earnest money.

The public auction was approved by the competent authority and allotment letter dated 31.3.1982 was issued in favour of late Shri Mahender Singh.

It is the case of the plaintiff that late Shri Mahender Singh agreed to sell the aforesaid plot for a sum of Rs.4.41 lacs in favour of the plaintiff and on receipt of full sale consideration of Rs.4.41 lacs, Late Shri Mahender Singh executed the agreement to sell, general power of attorney and the testamentary document-Will (registered with the Registrar on 24.2.2003 in his favour. It is further case of the plaintiff that the plaintiff did get the aforesaid plot transferred in his favour at any point of time. The plaintiff is further pleaded that possession of the plot was delivered by defendants No.5 and 6 to the plaintiff as general power of attorney of Late Shri Mahender Singh on 29.9.2004. The plaintiff also filed a complaint in the consumer court as attorney of Shri Mahender Singh. The plaintiff also deposited a sum of Rs.5,000/- as requisite fee required by defendants No.5 and 6.

The plaintiff further pleaded that defendants No.5 and 6 on coming to know that Shri Mahender Singh died on 22.3.2004, asked the plaintiff to get a probate of the 'Will'. However, when it was pointed out

that in the State of Punjab, probate is not required, defendants No.5 and 6 insisted that no objection be obtained from legal heirs of Late Shri Mahender Singh, i.e. defendants. However, defendants refused to give no objection, forcing the plaintiff to file the present suit.

In the written statement, execution of the agreement to sell and the Will were denied. It was alleged that Late Shri Mahender Singh did not receive the payment of Rs.4.41 lacs and infact the agreement to sell and the Will are forged and fabricated. It was further pleaded by the defendants that general power of attorney was given to the plaintiff only to file a complaint and under that pretext even signatures on the alleged will were obtained.

The learned trial court after appreciating the evidence available on the file ignored the agreement to sell on the ground that such agreement to sell does not confer ownership. General power of attorney dated 24.2.2003 was ignored on the ground that after the death of Shri Mahender Singh, general power of attorney has come to an end. The registered Will was ignored on the following grounds:-

- (i) Although three documents were executed on 24.2.2003, however, the documents do not refer to each other.
- (ii) Late Shri Mahender Singh did not appear to be in sound mind as he had executed three documents, ignoring his natural heirs.
- (iii) The Will was registered at 6.15 PM, although the office time was only up to 5.00 PM.
- (iv) Presence of the plaintiff Devinder Singh is contradictory

as he claims that he was not present at the time of execution of the Will, whereas the attesting witness Niranjan Singh, who has been examined as PW-6, states that Devinder Singh was present.

With these findings, the learned trial court dismissed the suit. In the appeal, the learned first appellate court held that the registered Will and other two documents, i.e. agreement to sell and general power of attorney, have been proved in accordance with the requirements of the Evidence Act. However, the learned first appellate court ignored the Will on the ground that the testamentary document Ex.P3 is not infact a 'Will' as defined in Section 2(h) of the Indian Succession Act, 1925 being part of the documents of 'sale transaction'. The learned first appellate court also noticed that three documents executed on the same date do not refer to each other and such 'Will' cannot be treated as posthumous deposition of the testator in such circumstances. Now the stage is set for considering the substantial questions of law.

Question No.(i)

“Whether a registered testamentary document duly proved on the file, in accordance with the provisions of Section 68 of the Indian Evidence Act, 1872, can be ignored by the courts on the ground that such testamentary document was part of a “sale transaction” (General Power of Attorney, agreement to sell and Registered Will)?”

It is not in dispute that Late Shri Mahender Singh had signed the aforesaid registered Will dated 24.2.2003. To prove the Will, the plaintiff has examined PW-1 Balwant Singh, Clerk from the office of the

Sub Registrar. Sub Registrar Hari Chand Bhatia himself appeared as PW-4 and attesting witness of the will Niranjana Singh appeared as PW-6, who had also attested the general power of attorney. Jugal Kishore-PW-5 has also been examined. The learned first appellate court also recorded a finding that the 'Will' stands proved, in accordance with Section 68 of the Evidence Act. The Will is proved to have been executed in accordance with the provisions of Section 63 of the Indian Succession Act, 1925. However, testamentary document has been ignored on the ground that such testamentary document does not fall within the definition of Section 2(h) of the Indian Succession Act, 1925. Section 2(h) of the Indian Succession Act, reads as under:-

(h) “will means the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death.”

A testamentary document is required to be executed in accordance with Section 63 of the Indian Succession Act, 1925, which reads as under:-

“Section 63 in The Indian Succession Act, 1925

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.

A reading of the aforesaid statutory provisions makes it clear that 'Will' means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. Whether the testamentary document is part of the sale transaction or otherwise would not make any difference. A testamentary document is basically is a wish of the testator to bequeath the property in a particular manner provided such wish constitutes a Will, in accordance with the provisions of Section 63 of the Indian Evidence Act, 1925. Both the courts below have found that the Will was executed in accordance with the provisions of Section 63 of the Indian Succession Act. The testamentary document has been signed by the executant and it is attested by two attesting witnesses namely Niranjan Singh and Rajinder Parshad. The testamentary document was also got registered with the Registrar, although not required. As per the requirement of Section 68 of the Indian Evidence Act, it is sufficient to examine one attesting witness if that attesting witness

proves execution of the Will, in accordance with Section 63 of the Evidence Act.

The alleged suspicious circumstances pointed out by the learned first appellate court to ignore the Will are only the result of conjectures. Merely because the three documents executed on 24.2.2003 do not refer to each other, would not render a registered Will suspicious. Testator during his life time never revoked the same. He remained alive for almost 13 months. Still further, initially when officials of the HUDA wrote to the defendants (LRs of Late Mahender Singh) to give no objection for transfer of the plot in favour of the plaintiff, they did not deny the sale of the plot but only sought time as some of the legal heirs were not residing with them. Thereafter, the defendants started denying the execution of the aforesaid documents by Late Shri Mahender Singh.

In the present case, defendants had set up a case that 3 documents namely Agreement to Sell, General Power of Attorney and Will were the result of forgery. However, no evidence was led on behalf of the defendants. Sher Jang Singh, son of Late Sh.Mahender singh only appeared in the witness box. Still further it is not disputed that HUDA, the authority, which auctioned the property had been dealing with the plaintiff-appellant inasmuch as the possession was delivered to the plaintiff-appellant as an attorney of Late Shri Mahender Singh on 29.9.2004. Official of the HUDA namely Pappu Ram has appeared in the witness box and has proved that the plaintiff-appellant paid certain amount and was delivered possession by HUDA.

In view of the evidence available on the file, the first appellate court committed a material illegality in ignoring the testamentary deposition of Late Shri Mahender Singh only on the ground that the testamentary document is not the 'Will' as defined in Section 2(h) of the Indian Succession Act.

Question No.(ii)

“Whether after the judgment of the Hon'ble Supreme Court in **Suraj Lamp and Industries Pvt. Limited, 2012 (1) SCC 656**, documents like Agreement to Sell, General Power of Attorney and Will etc. have become unenforceable?”

Both the courts below have relied upon a judgment passed by Hon'ble Supreme Court in the case of **Suraj Lamp and Industries Pvt. Limited, 2012 (1) SCC 656**.

This Court has carefully read the aforesaid judgment. In the judgment, the Hon'ble Supreme Court has held that execution of the documents like agreement to sell, general power of attorney, special power of attorney, Will, affidavits and indemnity bonds would not amount to sale of the property. However, the court has further held that such documents are being executed for quite long time, therefore, the documents which have been accepted by the allotment authorities and have been acted upon would not adversely affect the rights of such purchasers. As noticed in the present case, the documents like agreement to sell, general power of attorney and will- testamentary document have been supplied to HUDA and thereafter HUDA started dealing with the plaintiff-appellant.

Hon'ble Supreme Court in a subsequent judgment in the case of **Maya Devi Vs. Lalta Prasa, AIR 2014 SC 1356** has clarified that the

judgment passed in **Suraj Lamp's** case (supra) applies prospectively and not retrospectively.

Agreement to sell coupled with the delivery of possession although does not confer any right, title or interest in the property, however, it certainly enables the agreement holder to protect his possession, in terms of Section 53 A of the Transfer of Property Act, subject to fulfillment of the requirement of law. An agreement holder, who has been ready and willing to perform his part of the contract and has taken step in furtherance thereto, can protect his possession.

Similarly, General Power of Attorney holder, which is valid and has not been revoked, can be acted upon by the Power of Attorney holder, in accordance with law. Similarly, testamentary document, i.e. 'Will' can be used by the beneficiary to claim succession of the property on the basis of Will after the death of the testator.

Merely because these documents were executed collectively at the time of entering into 'sale transaction' as is commonly understood, these documents would not be rendered unenforceable. These documents collectively or separately can be put to use for staking claim, in accordance with law. Hon'ble Supreme Court in **Suraj Lamp's** case (supra) has only held that such documents like agreement to sell, general power of attorney, special power of attorney, will etc. would not amount to sale. However, Hon'ble Supreme Court has nowhere held that such documents would become unenforceable.

In view of the above, both the questions of law are answered in favour of the appellant.

In view of the discussion made above, the present regular second appeal is allowed. The judgments passed by the courts below are set aside. The suit filed by the plaintiff is decreed, declaring the plaintiff to have become the owner of the suit property on the basis of Will-testamentary document dated 24.2.02003.

17.01.2018
mks

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No