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

Date of decision : 01.03.2018

1.

RSA-5041-2011 (O&M)

Sadhu Singh (deceased through LRs)

... Appellant(s)

Versus

Gurdeep Singh and others

... Respondents

2.

RSA-284-2012 (O&M)

Gian Kaur

... Appellant(s)

Versus

Gurdeep Singh and others

... Respondents

3.

RSA-3288-2012 (O&M)

Harbhajan Kaur

... Appellant(s)

Versus

Gurdeep Singh and others

... Respondents

4.

RSA-1490-2012 (O&M)

Jang Singh (deceased through LRs)

... Appellant(s)

Versus

Gurdeep Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Kanwaljit Singh, Senior Advocate with
Mr. Abhinav Aggarwal, Advocate
for the appellant(s) in RSA-284-2012.

Mr. Ashok Aneja, Advocate
for the appellant(s) in RSA-5041-2011
for respondent No.4 in RSA-284 and 1490 of 2012,
for respondent No.7 in RSA-3288-2012.

Mr. M.K. Garg, Advocate
for the appellant(s) in RSA-3288-2012.

Mr. N.K. Manchanda, Advocate
for the appellant(s) in RSA-1490-2012.

Mr. K.R. Dhawan, Advocate
for respondent No.1 in all the cases.

AMIT RAWAL, J. (ORAL)

CM-8765-C-2012 IN RSA-3288-2012

For the reasons stated in the application, which is duly supported by an affidavit, the application is allowed and the delay of 163 days in re-filing the appeal is condoned.

CM-7711-C-2017 IN RSA-1490-2012

For the reasons stated in the application, which is duly supported by an affidavit, the application is allowed and the LRs of the appellant-Jang Singh are ordered to be brought on record for the purpose of prosecuting the appeal.

CM-4021-C-2012 IN RSA-1490-2012

This is an application under Order 22 Rule 2(c), Chapter 1 Part C of the Punjab and Haryana High Court Rules and Order, read with Section 151 of C.P.C. for leave to make the applicant as appellant and to file the RSA before this Court against the judgment and decree dated 19.09.2011.

For the reasons stated in the application, which is duly supported by an affidavit, the application is allowed and leave to make the application as appellant and to file the RSA before this Court is granted.

CM-4023-C-2012 IN RSA-1490-2012

For the reasons stated in the application, which is duly supported by an affidavit, the application is allowed and the delay of 14 days in filing the appeal is condoned.

MAIN CASES

This order of mine shall dispose of four appeals bearing RSA No.5041 of 2011 titled as “Sadhu Singh (deceased through LRs) V/s Gurdeep Singh and others”, RSA No.284 of 2012 titled as “Gian Kaur V/s Gurdeep Singh and others”, RSA No.3288 of 2012 titled as “Harbhajan Kaur V/s Gurdeep Singh and others” and RSA-1490-2012 titled as “Jang Singh (deceased through LRs) V/s Gurdeep Singh and others”, involving identical question of law and facts.

The facts are being referred from RSA No.5041 of 2011.

A Civil Suit bearing No.334-A of 2001 was filed by Gurdip Singh son of Gurdial Kaur son of Bhajan Singh against Gian Kaur, Sadhu Singh, Jagsir Singh, Kuljit Singh and Harbhajan Kaur, defendant Nos.1 to 5, respectively, claiming declaration to the effect that :-

- (a) He is owner in possession of land bearing Khasra numbers 32/9/2, 12, 19, 20/2, 21, 22/1, 33//21, 32//11/1, 11/2, 33//15/21, Khewat No.65/61, 110, 199 Khatauni No.149, 251/243 and 412, as per Jamabandi for the year 1992-93 situated in the area of Village Warreh Tehsil Zira,*
- (b) Land measuring 13 kanals 8 marals bearing Khewat No.205 Khatauni Nos.427 & 428 Khasra Nos.28//12/1(6-8), 12/2 (1-4), 18/1(4-18), 13/2(0-6) and land measuring 1 kanals 6 marals being 26/40 share of land measuring 2 kanals khewat No.206 min, Khatauni Nos.439, 439 and Khasa Nos.268 min (1-6) & 268 min (0-14) as entered in the jamabandi for the*

year 1990-91 situated in the area of Village Maddoke Tehsil Moga and as mentioned and as mentioned in the judgment and decree dated 22.10.94.

(c) That the plaintiff is also entitled to recover ₹ 70,517/- along with interest, which has been deposited in the Punjab and Sind Bank, Railway Raod Moga along with Locker No.47/87 and amount of ₹ 246/- which has been deposited in Punjab and Sind Bank Railway Road, Moga and an amount of ₹ 1,00,000/- the mortgage amount under mortgage with Surjit Kaur for ₹ 1.0 lac.

(d) And a house situated in Khasra No.268 min bounded as :-

North: Road South : Gali

East: Balwant singh West: Master Sarwan Singh

situated in abadi Maddoke Tehsil Moga.

(e) A house shown in red in the attached plan bounded as under:-

North: Atma Singh South: Farm Surjit Kaur

East: Balbir Singh West Farm Surjit Kaur

siutated in abadi of Village Warreh Tehsil Zira,”

with consequential relief of permanent injunction restraining the defendants from dispossessing the plaintiff and from alienating in nay manner and with alternative relief of possession of the property.

It was averred that the aforementioned land was owned by Surjit Kaur d/o Kartar Singh wife of Kartar Singh of Village Maddoke. She was residing in Malaysia since 1953 and had a great love and affection with Gurdip Singh-plaintiff, who is father/son of Jeet Kaur. Surjit Kaur had no male child and she used to treat the plaintiff as her son. Whenever, she visited the Village, she was served by Gurdip Singh. She had executed a Will dated 07.04.1996 bequeathing the entire estate *ibid* in his favour, but the defendants denied the ownership of the same, therefore, the plaintiff was

compelled to file the aforementioned suit. Surjit Kaur was murdered by Sadhu Singh/defendant No.2, her real brother.

The aforementioned suit was contested by defendant No.1-Gian Kaur, by filing written statement, whereby the Will, aforementioned, was denied and it was stated that she died intestate and therefore, Gian Kaur along with Sadhu Singh, being natural Class-II heirs, would have succeeded to the share. It was also stated that the Will set up by Gurdip Singh along with Jagseer Singh/defendant No.3 of Surjit Kaur dated 07.04.1996 was also emphatically denied and said to be false and fabricated.

Defendant No.2/Sadhu Singh filed a written statement by taking preliminary objection that Surjit Kaur had executed a Will dated 06.09.1975, in favour of his son Kuljit Singh/defendant No.4.

Defendant No.4 filed a separate statement by taking a plea of non-maintainability of the suit and stated that he had become the owner by virtue of Will dated 06.09.1975.

Defendant No.5 also filed a separate written statement by taking preliminary objection that the plaintiff-Gurdip Singh did not have locus standi, whereas Surjit Kaur had executed a Will dated 25.08.1995 in favour of defendant No.5 Harbhajan Kaur.

Since the parties were at variance, the trial Court framed the following issues:-

- “1. Whether the plaintiff is entitled to declaration as prayed for? OPP*
- 2. Whether the plaintiff is entitled to injunction as prayed for? OPP*
- 3. Whether plaintiff has got no locus standi to file the present*

suit? OPD

4. Whether the suit is not maintainable? OPD

5. Whether the suit is barred by principle of res judicate? OPD

6. Relief.”

The plaintiff examined Gurcharan Singh as PW-1, Mohan lal PW2, Malkiat Singh PW3, Kuldeep Singh PW4, Nazar Singh PW5, Mohinder Kaur PW6, Sadhu Singh PW7, Vijay Bansal PW7/A, Sh. N.K. Aggarwal PW8 and Gurdip Singh-plaintiff himself as PW8, Anil Kumar Gupta PW9 and in rebuttal, Anil Kumar Gupta PW10. He also examined Hari Krishan Singh PW11 and tendered in evidence the documents as Ex.P33 to Ex.P38, whereas defendant examined Gian Kaur as DW1, Sadhu Singh DW2, Milkha Singh DW3, Baldev Kaur DW4, Harbans Singh DW5, Bohar Singh DW6 and brought on record the documents Ex.D1 to D8 i.e. various orders, whereby the criminal proceedings initiated against Sadhu Singh.

The trial Court on the basis of the preponderance of the evidence upheld the Will dated 07.04.1996 executed by Surjit Kaur in favour of Gurdip Singh as it was attested by Malkiat Singh & Nazar Singh and written by Kuldeep Singh and by holding to be in compliance of the provisions of Section 68 of the Indian Evidence Act, decreed the suit, aforementioned. Four appeals were filed by Gian Kaur, Sadhu Singh, Harbhajan Kaur and Jang Singh, who had purchased some part of land from Kuljit Singh, beneficiary of the Will dated 06.09.1995. All the appeals have also been dismissed. Hence, the four regular second appeals.

Mr. Kanwaljit Singh, learned Senior Counsel assisted by Mr. Abhinav Aggarwal, learned counsel appearing on behalf of the appellant/defendant-Gian Kaur, sister of Surjit Kaur, in RSA-284-2012,

submitted that both the Courts below have committed a gross illegality and perversity ignoring the fact that the Will was surrounded by the suspicious circumstances as Surjit Kaur on the next day i.e. 08.04.1996 was allegedly murdered by her brother-Sadhu Singh, who later on was acquitted vide judgment dated 24.01.2000, as the Will was executed at Village Kandoor Sahib, District Ludhiana, whereas Surjit Kaur was resident of Village Warreh, Tehsil Zira, District Ferozepur. There is no compliance of Section 63(c) of the Indian Succession Act as the desire of the testator is not crystal clear, for, it has not come on record through the testimony of Malkiat Singh and Nazar Singh that they had appended their signatures or thumb-impressions on the instruction and dictation of the testator. It is mandatory requirement of law. In support of his contentions, he relies upon the *ratio decidendi* culled out by the Hon'ble Supreme Court in **“Janki Narayan Bhoir V/s Narayan Namdeo Kadam” 2003(1) RCR (Civil) 409** and as well as the decision dated 13.12.2016 of this Court rendered in **RSA No.5252 of 2012** titled as **“Kanwaljeet Kaur V/s Joginder Singh Badwal (deceased through LRs) and others”**. No evidence has come on record whether at any point of time, Surjit Kaur lived with Gurdip Singh, even, the last rites were performed at Village Warreh and not at Kandoor Sahib or even, in the Village of the beneficiary Gurdip Singh i.e. Village Korotana. If at all Gurdip Singh had good relation with Surjit Kaur, bhog ceremony would have been performed in the Village of Gurdip Singh. All these factors, if read in cumulative, would have led to the dismissal of the suit, thus, there is gross illegality and perversity.

Mr. Ashok Aneja, learned counsel appearing on behalf of the

appellant-Sadhu Singh, in RSA-5041-2011, submitted that the Will dated 06.09.1995 was allowed to be led by way of secondary evidence and therefore, no objection could have been taken that the same was not proved. The mutation on the basis of that Will had already been effected in favour of Kuljit Singh and as a result thereof, part of the land had been sold to Jang Singh. Even otherwise, if the Will is not proved, he being a brother, would have succeeded to the estate of Surjit Kaur as she had died issueless.

Mr. M.K. Garg, learned counsel appearing on behalf of the appellant-Harbhajan Kaur, in RSA-3288-2012, submitted that Surjit Kaur had executed a Will dated 25.08.1995, whereby she had delivered the possession of the house i.e. property at Sr. No.D, situated in *abadi deh*, village Maddoke Tehsil and District Moga and she along with her family member is living in the property. No harm and prejudice would be caused to her successor to be decided by this Court for not staking any claim in the aforementioned suit.

Mr. N.K. Manchanda, learned counsel appearing on behalf of the appellant-Jang Singh in RSA-1490-2012 submits that Jang Singh is *bona fide* purchaser without notice for a valuable consideration, therefore, his client is protected by virtue of the provisions of Section 41 of the Transfer of Property Act.

On the contrary, Mr. K.R. Dhawan, learned counsel appearing on behalf of respondent No.1/Gurdeep Singh/plaintiff submitted that umpteen number of documentary evidence brought on record weighed in the mind of the Court to form an opinion that the Will dated 07.04.1996 was executed by Surjit Kaur in favour of Gurdip Singh. The Courts below have

also taken the notice of the provisions of Section 63 of the Indian Succession Act and as well as found that there was a compliance of Section 68 of the Indian Evidence Act. All the other Wills i.e. the Will propounded by Sadhu Singh had not been proved, even Harbhajan Kaur had also not been able to prove the Will dated 25.08.1995 and rightly so, the same has been discarded. Surjit Kaur was never looked after by his sister or the brother i.e. Sadhu Singh and Gain Kaur and whenever she came India from Malaysia, she lived with Gurdip Singh, even Gurdip Singh performed the last rites, though, bhog ceremony was performed in the Village, where she was residing, keeping in view the sentiments of the deceased. Gurdip Singh had been in possession of the property. An expert had also proved the signatures of Surjit Kaur on record from the compromise dated 20.09.1994 (Ex.P3), plaint dated 28.08.1994 (Ex.P5), vakalatnama (Ex.P4), statement made in Court (Ex.P5), Passport as Ex.P-11 and general power of attorney dated 22.11.1995 (PW-7/1 & PW-7/2). All these documents bore the signatures of the deceased-Surjit Kaur. PW9-Anil Kumar, hand-writing expert, compared the aforementioned signatures of Surjit Kaur on the Will and other documents and opined that they were of same very person. Anil Kumar Gupta in rebuttal also appeared as PW-10 and proved his report (Ex.PW10-1), wherein he on comparison of signatures of Surjit Kaur on the documents referred above opined that the signatures of Surjit Kaur on Will dated 06.09.1995 (Ex.D3), did not tally with the signatures on her passport Ex.P11. Jamabandi (Ex.P-9) revealed that Kartar Singh, husband of Surjit Kaur, was the owner of the land and he had given the suit land to Surjit Kaur by way of a decree. All these facts weighed in the mind of the Court

below, even the civil suit was filed by Gain Kaur against general public under Section 372 of the Indian Succession Act for claiming the succession to the estate of Surjit Kaur, but according to Mr. Dhawan, the matter was stayed owing to the outcome of the present regular second appeals. Non-compliance of one of the conditions of provisions of Section 63(c) of the Act would not render the Will invalid as the intention of testator from the pith and substances of the Will showed that she had intended to bequeath the entire property in favour of the plaintiff-Gurdip Singh. The concurrent finding of fact cannot be interfered until and unless there is gross illegality and perversity, which has not been pointed out, during the course of the hearing, by the respective counsels, thus, urges this Court for upholding the judgments and decrees, under challenge.

I have heard the learned counsel for the parties and appraised the paper book as well as record of the Courts below.

The provisions of Section 63 (c) of the Indian Succession Act provides three conditions to be complied with; (i) The Will should have been attested by two or more witnesses, each of whom had seen the testator either sign or affix his mark to the Will or seen some other person signing the Will in the presence; (ii) 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 (iii) 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. No doubt both the witnesses, PW3-Malkiat Singh and PW5-Nazar Singh, have been examined by the plaintiff-Gurdip

Singh to prove the execution of the Will and have stated that they had signed the Will in the presence of the testator-Surjit Kaur, but the compliance of the 2nd condition i.e. by the "Direction" of the testator, is conspicuously wanting. The compliance of the aforementioned provisions had been point of debate and consideration before the Hon'ble Supreme Court in **Janki's case** (supra) and before this Court in **Kanwaljeet's case** (supra), wherein it has been held that all the ingredients of Section 63(c) of the Indian Succession Act are required to be complied with. For the sake of brevity, the paragraph Nos.6 to 8 and 10 of **Janki's case** (supra) and the relevant portion of **Kanwaljeet's case** (supra), read thus:-

“6. At the hearing the learned counsel for the respondent fairly submitted that Raikar was only the scribe and he was not the attesting witness. Even looking to the evidence of Raikar himself it is clear that he gave evidence as the scribe. There is nothing on record to indicate that he had any intention to attest the Will. The attesting witness Sinkar has not stated that the other attesting witness Wagle attested the Will in his presence. On the other hand, he has stated that he did not see Wagle present at the time of execution of the Will. Wagle, the other attesting witness, being alive ought to have been examined in order to prove the Will. Nothing is brought on record to show that any attempt was made to examine Wagle or there was any impediment in examining him. It is true that although will is required to be attested by two witnesses it could be proved by examining one of the attesting witnesses as per Sections 68, Indian Evidence Act.

7. We think it appropriate to look at the relevant provisions, namely, Section 63 of the Indian Succession Act, 1925 and Sections 68 and 71 of the Indian Evidence Act, 1872 which read:

Section 63 of the Succession Act "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)

(b)

(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 of 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."

Section 68 of the Evidence Act "68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided..."

Section 71 of the Evidence Act "71. Proof when attesting witness denies the execution.- If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

8. *To say will has been duly executed the requirements*

mentioned in clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e., (a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.

10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as

required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove

the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.”

Relevant portion of Kanwaljeet's case (supra)

I have heard the learned counsel for the parties and appraised the paper book and of the view that there is a merit and force in the submissions of Mr. Kanwaljit Singh, for, I cannot shut my eyes in not assuming the role of Expert by taking the aid of the provisions of Section 45 of the Indian Evidence Act. On bare glance of the Will (Ex.DW-1/1), Bhagwant Kaur had allegedly appended her signatures not above the typed name, but below. When the Will finishes, there is signature of someone which had scored off. It appears that it had been typed on blank paper. If actually Bhagwant Kaur had to sign the same, the defendant(s) should not have been circumspect, rather bold enough to get the same executed and registered, during her lifetime or even thereafter. I have also an occasion to examine the examination-in-chief of DW-1 Dr. Harsharan Singh, the attesting witness of the Will, who had not deposed in terms of the provisions of Section 63 (c) of the Indian Succession Act which reads thus:-

(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.

There are two aspects of the matter that the Will has to be attested by two witnesses and signed by one of them and the witnesses must have been seen each other sign, but the expression on the "direction" of the testator is conspicuously wanting. The expression "desire" cannot be equated with the expression "direction" as per the plain and simple dictionary meaning, it does not in any way indicate that a person had actually intended a person to do it. "Desire" can be imaginary, but the "direction" has to be practical and specific. All these factors, in my view, have not been looked into, much less, seen from this angle, thus, there is a gross illegality and perversity."

The testimony of both the witnesses, namely, PW3-Malkiat Singh and PW5-Nazar Singh, were read over loudly in the Court by the respective counsel and not once, but twice, none of the examination-in-chief mandates the requirement suffices the requirement of the expression "direction" of the testator and the Will is hit by the legal flaw, therefore, the same was required to be discarded. Both the Courts below though referred to the provisions of the aforementioned Act, but failed to go in-depth in not noticing the legal lacuna and flaw. Keeping in view the aforementioned the other arguments regarding suspicions circumstances are rendered meaningless, in other words, the Will dated 07.04.1996 cannot be said to be in existence. In the absence of the Will, it would deem to presume that Surjit Kaur, died intestate. The relationship of Sadhu Singh and Gian Kaur being brother and sister of Surjit Kaur, is not controverted, whereas the plaintiff-Gurdip Singh being not collateral or a Class-II heir, but cousin

brother of Surjit Kaur i.e. son of Aunt. The other stake-holder i.e. Sadhu Singh (since deceased) and Harbhajan Kaur, have not succeeded in proving their respective Wills and also cannot succeed to the estate of Surjit Kaur, much less, Jang Singh, who is stated to be a *bona fide* purchaser.

Since Jang Singh had acquired the right and title by looking at the revenue record, in other words, stated to have made a reasonable inquiry in ascertaining the title and found that Kuljit Singh son of Sadhu Singh, in whose favour the mutation was entered, had purchased the part of the land vide sale deeds dated 20.03.2009 and 07.01.2009, all are during the pendency of the suit, therefore, the same would be hit by "Doctrine Akin to Lis Pendens" and would have independent right, claim and damages against the vendor, but cannot stake claim in the estate of Surjit Kaur.

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 appeals, aforementioned.

Keeping in view the aforementioned facts, I am of the view that both the Courts below have committed illegality and abdication as the Will suffered from legal flaw, therefore, the same is discarded. The judgments and decrees of the Courts below are hereby set aside and the suit is dismissed.

Resultantly, the appeal bearing **RSA No.284 of 2012** is allowed and the other three appeals bearing **RSA No.5041 of 2011**, **RSA No.1490 of 2012** and **RSA No.3288 of 2012** are dismissed.

01.03.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

✓

Whether speaking/reasoned Yes/ No

✓

Whether Reportable Yes/ No