

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

R.S.A.No.2955 of 2012 (O&M)

Date of Decision: March 09, 2018

Rajinder Kumar (since deceased) through L.Rs

...Appellants

Versus

Rajinder Parshad through LR Upendar Verma & another

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

Present: Mr.Parveen K. Kataria, Advocate,
for the appellants.

None for respondent No.1.

Mr.B.R.Gupta, Advocate,
for respondent No.2.

AMIT RAWAL, J. (Oral)

Appellant-defendant is in Regular Second Appeal against the judgment and decree dated 8.6.2010 rendered by the trial Court, whereby the suit of the respondent-plaintiff for possession by way of partition of half share of the appellant-defendant No.1 by passing a preliminary decree, had been decreed and the judgment and decree dated 5.5.2012, whereby the appeal preferred by the appellant-defendant had been dismissed.

It would be in the fitness of things to give brief facts of the case.

Respondent-plaintiff instituted the suit claiming possession by way of partition to the extent that he had become the owner to the extent of half share in the Shop No.9475/6, Sarafa Bazar, Ambala City with a mandatory injunction for removing the iron shutter and lintel placed on the roof of the shop with consequential relief of permanent injunction

restraining the appellant-defendant No.1 from alienating, mortgaging, creating any charge or renting out the shop in question. It was stated that one Lachhman Dass was real uncle of the plaintiff and defendant No.2. He purchased the shop in question along with defendant No.1 in equal share, i.e., half share and the sale deed was executed in favour of Shanti Devi, wife of late Lachhman Dass on 1.10.1975. By virtue of the aforementioned sale deed, the appellant and Shanti Devi were the owners to the extent of half share. In fact, it was Lachhman Dass and defendant No.2, who had actually purchased the shop in question and Shanti Devi was only a name-lender/*benamidar*. Lachhman Dass died on 2.4.1993 and during life time, executed a Will dated 20.11.1992 in favour of plaintiff and defendant No.2, bequeathing all the movable and immovable properties. Shanti Devi died on 29.8.1994 issueless and in possession of half share in the property and it is in that background, the right in the aforementioned property was claimed, but as per the averment, on 5.11.1999 taking the advantage of the old age of the plaintiff, defendant No.1 demolished the roof of the shop and put the shuttering for placing lintel thereon. An application was submitted to the police station on 7.11.1999. Many requests were made, but defendant No.1-appellant did not accede, necessitating the filing of the suit.

On notice, appellant-defendant No.1 appeared and filed the written statement taking customary pleas qua maintainability of the suit, locus-standi, valuation etc. On merits, it was stated that the shop was purchased by Lachhman Dass, uncle of the plaintiff and defendant No.2 as *benami*. It was actually purchased in the name of Shanti Devi along with defendant No.1 in equal share as per sale deed dated 6.1.1975. The execution of the Will by Lachhman Dass in favour of plaintiff and

defendant No.2 was also denied. It was stated that on the demise of Shanti Devi, appellant-defendant No.1 had become the owner of the half portion as per the Will dated 12.8.1993 executed by Shanti Devi.

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

- 1) Whether the plaintiff is entitled to the relief of mandatory injunction as prayed for? OPP
- 2) Whether the plaintiff is entitled to the relief of permanent injunction as prayed for? OPP
- 3) Whether the suit of plaintiff is not maintainable in the present form? OPD
- 4) Whether the plaintiff has no locus standi to file the present suit? OPD
- 5) Whether suit of the plaintiff is time barred? OPD
- 6) Whether the suit of plaintiff is bad for non-joinder of necessary parties? OPD
- 7) Relief.

Respondent-plaintiff examined Deep Chand PW1, Sardara Singh PW2, Labh Singh PW3, plaintiff himself as PW4, Ujjagar Singh PW5, N.K.Jain, Document Expert PW6 and Upinder Kumar PW7 and tendered in evidence the following documents:-

i	Ex.P1 & Ex.P2	Attested copy of Judgment & Decree dated 20.12.2000, passed in the Civil Suit No.9 of 1993, titled as “Rajinder Parshad & Anr. Vs. Shanti Devi
ii	Ex.P3	Copy of intequal
iii	Ex.PW6/A	Detailed observations and opinion report dated 10.05.2008 of N.K.Jain, Documents Expert.
iv	Ex.PW6/B to Ex.PW6/D	Photographic Charts
v	Ex.PW6/E1 to Ex.PW6/E7	Negatives
vi	Ex.PX	Certified copy of rent petition titled as Rajinder Kumar Vs. Joginder Mohan

On the other hand, defendant No.1 himself appeared as DW-1, Devendra Prasad, Document Expert DW2, G.S.Saini, Advocate DW-3 and Baldev Singh DW-4 and brought on record the following documents:-

i	Ex.D1	Will dated 12.08.1993 executed by Smt.Shanti Devi, in favour of Rajinder Kumar, son of Lal Chand
ii	Ex.DW2/1	Report
iii	Ex.DW2/2 to Ex.DW2/6	Negatives of the photographs of thumb impressions
iv	Ex.DW2/7 to Ex.DW2/11	Photographs pasted on charts

On the basis of the aforementioned evidence, the trial Court discarded the Will set up by the plaintiff and as well as defendant and passed the preliminary decree, as indicated above. The appeal laid before the Lower Appellate Court was also dismissed.

Mr.Parveen K. Kataria, learned counsel representing the appellant-defendant No.1 submitted that the judgments and decrees of the Courts below are not sustainable in the eyes of law as the respondent-plaintiff failed to discharge the onus or prove the pleadings as set out in the plaint, for, it has not been proved on record that the property in dispute, i.e., to the extent of half share was purchased out of the funds of Lachhman Dass in the name of Shanti Devi. In essence, Shanti Devi was a name-lender and transaction was *benamidar*. In order to prove the Will dated 12.8.1993, appellant-defendant No.1 examined Baldev Singh, therefore, there is a compliance of Section 68 of the Evidence Act and also stated in terms of the provisions of Section 63 (c) of the Indian Succession Act. Appellant-defendant No.1 was in joint ownership with Shanti Devi and was nephew from maternal side, whereas respondent No.1 and defendant No.2 were nephews of Shanti Devi from paternal side. Plaintiff and defendant No.2

instituted the suit against Shanti Devi bearing No.9 of 1993 on 26.10.1993, when Shanti Devi was living, claiming declaration with regard to some other shop, situated in the same Sarafa Bazar, Ambala City. Shanti Devi died and her legal representatives did not come forward resulting into ex-parte judgment dated 20.12.2000. Shanti Devi was living at Chandigarh and had sought the ejectment of the tenant from the premises by filing a rent petition, which was dismissed by the Rent Controller vide order dated 20.5.1982 and the Rent Appeal No.162/RA was filed jointly by Rajinder Kumar and Shanti Devi in the year 1982, though the same was dismissed by the Appellate Authority vide order dated 11.12.1984. All these factors have not been noted and, therefore, there is misdirection, much less illegality and perversity.

He further submitted that the report of the Handwriting Expert N.K.Jain was not credible as this Court had already observed regarding his conduct, but the fact of the matter is that the expert examined on behalf of the appellant had proved the thumb impressions of Shanti Devi. The Will was sought to be registered, but somehow it was not registered, therefore, there was a blank column to be filled by Sub Registrar.

Per contra, Mr.B.R.Gupta, learned counsel appearing on behalf of respondent-defendant No.2 submitted that the concurrent findings of fact cannot be interfered with unless and until there is a gross illegality or perversity. Both the Courts below have rightly discarded the Will and, therefore, passed the preliminary decree to the extent of half share which Shanti Devi have, to be partitioned by metes and bounds. Appellant-defendant No.1 has failed to prove the Will dated 12.8.1993 as it has consistently been held to be suffering from conjectures and surmises, which

had been in detail noticed by the Courts below. Once defendant No.2 along with the plaintiff had already succeeded to the property of Shanti Devi by virtue of a decree, *ibid*, the share of Shanti Devi in the property in dispute has rightly been granted. No doubt, the Will dated 20.11.1992 has not been proved or the original of the same is not brought on record, but the fact of the matter is that the trial Court had struck the equities by passing a preliminary decree and, thus, urged this Court for dismissal of the appeal.

I have heard the learned counsel for the parties, appraised the paper book and of the view that there is force and merit in the submissions of Mr.Kataria and the reason is not one but many:-

- a) Both the Courts have not referred to Civil Suit No.9 of 1993 preferred by the plaintiff and defendant No.2, respondent No.2 in the present appeal) being represented by Mr.Gupta. The title of the same reads as under:-

“1. Rajinder Parshad son of Shri Dasondhi Ram s/o Gobind Ram.

2. Rajmahinder Pal son of Shri Dasondhi Ram s/o Gobind Ram residents of house no.5147/3, Chowk Darzian, Ambala City.

....Plaintiffs

Versus

Smt.Shanti Devi deceased through her LR Smt.Laxmi Devi wife of Shri resident of Morinda, Tehsil Rupar, District Rupar.

....Defendant”

- b) Shanti Devi, when she was alive, contested the suit by taking specific stand that she had become absolute owner of the property on the demise of Lachhman Dass, though the property was owned by Lachhman Dass. Concededly, she died on

29.8.1994 and her legal representatives did not contest the suit.

The aforementioned suit, on the basis of the *ex-parte* evidence, was decreed vide judgment and decree dated 20.12.2000.

3) On the contrary, appellant-defendant No.1 had pointedly been pursuing the litigation, as noticed above, by filing a rent petition and rent appeal. The title of the rent appeal reads as under:-

“In the Court of Shri M.C.Aggarwal, Appellate Authority, Ambala.

Rent Appeal No.162/RA of 1983/1982.

Date of Instt:- 21.5.1983/1.8.1982

Date of Decision: 11.12.1984.

1. Rajinder Kumar son of Lal Chand,

2. Shanti Devi wife of Lachhman Dass.

Both residents of Ambala City.

...Landlords-Appellants.

Versus

Joginder Mochi, resident of Sarafa Bazar, Stair Case No.135, Ambala City.

...Tenant-Respondent

Appeal u/s 15 of the Haryana Urban (Control of Rent & Eviction) Act, 1973, from the Judgment of Sh.Virender Singh, Rent Controller, Ambala City dated 20.5.1982, vide which the ejectment application filed by the landlord/appellants against the tenant-respondent, was dismissed.”

c) Baldev Singh DW4 in his affidavit Ex.DW4/A as examination-in-chief, stated as under:-

“1. That the deponent is the Lambardar of village Kumbra Tehsil Kharara Distt.Mohali.

2. That late Smt.Shanti Devi was the real sister of the father of the defendant no.1 who is also the permanent resident of

village Kumbra and as late Smt.Shanti Devi used to visit the house of her brother Lal Chand at village Kumbra so she was known to the deponent being the neighbourer of Lal Chand.

3. *That late Smt.Shanti Devi executed a will on 12.8.1993 in favour of Defendant no.1 in presence of the deponent.*

4. *That the said will was read over to late Smt.Shanti Devi and after that she put her right hand thumb impression on the will which is Ex.DW1/A and after putting her thumb impression she asked me and Avtar Singh s/o Sh.Gurbax Singh who was also present at the time of the execution of the will for attestation of the will so the deponent and Avtar Singh both put their signatures on the will as attesting witnesses. The will was got subscribed by Sh.G.S.Saini Advocate of Chandigarh on the asking of late Smt.Shanti Devi who also put his signature on the will.*

Verification:-

Verified at Ambala City that the contents of all the paras of above said affidavit are true and correct to the best of my knowledge and belief and nothing has been concealed therein.”

d) There is a specific compliance of provisions of Section 63 (c) of the Indian Succession Act as Baldev Singh DW-4 categorically stated that he had put his signature on the asking of the testator, which is mandatory requirement. Section 63 (c) of the Act, reads as under:-

“63 (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 acknowledgment 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.”

e) The Courts below have also not referred to the testimony of Baldev Singh DW-4, but one line here and there in the cross-examination with regard to the identity of the property or the date of execution of the Will. He was examined in the year 2009, whereas the Will is of 1993. Owing to the lapse of time, the witnesses do not remember correctly all the particulars, but the fact of the matter is that he identified his signatures on the Will, much less stated that Shanti Devi had also put her thumb impression. Every will has to be registered. DW-3 Mr.G.S.Saini, Advocate was not the regular Deed Writer, therefore, the findings in this regard pale into insignificance. Plaintiff and defendant No.2 are the nephews from paternal side, whereas defendant No.1 is nephew from the maternal side and also co-owner to the extent of half share in the suit property, therefore, an irresistible conclusion to be drawn is that Shanti Devi and defendant No.1 were having cordial relations. No material has been placed on record to show that they were at loggerheads and, therefore, there was no occasion for Shanti Devi to execute the Will in favour of appellant-defendant No.1.

f) Concededly, it has not been brought into the notice of the Court that the possession of the half share is also with the appellant-defendant No.1. In my view, plaintiff and defendant No.2 have not been able to prove the nature and character of

the property to be *benami*. Neither any bank account or bank statement has been placed on record to establish that the suit property was purchased by Lachhman Dass from his funds, but in the name of Shanti Devi as Benami Transaction Act was in vogue at the time of the transaction and even after repealing of the Act, the transaction is permissible in favour of the wife and unmarried daughters.

f) All these factors have not been adverted to or noticed by the Courts below, therefore, in my view, there is illegality and perversity in the concurrent findings with regard to the Will suffering from suspicious circumstances. The findings are based upon conjectures and surmises by picking up the line here and there in the cross-examination, which should not be a ground for negating the plea of the appellant-defendant No.1. It is settled law that the entire pith and substance of the examination-in-chief and cross-examination is to be read. Aforementioned view of mine is supported by the ratio decidendi culled out in **P.John Chandy & Co.(P) Ltd. Versus John P.Thomas, 2002 (5) SCC 90.**

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 & others Vs. Chandrika & 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 and decision thereof could be without framing of substantial question of law or not. 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.

As an upshot of my findings, the judgments and decrees of the Courts below are set-aside. Resultantly, the suit of the respondent-plaintiff is dismissed. Appeal stands allowed.

March 09, 2018
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable:

Yes/No