

In the High Court of Punjab and Haryana at Chandigarh

Date of Decision:21.8.2018

RSA No. 2732 of 2016(O&M)

Naranjan Singh (since deceased) through Lrs Manjit Kaur and others

---Appellant

vs.

Kartar Singh (deceased) through and others

---Respondents

RSA No.6018 of 2016(O&M)

Sarwan Singh and another

---Appellants

vs.

Niranjan Singh (since deceased) through his Lrs and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. S.S.Rangi, Advocate
for the appellants in RSA No. 2732 of 2016

Mr. Manish Gupta, Advocate
for the appellants in RSA No. 6018 of 2016

Rekha Mittal, J.

This order will dispose of RSA Nos. 2732 and 6018 of 2016 as

these have emerged out of the same judgments and decrees passed by the Courts whereby suit filed by appellant Naranjan Singh (since deceased represented by his Lrs) (appellants in RSA No. 2732 of 2016) and the counter claim preferred by Ajaib Singh and Sarwan Singh, defendants No. 7 and 8 (appellants in RSA No. 6018 of 2016) were dismissed.

The present lis pertains to inheritance to the estate of Uttam Kaur @ Uttami wife of Harnam Singh who was owner of suit land measuring 129 bighas 1 biswa, situated in village Kohle Majra @ Naraingarh, Tehsil and District, Patiala and 31 bighas 1 biswa situated in revenue limit of village Kohle Majra, Tehsil Rajpura and house as detailed in para 1 (unnumbered) of judgment of the trial court. Naranjan Singh plaintiff claimed 1/3rd share in the aforesaid land on the basis of Will dated 9.5.1980 registered on 31.7.1980 on the premise that Uttam Kaur @ Uttami bequeathed 1/3rd share in the suit land in favour of Naranjan Singh and the remaining 2/3rd share in favour of Kartar Singh son of Ram Singh. It is further averred that the said Will was executed by Uttam Kaur @ Uttami in her sound disposing mind and without any pressure. The Will was presented before the Sub Registrar, Patiala for registration and Uttam Kaur @ Uttami affixed her thumb impressions on the Will after admitting the same to be correct in presence of the Sub Registrar and witnesses on 31.7.1980. Alienation by way of mortgage of land by defendants No. 2 to 6 in favour of defendants No. 10 to 12 is void and without consideration. Defendant No. 9 alleged himself to be son of Indi daughter of Uttam Kaur @ Uttami having born from loins of Jai Singh alias Jassy. Civil suit No. 358 of 22.6.1983 filed in the court at Rajpura against defendants No. 2 to 6

was dismissed on 6.1.1990. In the said suit, defendants No. 2 to 6 claimed themselves to be owners of suit land on the basis of some Will allegedly executed by Uttam Kaur @ Uttami in their favour on 27.4.1981. The court held that Will dated 27.4.1981 is not established. Uttam Kaur @ Uttami did not execute any other Will except the Will dated 9.5.1980 registered on 31.7.1980. Uttam Kaur @ Uttami died on 3.5.1981 and after her death, defendants No. 2 to 6 without any right have trespassed upon the suit land. The plaintiff claimed damages/mesne profits to the tune of Rs. 1,68,000/- for a period of three years prior to institution of the suit @ Rs. 7,000/- per acre with interest @ 18% per annum.

Defendants No. 1 to 6 filed the written statement and denied that the plaintiff is entitled to a share in the estate of Smt. Uttam Kaur @ Uttami with the averments that the alleged Will dated 9.5.1980 registered on 31.7.1980 is fictitious one. The plaintiff had no concern with the deceased in any manner. He has wrongly described himself as resident of village Kohle Majra but he is resident of village Harnauli, Police Station Guhla. He is Ahluwalia by caste whereas Uttam Kaur @ Uttami is Jat by caste. Defendant No. 1 is the only natural heir of Smt. Uttam Kaur @ Uttami. Sh. Mehtab Singh was father of great grand father of Kartar Singh and he was father of grand father of Harnam Singh husband of Uttam Kaur @ Uttami. Mehtab Singh had two sons namely Bhag Singh and Lal Singh and Bhag Singh had one son namely Toti and Lal Singh had one son namely Joti. Toti had one son namely Harnam Singh and Smt. Uttam Kaur @ Uttami was widow of Harnam Singh. She died issueless. Joti son of Lal Singh son of Mehtab Singh had one son namely Ram Singh and Ram Singh

had one son namely Kartar Singh defendant No. 1. Smt. Uttam Kaur @ Uttami was being served by defendants No. 1 to 6 and she executed valid Will dated 27.4.1981 in favour of defendants No. 2 to 6 and on the basis thereof, they have become owners in possession of the land in dispute by virtue of judgment and decree dated 20.2.1982 passed by the Sub Judge Ist Class (D), Patiala. Defendants No. 2 to 6 have legally mortgaged land in favour of defendants No. 10 to 12.

Defendants No. 7 and 8 filed their joint written statement alongwith counter claim. They denied that Uttam Kaur @ Uttami executed Will dated 9.5.1980 in favour of the plaintiff. It is averred that she was being looked after by Ajaib Singh son of Bakhshish Singh and Sarwan Singh son of Kapur Singh. Uttam Kaur @ Uttami executed Will dated 28.4.1981 in favour of Ajaib Singh and Sarwan Singh bequeathing 2/3rd share in favour of Ajaib Singh and 1/3rd in favour of Sarwan Singh, out of love and affection and services rendered by them. Defendants No. 2 to 6 have no right in the property left by Smt. Uttam Kaur @ Uttami and as such they could not alienate the same. All other material averments of the plaint have been denied.

They filed counter claim to seek declaration that they have become owners of the suit land on the basis of Will dated 28.4.1981 and entitled to possession thereof.

On the basis of pleadings of the parties, the trial court framed issues on 10.4.2007 and additional issues were framed on 2.4.2008 and 30.7.2008, reproduced in paras 14 and 15 of the judgment of trial court.

The parties were permitted to adduce evidence in support of

their respective contentions. Having heard counsel for the parties in the light of materials on record, the trial court rejected claim of the plaintiff that he has become co-owner of the suit land to the extent of 1/3rd share on the basis of Will propounded by him. Similarly, the Will propounded by defendants No. 2 to 6 and so also the Will dated 28.4.1981 propounded by defendants No. 7 and 8/counter claimants were rejected.

The judgment and decree dated 31.1.2012 passed by the trial court became subject matter of challenge in CA No. 6T of 30.1.2015 filed by plaintiff Naranjan Singh, CA No.30T of 22.3.2012 filed by Sarwan Singh and another and CO No. 135 of 2013 filed by Naranjan Singh alongwith cross objections filed by defendants No. 1 to 6 and cross objections No. 134 of 2013 by Sarwan Singh and another and the same were decided by common judgment and decree dated 2.11.2015 passed by the Additional District Judge, Patiala whereby the appellate court affirmed the judgment and decree passed by the trial court with regard to dismissal of suit of the plaintiff-appellant and counter claim filed by Sarwan Singh and another.

For the sake of convenience, parties shall be referred to as the appellant and counter claimants.

Counsel for the appellant would argue that Smt. Uttam Kaur @ Uttami left behind Will dated 9.5.1980 whereby she bequeathed 1/3rd share of suit land in favour of Naranjan Singh appellant (since deceased represented by his LRs) and the remaining 2/3rd share in favour of Kartar Singh defendant No. 1. It is further argued that in order to prove the Will, appellant examined Shamsheer Singh, one of the attesting witnesses of the Will PW4, Dr. Vijay Kumar Aggarwal another attesting witness of the Will

PW5, Umrao Singh Mahal, retired Sub Registrar PW7, Sher Singh Registration Clerk PW3, Handwriting and Finger Prints Expert Dr. Inderjit Singh PW6. It is argued that Shamsheer Singh was examined in chief and appeared in the Court on one more date for his cross examination and thereafter, he was won over by the contesting party and did not cause appearance for his cross examination. The appellant made his best efforts to examine as many witnesses as could be brought before the Court to prove the Will which is a registered document and registration of the Will stands proved by Umrao Singh Mahal, retired Sub Registrar, Patiala. It is further argued that since the Will propounded by the appellant is a registered document and a presumption of correctness is attached to endorsement made by the registering authority, the courts have committed a serious error rather perversity by rejecting the Will propounded by the appellant.

Another submission made by counsel is that Kartar Singh defendant No. 1 is not proved to be natural heir of Smt. Uttam Kaur @ Uttami, therefore, Kartar Singh or for that matter defendants No. 2 to 6 sons of Kartar Singh cannot be allowed to enjoy the suit property to the exclusion of others.

With regard to the appeal preferred by Sarwan Singh and another, counsel would urge that the courts have wrongly rejected counter claim preferred by them on the basis of Will dated 28.4.1981 executed by Smt. Uttam Kaur @ Uttami.

There cannot be dispute about the settled position in law that if one of the attesting witnesses of the Will is alive and available for examination before the Court, the Will is required to be proved in

accordance with the provisions of Section 68 of the Indian Evidence Act, 1872 (in short “the Act”). The Will set up by the appellant bears attestation of Sh. Joginder Singh, Ex Sarpanch Uppli and Shamsher Singh Lambardar of village Kohle Majra. The same also bears endorsement of Lal Chand Bajaj, Document Writer with entry No.177 dated 9.5.1980. There are also purported signatures of Dr. Vijay Kumar Aggarwal alongwith seal of doctor on the said document.

The appellant examined a witness from the office of Sub Registrar to produce copy of the Will maintained in the said office and so also Umrao Singh Mahal, the then Sub Registrar to prove that the Will was registered by him. Indisputably, Joginder Singh Ex Sarpach Uppli was not examined in the case and he is stated to have passed away. Shamsher Singh Lambardar, the other attesting witness was examined in chief but he did not turn up for his cross examination, therefore, his testimony cannot be taken into consideration. There is nothing on record suggestive of the fact that the appellant filed an application before the trial court for procuring presence of Shamsher Singh Lambardar through process of the Court by averring that he has been won over by the other party. In this view of the matter, contention raised by counsel for the appellant for his failure to ensure cross examination of Shamsher Singh Lambardar by the contesting is not meritorious and liable to be rejected.

The appellant examined Dr. Vijay Kamar Aggarwal, who tendered into evidence his affidavit Ex. PW5/A. In paras 3 and 4 of the affidavit, he has stated about execution of the Will and its registration at the behest of Smt. Uttam Kaur @ Uttami. However, when the witness tendered

into evidence his affidavit Ex. PW5/A by way of examination in chief, he had stated that he has seen documents Ex. P4 and P6 on the judicial file. Again said, he has seen thumb impression on a document on judicial file but he cannot say that who had appended those thumb impressions. He had seen Will Ex. P4 on the judicial file which bears his signatures at points 'A' and 'B'. However, in his cross examination by counsel representing defendants No. 7 and 8 before the trial court, he has stated to the following effect:-

“I have not seen any original will today in the court. I have seen only Ex. P4 shown to me by the counsel for plaintiff. I do not maintain any record regarding stated examination of Uttam Kaur. Volunteered I maintained OPD patient register. Uttam Kaur was not admitted in my clinic at any time. I have come to depose in the court only that Uttam Kaur was in full disposing mind at the time of my stated examination of Uttam Kaur and I have not come to depose any other fact. It is wrong to suggest that Smt. Uttam Kaur was not in senses at the alleged time of her stated examination.”

On due consideration of the aforesaid, it can be safely held that testimony of Dr. Vijay Kumar Aggarwal is not at all sufficient to prove the Will, in accordance with Section 68 of the Act. This apart, Dr. Vijay Kumar Aggarwal is not stated to be attesting witness of the Will as per document Ex. P4 though it bears his signatures and stamp. As the appellant failed to get statement of Shamsheer Singh Lambardar completed by providing opportunity to the contesting defendants to cross examine him and

testimony of Dr. Vijay Kumar Aggarwal does not prove that the Will was executed by Smt. Uttam Kaur @ Uttami, the appellant has miserably failed to prove the Will, in accordance with law. In this view of the matter, no error much less perversity can be found in the consistent findings recorded by the courts rejecting plea of the appellant that he became co-owner to the extent of 1/3rd share in the suit land on the basis of Will propounded by him. Counsel for the appellant has failed to point out any other material on record sufficient to prove the Will in question.

So far as the plea that Kartar Singh and his family is not entitled to enjoy possession and fruits of the land in question, a specific plea was raised by Kartar Singh that he is the only natural heir of Smt. Uttam Kaur @ Uttami. In the Will propounded by the appellant, there is reference that Kartar Singh son of Ram Singh son of Joti is the nephew of Smt. Uttam Kaur @ Uttami. Once the Will Ex. P4 has been set up by the appellant, he cannot wriggle out of the recitals incorporated therein. Under Section 32 of the Act, Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases envisaged in sub sections (1) to (8) of Section 32.

Sub Section (5) of Section 32 deals with relevant facts pertaining to existence of relationship. A relevant extract therefrom reads as follows:-

“When the statement relates to the existence of any

relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.”

The Will set up by the appellant contains reference that Kartar Singh son of Ram Singh is the nephew of Shmt. Uttam Kaur @ Uttami. As this document has been relied upon by the appellant, he can not escape its legal consequence. As such, the Will propounded by the appellant answers that defendant No. 1 is related to Shmt. Uttami. This fact also substantiates plea of defendant No. 1 that he is the legal heir of Shmt. Uttami.

No other point has been raised.

Coming to the appeal filed by Sarwan Singh and another, defendants No. 8 and 7 counter claimants respectively, the Court in Appeal at internal pages 85 to 89 of the judgment has noticed that Ajaib Singh DW3 had admitted that Civil Suit titled “Sarwan Singh, Ajaib Singh vs. Gurmail Singh and others” filed by them through Sh. Vijay Tiwari, Advocate, Patiala was dismissed on 6.3.1982 vide order Ex. DW3/D-3. He has also admitted his signatures on Vakalatnama Ex. DW3/D2 and copy of plaint Ex. DW3/D1 of the said civil suit. He further admitted that application for restoration of said suit filed by him and Sarwan Singh was also dismissed vide order dated 18.9.1982 Ex. DW3/D4.

The Court has held that perusal of copy of plaint Ex. DW3/D1 shows that Sarwan Singh and Ajaib Singh (defendants No. 8 and 7 in the present suit) filed suit for declaration against defendants Nos. 1 to 6 and

plaintiff Naranjan Singh to the effect that they are owners in possession of suit property measuring 129 bighas 1 biswas situated in the area of village Naraingarh alias Kohle Majra and land measuring 31 kanal 1 marla situated in village Kohle Majra, Tehsil Rajpura on the basis of Will dated 28.4.1981. Ajaib Singh has also admitted that application dated 1.8.1981 Ex. DW3/D5 filed by him and Sarwan Singh for bringing them on record as LR's of Smt. Uttam Kaur @ Uttami in civil suit No. 191 of 6.10.1980 titled "Hazura Singh vs. Uttam Singh (sic) through Sh. Brij Mohan Bansal, Advocate, Rajpura was dismissed on 16.7.1982. Sarwan Singh and Ajaib Singh filed another application DW3/D9 for bringing them on record as LR's of Smt. Uttam Kaur @ Uttami on 1.8.1981 and the same was dismissed vide order dated 16.7.1982 Ex. DW3/D-11. The suit filed by defendants No. 7 and 8 claiming ownership on the basis of Will dated 28.4.1981 purportedly executed by Smt. Uttam Kaur @ Uttami was dismissed in default under Order 9 Rule 8 of the Code of Civil Procedure (in short "the Code") on 6.3.1982. Under Order 9 Rule 9 of the Code, the plaintiff is precluded from bringing a fresh suit in respect of the same cause of action. That being so, the Court in Appeal has rightly held that counter claim preferred by appellants Sarwan Singh and Ajaib Singh being a cross suit is not maintainable in view of dismissal of their previous suit under Order 9 Rule 8 of the Code based upon the same cause of action. Counsel for the counter claimants is not in a position to successfully challenge the position in law, noticed by the appellate court.

No other point has been raised.

For the foregoing reasons, the appeals fail and are accordingly

dismissed in limine, leaving the parties to bear their own costs.

(Rekha Mittal)
Judge

21.8.2018
paramjit

Whether speaking/reasoned: Yes
Whether reportable : Yes/No