

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

RSA No.4220 of 2014

Date of Decision.24.05.2018

Tek Bahadur Singh and others

.....Appellants

Vs

Sukhdev Singh and others

.....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. S.S. Salar, Advocate
for the appellants.

Mr. Vikas Mehsempuri, Advocate
for respondent No.3.

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AMIT RAWAL J.(ORAL)

The appellant-defendant No.1 to 3 are in regular second appeal against the judgment and decree dated 24.03.2014 rendered by the District Judge, Sangrur whereby the suit of the respondents-plaintiffs has been decreed while setting aside the judgment and decree dated 9.12.2009 passed by the trial Court on the basis of the Will dated 11.12.1995 by discarding the Will dated 28.09.1990.

The brief facts which are essential and necessary for adjudication of the suit are that the plaintiffs Sukhdev Singh, Manjit Singh and Hardev Singh sons of Jangir Singh son of Nikka Singh instituted the suit claiming that they and defendant No.4 are owners in joint possession in equal shares to the extent of 1/4th share in the land measuring 11 bighas 16 biswas Pukhta comprising in Khewat Khatauni No.117/200, Khasra No.467 (5-6-0) and 469 (6-10-0) with further claim of ownership in joint possession of 1/6th share in the land measuring 33 bighas 1 biswas Pukhta comprising of Khewat

Khatauni No.122/210 to 214, Khasra No.494 min (2-10-0) 556 (3-14-0), 1732/308 (4-6-0), 494 min (1-10-0), 557 (1-7-0), 558 (3-10-0), 2304, 2305/310 (4-12-0), 1731/308 (0-19-0), 309 (3-7-0), 495 (3-10-0), 557 (4-5-0) situated in the revenue estate of village Bagrian, Tehsil Malerkotla after deduction of the land measuring 4 bighas 12 bisws Pukhta already sold by Jangir Singh comprising of Khewat Khatauni No.112/213, Khasra No.2304-2305/310 (4-12-0) having inherited by them on the death of Jangir Singh on the basis of registered Will dated 11.12.1995 executed by Jangir Singh in their favour by setting aside the mutation No.7028 dated 21.12.2001 regarding 1/4th share of land measuring 11 bighas 16 biswas pukhta, which was sanctioned on the basis of forged, fabricated and fictitious Will dated 28.09.1990 in favour of defendant Nos.1 to 3 and 1/6th share of land measuring 33 bighas 1 biswas pukhta with permanent prohibitory injunction restraining the defendants from alienating the suit land described in the head note 'A' of the plaint by way of sale, mortgage, gift exchange etc. on the premise that plaintiffs and defendant No.4 had inherited all moveable and immoveable properties of Jangir Singh by way of Will aforementioned.

The suit aforementioned was contested by defendant No.1 to 4, 8 and 9 by filing joint written statement averring that 1/4th share out of the disputed land measuring 11 bighas 16 biswas Pukhta was self-acquired/self-purchased land of Jangir Singh out of the funds provided to him by his son Surjit Singh, father of defendant No.1 to 3 and husband of defendant No.4. This fact was proved in the mutation file bearing No.235/ACIG decided by the then Assistant Collector 1st

Grade, Malerkotla in its order dated 21.12.2001. Jangir Singh had been residing with defendant No.1 to 4 and they provided all the necessities of life to him and out of a gesture of love and affection, he bequeathed the property by virtue of registered Will dated 28.09.1990 in favour of defendant No.1 to 3.

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

- “1. Whether plaintiffs are entitled to declaration as prayed for? OPP*
- 2. Whether Jangir Singh deceased executed registered Will dated 11.12.1995 in favour of plaintiffs and defendant No.4? OPP*
- 3. Whether the Will dated 28.9.1990 in favour of defendant No.1 to 3 is false, frivolous, forged, fabricated and fictitious document? OPP*
- 4. Whether mutation No.7028 is illegal, null and void? OPP*
- 5. Whether plaintiffs are entitled to permanent injunction as prayed for? OPP*
- 6. Whether suit is maintainable? OPP*
- 7. Whether Jangir Singh deceased executed registered Will dated 28.9.90 in favour of defendants No.1, 2 and 3? OPD*
- 8. Whether plaintiffs have no locus-standi to file present suit? OPD*
- 9. Relief.”*

In support of pleadings, the plaintiffs examined three witnesses whereas the defendants examined four witnesses.

The trial Court on the preponderance of evidence discarded both the Wills and dismissed the suit, meaning thereby, the property was to devolve by way of natural succession. However, the lower Appellate Court while reversing the finding of the trial Court discarded the Will propounded by the defendants and upheld the Will of the plaintiff and allowed the appeal.

Mr. Salar, learned counsel appearing on behalf of the appellants-defendants submitted that the lower Appellate Court has erroneously discarded the Will dated 28.09.1990 on the premise that the defendants have not challenged the judgment and decree of the trial Court by filing the appeal, for, it was only the plaintiffs who availed the remedy of appeal. He submitted that in case any of the parties aggrieved by the judgment and decree of the trial Court did not avail the remedy of appeal, the adverse party can always assail the finding of trial Court by taking the aid of provisions of Order 41 Rule 33 CPC, thus, the appellants were no required to even file the cross objections. The lower Appellate Court has not discussed the fact that the plaintiffs had not made any effort to prove the Will, for, no explanation has come forth as to how and in what manner the original Will was lost. Even the register of the scribe did not contain any details of the Will. It was obligatory upon the plaintiffs to examine the Sub Registrar, thus, the plaintiffs failed to discharge the onus *vis-a-vis* the Will dated 11.12.1995 propounded by them. A suspicious circumstance was manifested, for, the Will dated 11.12.1995

propounded by the plaintiffs did not disclose the execution of the Will of 1990 as it was also registered one. If the testator had already executed a Will and wanted to execute a fresh Will, there has to be reference of the previous Will. It is, in these circumstances, the trial Court discarded both the Wills, thus, urges this Court for setting aside the judgment and decree rendered by the lower Appellate Court.

Per contra, Mr. Vikas Mehsempuri, learned counsel appearing on behalf of respondent No.3 submitted that the lower Appellate Court being the last court of fact and law has re-appreciated the evidence and correctly held that the Will of 1990 as propounded by the defendants could not be looked into, for, the defendants did not avail the remedy of appeal. Testimonies of PW-2 Garib Dass, attesting witness and PW-3 Sham Lal, Scribe despite extensive cross-examination have not shattered rather were consistent and coherent to state that Jangir Singh was in full sense at the time of execution of the Will, for Jangir Singh died on 7.7.2001 after six years of the Will. It is in these circumstances, the judgment of the trial Court which held that the plaintiffs could not prove the execution of the Will dated 11.12.1995, Ex.P1, had been set aside, thus, urges this Court for upholding the judgment and decree under challenge.

I have heard learned counsel for the parties, appraised the paper book and of the view that it is a fit case where both the Wills are required to be discarded, for, it has come in evidence that PW3, Scribe did not enter complete details of the Will in register nor obtained the signatures of the attesting witness of the Will. The other witness Garib Singh did not depose in terms of Section 63(c) of the

Indian Succession Act, for, he did not utter a word that he appended his signatures/thumb impression on the “Asking Of The Testator” which is one of the essential ingredients of the statute. Though the plaintiffs had been allowed to lead secondary evidence regarding the Will but the lower Appellate Court had non-suited the defendant on the premise that PW1, Hardev Singh was not cross-examined with regard to the loss of Will, for, the case set out by the plaintiffs was that the original Will, Ex.P1 at the time of mutation proceedings was given to the revenue authorities. But when the record was summoned, the original Will not was available. It is in that background, the application aforementioned was filed. Non cross-examination of PW1 regarding the existence of the Will would not tantamount to admission of the Will, for, no effort had been made to summon the record of the Will lying in the office of the concerned Sub Registrar. That was the clinching point to form an opinion with regard to the existence of the Will. For proving secondary evidence, two ingredients i.e. 'existence' and 'loss' are pre-requisites. Sufficing of one requirement would not tantamount to discharge the onus or proving the secondary evidence. Both are complementary to each other and have to be proved. The aforementioned fact was vital for adjudication of the *lis*, thus, in my view, the lower Appellate Court has committed illegality and perversity in decreeing the suit and non-suited the defendants.

I am in agreement with the contention of Mr. Salar that if both the parties had propounded the Will and the trial Court discarded both the Will, if one of the parties i.e. plaintiffs in the

instant case assailed the same by filing appeal under Section 96 of the Code of Civil Procedure, the other party can always assail the finding of the trial Court by taking the aid of provisions of Order 41 Rule 33 CPC without filing any separate appeal. For the sake of brevity, Order 41 Rule 33 CPC reads as under:-

“33. Power of court of Appeal.- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order.”

There is no need to cite any law as the applicability of the aforementioned provisions have been held to be justified in catena

of judgments. Even the witness of the Will propounded by the plaintiffs did not depose in terms of provisions of Section 63(c) of the Indian Succession Act, therefore, I am of the view that the reasoning assigned by the trial Court discarding both the Wills while ordering devolution of property by way of natural succession was correct appreciation of fact and law.

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 Vs. 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 the substantial questions of law. 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 finding, the judgment and decree rendered by the lower Appellate Court is set aside and judgment and decree of the trial Court is upheld. The second appeal is allowed. Decree sheet be prepared accordingly.

(AMIT RAWAL)
JUDGE

May 24, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No