

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA-5355-2017 (O & M)
Date of Decision:15.10.2018

M/s Ambition Poultry Farm

...Appellant

Versus

Jagir Kaur and others

...Respondents

RSA-5637-2017 (O & M)

Balwinder Singh

...Appellant

Versus

Jagir Kaur and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Arjun Kundra, Advocate
for the appellant in RSA-5355-2017 and
for respondent No.3 in RSA-5637-2017.

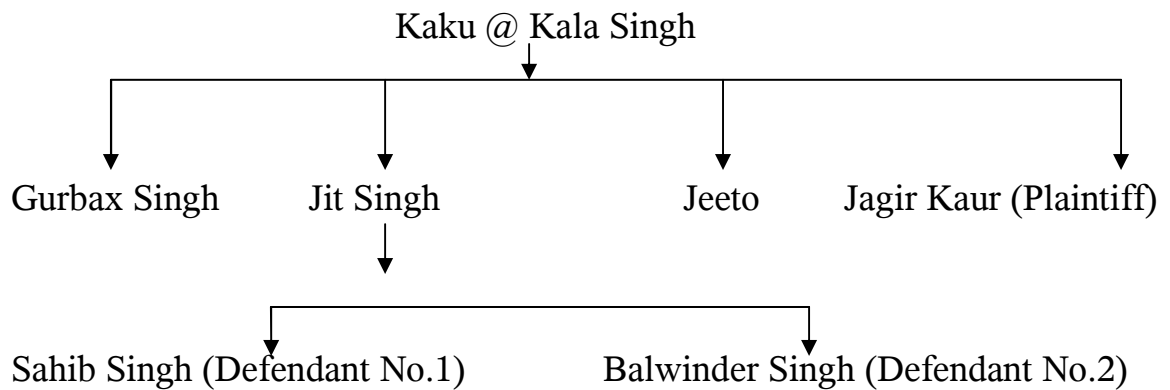
Mr. Parvinder Singh, Advocate
for the appellants in RSA-5637-2017 and
for respondent No.3 in RSA-5355-2017.

Mr. Manvinder Singh Bal, Advocate
for respondent No.1 in both the appeals.

ANIL KSHETARPAL, J.

These two appeals shall stand disposed of by a common judgment as both the appeals are arising out from the same suit. Two different defendants have filed separate appeals.

A short pedigree table would facilitate the Court in understanding the dispute and inter se relationship between the parties.



Plaintiff-Jagir Kaur filed a suit on 09.01.2010 claiming that she is owner in possession of land measuring 48 kanals and 2 ½ marlas being half share of total land measuring 96 kanals and 5 marlas. She also prayed for a decree for joint possession in case the Court comes to a conclusion that possession of the plaintiff is not proved on the land. She also prayed for a decree of permanent injunction. It is claimed in the suit that Gurbax Singh son of Kaku @ Kala Singh was owner of 48 kanals and 2 ½ marlas of land, who died without leaving any Class I heir, being issueless died on 23.02.2009. She claimed that she is only Class II heir, having preferential right as compared to defendants No.1 and 2, who are Sahib Singh and Balwinder Singh, nephews of Gurbax Singh.

It is not in dispute that Jit Singh, the brother and Jeeto, sister of Gurbax Singh had predeceased him. Plaintiff claimed that defendant No.2 has allegedly sold land in favour of defendant No.3-appellant vide sale deed dated 11.01.2010 i.e. during the pendency of the suit although defendant No.2 was not competent to execute any sale deed. Defendant No.2 claims that he is owner of the land left by Gurbax Singh as per Will dated 28.12.2008, which has been found to be fabricated. All the defendants contested the suit. It was pleaded that Kala Singh during his life time had executed a registered Will dated 18.07.1979 in favour of his two sons namely Gurbax Singh and Jit Singh. It was further claimed that Gurbax

Singh out of his love and affection has executed a Will in favour of the defendants. It was admitted that Gurbax Singh died issueless without leaving any Class I heir. Defendant No.3 claimed that it is a bona fide purchaser.

So the entire dispute between the parties is with regard to validity of the Will dated 28.12.2008. The Will dated 28.12.2008 has been got registered after the death of Gurbax Singh on 28.04.2009.

Both the Courts after appreciating the evidence have found as under:-

(i) Original Will dated 28.02.2009, which was registered after the death of Gurbax Singh, the testator, on 28.04.2009 has not been produced. Although, permission to lead secondary evidence was granted and certified copy of the Will has been produced but the Will is surrounded by various suspicious circumstances.

(ii) The alleged Will dated 28.12.2008 makes no reference to his only sister who is alive i.e Jagir Kaur.

(iii) It has come in evidence that an alleged right thumb impression of Gurbax Singh is stated to have been affixed. As per the normal practice and the rules framed for guidance of the document writers, a male is required to affix his left thumb impression, whereas a female is required to put her right thumb impression.

(iv) In the present case, a hand writing and finger print expert has been examined, who has opined about the existence of the right thumb impression but has failed to give any final opinion as no right thumb impression of Gurbax Singh was available for comparison.

(v) Still further, the Courts have found that in the alleged Will name of grand-father of Gurbax Singh has been mentioned as Hukam Singh whereas his name was Gurdit Singh.

Will is not scribed by any regular deed writer and it is alleged to have been got typed from a typist but it does not bear his name. Still further, the Courts have carefully examined the evidence of attesting witness i.e. DW-1-Gurdev Singh, who admitted that he had given a statement before Judicial Magistrate on 27.03.2010 that Gurbax Singh was not known to him. However, he stated that he was threatened by some unknown persons and was forced to sign the said statement. Hence, the Court found that Gurdev Singh is not a reliable witness. Second attesting witness i.e Surjit Singh, the Courts have found that he is father-in-law of Sahib Singh-defendant No.1. He goes on to admit that he has seen the Will on the date when his affidavit for tendering in lieu of examination-in-chief was prepared. He has admitted that Gurbax Singh was living in a separate house and was not being looked after by Sahab Singh and Balwinder Singh. If he had seen the Will on the day his affidavit was prepared, there is no reason why the Will was not produced. Hence, the Courts have found that entire story put-fourth by defendants No.1 and 2 is incorrect.

This Court has heard learned counsel for the parties at length and with their able assistance gone through the judgments passed by the Courts below and the record.

Learned counsel for the appellant submitted that once an application for permission to lead secondary evidence has been allowed, non production of the original Will would not make any difference. He further

is only required to put a mark on the Will and it is not provided that the thumb impression should be right or left. He further submitted that merely because wrong name of grand-father has been written would not be sufficient to doubt the correctness of the Will.

On the other hand, learned counsel appearing for the appellant in RSA-5355-2017 has submitted that if the appeal is to be dismissed, defendant No.3-appellant would be entitled to refund half of the amount paid under sale deed dated 11.01.2010.

As regards first argument of learned counsel for the appellant, it may be mentioned that while allowing the application for secondary evidence, the party is only granted an opportunity to prove the document by leading secondary evidence. The allowing of application for permission to lead secondary evidence does not mean that effect of non-production of the original document is washed away. Still further, the present case is of a Will, execution whereof is being disputed by the plaintiff. Propounder of the Will is required to explain all the suspicious circumstance surrounding the Will.

In such circumstances, it is of utmost importance that thumb impression of the executant is proved to have been affixed on the Will, however, since the original Will has not been produced, plaintiff has been deprived of an opportunity to compare the thumb impression to prove that Gurbax Singh never executed the Will.

In the present case, the Will has been got registered on 28.04.2009 after the death of Gurbax Singh whereas the suit has been filed seven months thereafter. Still further, one of the attesting witnesses when appeared in evidence has stated that he has seen the Will when he signed the affidavit tendered in evidence. In such circumstances, the Court is to examine the validity of the Will.

Still further, no reason has been given why a right thumb impression was affixed and not left thumb impression. It is normal that a male member is required to put his left thumb impression, which is universal practice in the country. Finger print and hand writing expert has clearly stated that he is unable to give his opinion as the thumb impression is of the right hand and no other thumb impression of the right hand is available for comparison. Still further, Gurbax Singh would atleast known what is the name of his grand-father. Once, wrong name of grand-father has been given in the Will that also creates doubt about the correctness of the Will.

In the present case, propounder of the Will i.e. defendants No.1 and 2 have failed to explain the suspicious circumstances as noticed by the Courts below. This Court in exercise of powers of second appeal does not find that such findings arrived at by the Courts below suffer from any perversity.

Next argument of learned counsel for the appellant based upon Section 63 of the Succession Act is to be noticed and rejected particularly with the passage of time and increase in awareness, everyone knows that a male member is to put his left thumb impression whereas a female is required to put her right thumb impression.

Now let us examine the argument of learned counsel for the appellant in RSA-5355-2017.

Learned counsel has submitted that since sale deed dated 11.01.2010 qua half share of the property has been set aside which finding is being affirmed, therefore, the Court should direct refunding of the half of the sale consideration along with expenses. Learned counsel for defendant No.2, who is for the appellant in RSA-5637-2017 had no answer for the

same.

Keeping in view the aforesaid facts, the judgment and decree passed by the learned First Appellate Court is modified and a decree for recovery of half of the amount from the sale consideration including stamp duty and registration charges dated 11.01.2010 is passed in favour of defendant No.3, appellant in RSA-5355-2017, against defendants No.1 and 2. The amount shall be recoverable with interest @ 9% per annum.

Appellant in RSA-5355-2017 has also filed an application for additional evidence in order to produce the judgments passed by Judicial Magistrate, Ist Class dismissing the complaint filed by Jagir Kaur, plaintiff.

In the considered view of this Court, such judgment is neither binding on the civil Court nor it has relevance for the decision of the present case. Still further, the judgment was passed on 17.03.2014 in the presence of defendants No.1 and 2. However, the aforesaid judgment and decree was never produced either before the learned trial Court or before the learned First Appellate Court. Hence, application for additional evidence is also dismissed.

In view of the aforesaid, there is no ground to interfere.

RSA No.5637 of 2017 is dismissed whereas RSA No.5355 of 2017 is partly allowed.

All the pending miscellaneous applications, if any, are disposed of, in view of the above said judgment.

15.10.2018

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(ANIL KSHETARPAL)

JUDGE

Whether Speaking/Reasoned : Yes/No
Whether Reportable : Yes/No