

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

RSA No.620 of 2017

Angrej Kaur and Ors.

...Appellants

Versus

Manjeet Kaur and Ors.

....Respondents

Date of Order: 15.5.2018

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. P.S. Poonia, Advocate for the appellants.

Mr. Baldev Singh Badhran, Advocate for the respondents.

AMIT RAWAL, J (ORAL)

The LRs of defendant No.2-Joginder Singh have challenged concurrent judgments and decrees passed by both the courts below whereby suit filed by the plaintiffs for declaration claiming ownership in equal shares on the basis of will dated 25.11.1992 executed by Labh Singh in respect of land measuring 19 kanal 19 marlas with consequential relief of permanent injunction restraining the defendants from alienating the suit property has been decreed vide judgment and decree dated 18.12.2015 passed by learned Civil Judge (Jr. Division), Sirsa and the lower Appellate Court vide judgment and decree dated 12.12.2016 while allowing the cross objections of the plaintiffs dismissed the appeal of the defendants.

The brief facts, which emanates from the pleadings are that the plaintiffs instituted the suit on the premise that one Kanha Singh was the common ancestor of the parties to the suit. Said Kahna Singh had four sons namely Jagan Singh, Joginder Singh, Dilawar Singh and Labh Singh.

Joginder Singh and Dilawar Singh pre deceased Kanha Singh. It was averred that Ajmer Singh in the year 1964 was adopted by Labh Singh (at the age of six months). Labh Singh died on 05.2.1993 whereas Ajmer Singh died on 18.2.2010. Owing to the death of Labh Singh, mutation was effected as per natural succession, which was totally illegal, null and void, for, Labh Singh during his life time executed a will dated 25.11.1992 in favour of Ajmer Singh as he was adopted son. The respondents-plaintiffs approached the defendants with the request to get the revenue record corrected but the said request was not acceded to, which gave rise to file the suit.

Upon notice, the suit was contested by the contesting defendants particularly by Jagan Singh, who was arrayed as defendant No.1. Said Jagan Singh died during the pendency of the suit. It was averred that Ajmer Singh was not his natural son much less nor adopted by Labh Singh. Pleas of limitation as also no accrual of cause of action were also taken.

From the pleadings of the parties, the following issues were framed by the trial court:

- “1. Whether the plaintiffs are entitled for the decree of declaration and possession as prayed for?OPP*
- 2. Whether plaintiffs are also entitled for injunction, if any?OPP*
- 3. Whether suit of the plaintiffs is not maintainable in the present form?OPD*
- 4. Whether plaintiffs have no locus standi and cause of action to file the present suit?OPD*
- 5. Whether plaintiffs have not come to the court with clean hands and have concealed the true and material facts from the court?OPD*
- 6. Whether the suit is hopelessly time barred?OPD*

7. Relief.”

In order to prove their case, plaintiffs examined two witnesses besides tendering documents i.e Ex.PA Original Will dated 25.11.1992, Ex.P1 Ration Card issued at Delhi, Ex.P2 Death certificate of Mukand Kaur, Ex.P3 Copy of death certificate of Labh Singh, Ex.P4 copy of ration card of Ajmer Singh, Ex.P5 copy of birth certificate of Simran Kaur as also Ex.P.6 to Ex.P20.

On the other hand, the defendants examined three witnesses i.e DW1-Gurmit Singh, Balwinder Singh, Patwari as DW2 and Ram Singh, Lamberdar as DW3 besides bringing on record documents Ex.D1 to Ex.D4 and Ex.DW2/A and Ex.DW3/B.

On the basis of preponderance of evidence, the trial Court decreed the suit of the plaintiffs but did not grant relief of possession. The appeal preferred by the defendants was dismissed but cross objections of the plaintiffs were allowed by the lower Appellate Court.

Learned counsel for the appellants-LRs of Joginder Singh son of Kanha Singh submitted that both the courts below have not correctly appreciated the evidence as well as law in correct perspective, for, the Will dated 25.11.1992 has not seen the light of the day as Labh Singh died on 05.2.1993 and Ajmer Singh expired on 18.2.2010 whereas the suit was filed on 03.4.2013. During the proceedings viz-a-viz estate of Labh Singh when initiated in the year 1995, share devolved upon the appellants-defendants, two brothers and their successors being collateral as per natural succession. Jagan Singh denied Ajmer Singh to be his son. No evidence as per provisions of Section 50 of Indian Evidence Act has been led to prove that he was born from the loins of Jagan Singh. Even the column against the

children in the Passport was blank. He submitted that the suit was also barred by limitation as the plaintiffs failed to establish that Ajmer Singh was biological son of Jagan Singh. Statement of LR of Jagan Singh before framing of the issues as noticed by the trial Court was not on oath and could not have been looked into, for, the plaintiff failed to prove that Ajmer Singh was actually adopted by Labh Singh. Though PW3-Surjit Kaur in her statement stated that Ajmer Singh was adopted by Labh Singh as he was issueless but in her cross examination, she admitted that she was tutored and was requested by the plaintiff to depose in her favour. He further submitted that the provisions of Section 63-C of the Indian Succession Act have not been complied with, therefore, the suit was liable to be dismissed.

Per contra, learned counsel for the respondents-plaintiffs submitted that as per Section 68 of Indian Evidence Act and Section 63(C) of the Indian Succession Act, it is mandatory that Will should be attested by two or more witnesses and where one attesting witness fails to prove execution of Will, the execution may be proved by other evidence. He submitted that even in the cross examination of Bhupender Kaur-attesting witness, nothing contrary surfaced to discard the Will. Even PW3-Surjit Kaur deposed with regard to adoption of Ajmer Singh by Jagan Singh, therefore, there is compliance of Section 50 of the Indian Evidence Act. Actually, there was a fraud played upon the plaintiffs qua estate of Labh Singh in the year 1995. There is no limitation prescribed for claiming the title. Moreover, concurrent findings of facts cannot be brushed aside unless and until there is gross illegality and perversity, which has not been pointed out, during the course of the hearing, thus, urges this Court for upholding the judgments and decrees, under challenge.

After hearing learned counsel for the parties and appraising the paper book, I find force and merit in the submissions made by learned counsel for the appellants. In her cross examination, Bhupender Kaur-PW2 did not utter a word that she appended her signatures on the direction of the testator, thus, it is apparent that she 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.

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.

Moreover, 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 question, which is posed herein, is whether in these facts and circumstances of the present case, the respondents-plaintiffs have been able to prove Ajmer Singh to be son of Jagan Singh, for, there is categorical denial to this effect in the written statement. The courts below rendered the findings with regard to adoption of Ajmer Singh in favour of the respondents-plaintiffs by relying upon the statement of the LRs recorded before the settlement of issues. I am afraid that such findings are not sustainable, for the LRs had not sought permission of the courts below to file separate written statement, for, Jagan Singh had died after filing of the written statement.

Neither any material has been brought on record by the plaintiffs to establish that Ajmer Singh was ever biological son of Jagan Singh nor any evidence in terms of Section 50 of the Indian Evidence Act has been led that he was ever adopted by Labh Singh. It was obligatory upon the plaintiffs to establish these facts particularly when specific objections in the written statement qua denial of relationship was averred. The lower Appellate Court being the last court of law and facts has

committed fallacy much less perversity in granting the relief of possession. Status of the plaintiffs would be of a co-sharer and relief of exclusive possession in the absence of partition cannot be granted.

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, so there is need to frame the substantial questions of law or not. 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 appeal, aforementioned. For the foregoing reasons,
the judgments and decrees of the Courts below are not sustainable in the
eyes of law and the same are set aside.

With the aforesaid observations, the appeal stands allowed.

May 15, 2018
manoj

^(AMIT RAWAL)
JUDGE

Whether speaking/reasoned: Yes/No
Whether Reportable : Yes/No