

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

**RSA No.1858 of 1990 (O&M)
Date of Decision.14.02.2019**

Gurbachan Singh (now deceased) through LRs ...Appellant

Vs

Surjit Singh (now deceased) through LRs and others
...Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. K.S. Dhillon, Advocate
for the appellant.

Mr. RKS Brar, Advocate and
Mr. Kuldeep Singh Saini, Advocate
for the respondents.

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AMIT RAWAL J. (ORAL)

The present regular second appeal is directed at the instance of the appellant-plaintiff, Gurbachan Singh, who was successful in the trial Court in Civil Suit No.140 of 1985/160 of 1986 titled as “Gurbachan Singh Vs. Jarnail Singh and others” but failed in lower Appellate Court in the appeal preferred by Surjit Singh-defendant No.2. Another suit was filed by one Amrik Singh bearing No.84 of 1985 titled as “Amrik Singh Vs. Jarnail Singh and others” which was dismissed by both the Courts below but no second appeal has been preferred assailing the aforementioned judgments.

Gurbachan Singh instituted the suit for declaration for joint possession of land bearing:-

(a) Khewat No.288, Khatauni No.495, Rect. No.11, Killa Nos.11/2 (0-12), 20/1(6-4), 20/2(1-16), 21 (7-11), Rectangle No.12, Killa Nos.16(6-12), 17(5-11), 24(7-

11), 25(7-11), 28(0-10), Rectangle No.15 Killa Nos.4/1 (3-9), 5/1(4-4) and khasra numbers 151(0-14), 160(0-8), 253(0-13) total area measuring 53K-6M, as owners to the extent of $\frac{1}{2}$ share as entered in the jamabandi of the estate of Talhan, Tehsil Jullundor for the year 1978-79.

(b) 24/205 share of Khewat/Khatauni Nos.72, 76, 77/130, 136, 137, khasra No.12//11/1/2(4-7), 11//15(8-0), 11//14(8-0) as owner to the extent of $\frac{1}{2}$ share of the said 24/205 share

(c) the total land comprising Khewat Khatauni No.80/143, 144, khasra Nos.11//23/1(1-2), 14//1/1 (0-12), 11//16(7-13), 17(6-12), 18(8-0), 19/1(7-12) as entered in the jamabandi of the estate of village Damodarpur, Tehsil Jullundur for the year 1977-78, as owner to the extent of $\frac{1}{2}$ shares.

It was explained that Phuman Singh, who died on 21.11.1981 left behind Jarnail Singh, defendant No.1 and Gurbachan Singh his brother, plaintiff as sons and Chanan Kaur, Swarn Kaur and Mohinder Kaur as daughters. Gurbachan Singh was blessed with sons Amrik Singh, Jaswinder Singh, Gurdev Singh and daughter Jadwinder Kaur whereas Jarnail Singh blessed with son Surjit Singh. Plaintiff, Gurbachan Singh, propounded a Will dated 08.09.1978 executed by Phuman Singh in favour of his sons namely Gurbachan Singh, plaintiff and Jarnail Singh, defendant No.1 whereby he bequeathed his entire estate in equal shares. It was alleged that Surjit Singh on one hand and defendants Gurdev Singh, Jaswinder Singh,

Yadwinder Singh and Amrik Singh propounded a separate Will of Phuman Singh, which in fact was not executed, as the Will in favour of plaintiff and defendant No.1 was stated to be genuine and natural.

In para 4, it was alleged that in case the Will propounded found to be not genuine then plaintiff and defendants No.1 and 8 to 10 i.e. sisters entitled to succeed in equal shares i.e. 1/5th share by way of natural succession. Surjit Singh son of Jarnail Singh, defendant No.2 alleged to have purchased the property vide four sale deeds dated 20.06.1979, 30.07.1979, 20.09.1979 and 14.04.1980 allegedly executed by Phuman Singh, which were an outcome of fraud, misrepresentation and without consideration, as Phuman Singh was neither capable nor had capacity. The factum of the sale deeds was not disclosed by Surjit Singh.

Defendants No.1 and 2, Jarnail Singh and Surjit Singh, both father and son, filed joint written statement and alleged that khasra No.253 was not owned by Phuman Singh and raised objection qua non-impleadment. On merits, they did not deny ownership of land by Phuman Singh but admitted execution of Will dated 08.09.1979 in favour of Gurbachan Singh and Jarnail Singh, which were stated to be executed under pressure and by playing fraud. In fact, Phuman Singh when realized the aforementioned fact, executed a fresh Will dated 12.12.1979, Ex.D1 in favour of Surjit Singh, defendant No.2 in his sound mind, owing to the services rendered by Surjit Singh. Even the last rites were performed by Surjit Singh by spending a sum of ₹15,000/-.

Other defendants filed written statements and denied any

Will was executed.

Replication was filed whereby correct khasra No.353 was given instead of khasra No.253 and denied execution of the Will dated 12.12.1979.

Amrik Singh had also filed suit, which was also clubbed along with aforementioned suit filed by Gurbachan Singh. The Will dated 08.09.1978 had been exhibited as Ex.DW2/1, 12.12.1979 as Ex.D1 and 19.05.1969 propounded by Amrik Singh in suit was exhibited as Ex.P1. It would not be necessary to refer to pleadings as the civil suit filed by Amrik Singh was dismissed by both the Courts below and the finding had not been assailed before this Court, thus, the dispute in the present appeal revolves around adjudication of two Wills and four sale deeds mentioned above.

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

- “1. Whether the land in dispute is the joint ownership of the parties? OPP*
- 2. Whether the plaintiff has locus standi to file this suit? OPP*
- 3. Whether the suit is bad for non-joinder of necessary parties? OPD*
- 4. Whether the suit is not maintainable in the present form? OPD*
- 5. Whether the suit is barred by time? OPD*
- 6. Whether Phuman Singh executed valid Will on 19.5.69 in favour of plaintiff and defendants No.4 to 6?*

OPP

7. Whether Phuman Singh executed valid Will in favour of Jarnail Singh from Gurbachan Singh on 8.9.78? OPD

8. If the above issue is proved, whether the sale deed was cancelled by Phuman Singh? OPD

9. Whether the sale deed was executed by Phuman Singh in favour of Surjit Singh? OPD

10. If the above issue is proved whether the sale was without consideration and as a result of fraud, misrepresentation and loss? OPP

11. Whether Phuman Singh executed Will in favour of Surjit Singh on 12.12.1979? OPD

12. Whether the plaintiff is stopped by his own act and conduct to file the present suit? OPD

13. Relief.”

The plaintiff in order to prove the Will examined himself as PW1, Joginder Singh as PW2 and Lalit Mohan as PW3 whereas defendants examined Lalit Mohan DW1, Dalip Singh DW2, Gurbachan Singh DW3, Jagir Singh DW4, Sukhdev Raj DW5, Sarwan Singh DW6, Lalit Mohan DW7, Malkiat Singh DW8, Mohinder Pal DW9, Rachhpal Singh DW9, Surjit Singh DW10 and Swaran Kaur DW11.

The Will Ex.DW2/1, being registered document, was attempted to be proved through the testimony of DW2 Garib Singh, Naib Tehsildar at the relevant point of time whereas in the Will dated 12.12.1979, Ex.D1 propounded by Surjit Singh son of Jarnail Singh

and the sale deeds, the common witness was Jagir Singh. As per the aforementioned sale deeds, Phuman Singh had sold 54 kanals plus Haveli and two taurs to his grandson for consideration of ₹1,10,000/- out of which ₹64,000/- were paid in cash before the Sub Registrar and ₹46,000/- at home. DW11 Dr. Chitkara was none else but the doctor, who stated that Phuman Singh was suffering from mental illness.

The trial Court decreed the suit of Gurbachan Singh and dismissed the suit of Amrik Singh. The appeal was filed by Surjit Singh being the beneficiary of the Will dated 12.12.1979, which had been allowed. It is in these circumstances, regular second appeal had been filed by plaintiff-Gurbachan Singh.

Mr. K.S. Dhillon, learned counsel appearing on behalf of the appellant in support of the memorandum of appeal raised the following submissions:-

(i) It was natural for a father to bequeath the property in favour of two living sons i.e. Jarnail Singh and Gurbachan Singh by way of Will dated 08.09.1978, Ex.DW2/1.

(ii) Surjit Singh failed to prove on record any material to establish that he was rendering services to Phuman Singh, which gave cause to him to execute Will dated 12.12.1979 in his favour by disinheriting all the legal heirs.

(iii) Defendants admitted execution of the Will dated 08.09.1978 Ex.DW2/1 but had not been able to give plausible reasons of executing subsequent Will in

favour of Surjit Singh grandson by taking away right of living sons i.e. plaintiff and Jarnail Singh, father of Surjit Singh.

(iv) Garib Singh, Naib Tehsildar, DW2 proved the Will and his statement was in terms of provisions of Section 63-C of the Indian Succession Act. He was subjected to cross-examination but nothing contrary surfaced. Rather it has come in the evidence that in the month of August, 1979, Phuman Singh was admitted in civil hospital, Jalandhar and was treated there for some days.

(v) Defendants failed to prove any evidence to support contents of the Will whereby Phuman Singh stated to have deviated from the line of succession for the reason that in the earlier Will he gave equal share to both of his sons i.e. Gurbachan Singh and Jarnail Singh in respect of ancestral property.

(vi) The sale deeds were without consideration as on death of Phuman Singh, only a sum of ₹2500/- was found on his person and account balance was nil, thus, urges this Court for setting aside judgment and decree of the lower Appellate Court by restoring the judgment and decree of the trial Court.

On the other hand, Mr. R.K.S. Brar & Mr. Kuldip Singh Saini, learned counsel appearing on behalf of the respondents No.1 and 9 supported the sale deeds by contending that they were executed during the life time of Phuman Singh and he lived for approximately

one year and no challenge was laid, therefore, fraud and misrepresentation cannot be said to have been played upon him. It is common practice amongst the children to assail the act done by common ancestor, after, his demise. DW4, Jagir Singh proved execution of the Will as well as sale deeds in favour of Surjit Singh. The deed writer read over contents of the Will to Phuman Singh, who thumb marked the same after admitting it to be true and he attested the same as a witness and also identified the thumb impression of Phuman Singh. Phuman Singh was in sound disposing mind for a period of four years before his death, thus, urges this Court for dismissal of the appeal.

I have heard learned counsel for the parties, appraised the paper book and of the view that following substantial question of law arises for consideration:

“Whether judgment and decree of the lower Appellate Court being the last court of fact and law suffer from perversity in not reading contents of the Will dated 12.12.1979 in correct perspective and whether in such circumstances, Will dated 08.09.1978, Ex.DW2/1 would prevail or not?”

It would be apt to reproduce para 2 of the plaint and corresponding para of the written statement of Jarnail Singh and Surjit Singh, defendants No.1 and 2, which are extracted herein below:-

“Para 2 of the plaint.

2. That Shri Phuman Singh executed a Will dated

8.9.1978 in favour of his sons Gurbachan Singh plaintiff & Jarnail Singh defendant bequeathing his estate to them in equal share.

Para 2 of written statement on behalf of defendants No.1 and 2 on merits.

2. Para No.2 of the plaint is correct to this extent that Shri Phuman Singh executed a Will dated 8.9.1978 in favour of Gurbachan Singh and Jarnail Singh. It may be submitted that the said Will has got executed by Shri Gurbachan Singh under pressure and fraudulently and subsequently when Shri Phuman Singh experienced that the said Shri Gurbachan Singh or Jarnail Singh neither give any respect nor render any service to him and it is only Surjit Singh defendant who is rendering him all sort of services in all spheres of his life so much so that Surjit Singh had been maintaining said Shri Phuman Singh according to status, choice, happiness of Shri Phuman Singh and he got cancelled the said will and executed a valid will in favour of said Shri Surjit Singh in sound disposing mind keeping in view the services rendered by said Surjit Singh and thus the properties of Shri Phuman Singh devolved upon Surjit Singh as per will and wishes of Shri Phuman Singh (copy attached)."

From the perusal of above, what is deciphered is that defendants did not deny execution of the Will dated 08.09.1978 but attempted to give explanation that the aforementioned Will was cancelled and another fresh Will was executed in favour of Surjit

Singh by Phuman Singh in his sound disposing mind, in view of the services rendered by him. Jagir Singh in cross-examination also admitted that Phuman Singh had executed two Wills i.e. one in favour of Surjit Singh and another in favour of Gurbachan Singh, Jarnail Singh, his sons and he was witness in both the Wills. He explained that after death of his wife Gurbachan Singh was residing with his son. Jarnail Singh was also used to reside in the same house. It was explained that Phuman Singh was rich person and was known as 'shah'. Jarnail Singh was cultivating land of Phuman Singh. Phuman Singh got some land in lieu of land left by him in Pakistan and some was purchased by him. He was not having any other income except from his land. He further stated that Surjit Singh was residing at well in the fields while Jarnail Singh resided in the house in village. However, in his cross-examination, he stated that Phuman Singh was in sound disposing mind at the time of execution of Will. He, Phuman Singh and other attesting witness appeared before the Registrar for getting the Will registered but before that Phuman Singh thumb marked the said Will in his presence and other witness. He also signed the Will as attesting witness. Similarly Garib Singh in examination-in-chief stated that Phuman Singh admitted the Will to be correct and thumb marked the same in his presence as well as in the presence of witnesses and attested in his presence. Section 63 (c) of the Indian Succession Act 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.”

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.

Both the witnesses have not deposed in terms of aforementioned provisions. Will Ex.D1 is hand written. From the tenor and mode of the Will, which was read out during the course of hearing, it is evident that there is variation in the spacing on the first page with an attempt to adjust the Will on the next page as thumb impression was there in the middle of the page. It appears that they have been adjusted on blank papers and was submitted to the Sub Registrar for registration. Even if the Will is registered, element of

suspicion cannot be ruled out. Both the Courts below have not noticed this fact. This court is not precluded to re-examine contents of the Will.

As regards the execution of the sale deeds, in my view, plaintiffs have miserably failed to prove fraud and misrepresentation as out of four sale deeds, three are of June, July and September 1979 and one April, 1980 whereas Phuman Singh died in 1981. He lived during all this period. It is not the case of the plaintiff that the suit property was ancestral at the hands of Phuman Singh and therefore, had right by birth. It was self-acquired property and he could have dealt with it in the manner he wanted to. Order 6 Rule 4 CPC envisages not only pleading but evidence to that effect.

As an upshot of my finding, I am of the view that both the Courts below have not noticed aforementioned facts and in such circumstances, both the Wills are discarded. The estate of Phuman Singh, which is not the subject matter of the sale deeds would thus be inherited to the extent of 1/5th share in favour of all the children (siblings). In view of such circumstances, finding of the lower Appellate Court qua sale deeds to be for valid consideration is upheld. The substantial question of law is answered in the aforementioned manner. Resultantly, the second appeal is partly allowed.

(AMIT RAWAL)
JUDGE

February 14, 2019
Pankaj*

Whether Reasoned/Speaking Yes

Whether Reportable No