

RSA No.217 of 1989 (O&M)

{1}

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

RSA No.217 of 1989 (O&M)

Date of decision:27.5.2019

Darshan Singh and another

... Appellants

Vs.

Dhanna Singh and others

... Respondents

RSA No.2318 of 1988 (O&M)

Malkiat Singh and others

....Appellants

Vs.

Dhanna Singh and others

....Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Ashok Jindal, Advocate
for the appellants (in both cases).

Mr. Neeraj Khanna, Advocate for
Mr. Deepak Suri, Advocate
for the respondents (in both cases).

AMIT RAWAL J.

This order of mine shall dispose of two regular second appeals filed by two sets of defendants i.e. RSA No.217 of 1989 by defendants no.1 and 2 and 2318 of 1988 by defendants no.3, 5, 7, 8, 9, 10, 12 and 13 arisen out of decision rendered in civil suit no.139 dated 14.6.1980.

Dhanna Singh and Niranjana Kaur, plaintiffs instituted civil suit no.139 for possession of agricultural land measuring 20 kanals 1 marla situated in village Surakhpur and land measuring 64 kanals 8 marlas in village Mandi Surakhpur on the premise that Gajinder Singh during his life time was originally owner in possession of the property in dispute. He died

on 18.01.1972, and defendants no.1 and 2 had taken the forcibly possession of suit properties. Revenue authorities on the basis of un-registered Will dated 03.12.1971 executed in their and Dial Kaur's favour, whereas plaintiffs being legal heirs have absolute right to succeed the estate. The Assistant Collector Grade I mutated the land of deceased in favour of the plaintiffs to the extent of 2/3 equal share and 1/3 share in favour of Dial Kaur and Chanan Kaur jointly declaring them to be widows of deceased which was totally incorrect as Chanan Kaur was divorced wife of deceased and during life time of Gainda Singh, had married to Jagat Singh. Dial Kaur was never married to deceased, therefore, could not be termed as wife. Will produced by defendants was false and fictitious document. During the pendency of litigation in the revenue department, defendants no.1 and 2 have sold, mortgaged and exchanged the land out of the disputed land with defendants no.3 to 17 in collusion with defendants no.1 and 2.

Defendants no.1 and 2 filed joint written statement and objected to maintainability of suit, much less locus standi and its valuation. On merit, ownership of land by Gainda Singh was admitted but denied that plaintiffs after the death succeeded to the property, much less forcible possession. In fact, initially, mutation was sanctioned in their favour but was upset by Assistant Collector Grade I. Dial Kaur was widow of deceased Gainda Singh and Chanan Kaur was the wife of Jagat Singh. She had no relation with Gainda Singh and plaintiffs are not legal heirs of Gainda Singh and Dial Kaur. Defendants no.1 and 2 being legal heirs on the basis of Will dated 3.12.1971 closely related to the testator being sister's son of Gainda

Singh. Factum of plaintiffs No.1 and 2 being son and daughter of Gaimda Singh was emphatically denied.

Defendants No.3 to 10, 12 and 13 filed separate written statement and raised objection qua maintainability and claimed themselves to be bonafide purchasers in terms of provisions of Section 41 of Transfer of Property Act and sought retention of possession. The plaintiffs always represented themselves children of Jaggu alias Jagat Singh.

Defendant no.11 filed separate written statement and alleged that Darshan Singh and Pritam Singh sons of Narain Singh executed a registered mortgaged deed dated 26.3.1979 with regard to land measuring 80 kanals.

Defendant no.14 also filed a separate written statement but admitted the claim of plaintiffs.

Defendants no.15 to 17 opposed the suit by raising objection qua locus standi and alleged that Dial Kaur had every right to sell the land in favour of defendants as she was legally wedded wife of Gaimda Singh.

The plaintiffs filed replication and denied all the averments.

From the pleadings of the parties, trial Court framed following issues:-

“1 Whether Smt. Chanan Kaur was the wife of Gaimda Singh?OPP

1-A If issue no.1 is proved, whether she divorced Gaimda Singh and contracted marriage with Jagat Singh. If so, its effect?OPP

2. *Whether Sh. Gainda Singh deceased executed a valid Will dated 3.12.1971 as alleged?OPD*
3. *Whether the alienation, mortgages and exchanges in favour of defendants no.3 to 17 are void as alleged?OPP*
4. *Whether the plaintiffs are the exclusive heirs of Gainda Singh and Dial Kaur deceased as alleged?OPP*
5. *Whether the suit is properly valued for the purpose of Court fee and jurisdiction?OPP*
6. *Whether the plaintiffs have locus standi to succeed?OPP*
7. *Whether the plaintiffs are murder of Smt. Dial Kuar and such cannot claim her inheritance? OPDefendants no.1 and 3.*
8. *Whether the defendants no.5 to 8 are minors? If so its effect?OPD*
9. *Whether the defendants no.3 to 17 except no.14 are bonafide purchasers for consideration without notice?OPD*
10. *In case the Will is not proved which is the party to the plaintiffs or defendants no.1 and 2 are the near heirs of Gainda Singh deceased?OP. Parties.”*

Plaintiffs in support of their case examined as many as 08 (eight) witnesses : PW1-Dhanna Singh, PW2-Kishan Chand, PW3-Sohan Singh, PW4-Bahadur Singh, PW5-Naranjan Kaur, PW6-Hari Singh, PW7-K.S.Puri and PW8-Bachattar Singh. On the contrary, defendants examined DW1-Chanan Kaur, DW2-Jang Bahadur, DW3-Piara Singh, DW4-Harbans Singh and various other witnesses and brought on record umpteen number

of documents like statement, sale deeds, mortgage deed etc.

- (i) The question which arose before trial Court whether Gaimda Singh had two wives namely Chanan Kaur and Dial Kaur?
- ii) Whether marriage with Chanan Kaur was valid?

On going through the evidence, trial Court rendered the finding on issue nos.1 and 1-A in favour of plaintiffs and held that divorce of Gaimda Singh with Chanan Kaur was not proved but desertion stood proved.

On preponderance of evidence, issue no.2 qua Will was decided in favour of plaintiffs no.1 and 2 and Dial Kaur.

Regarding issue no.1 i.e., plaintiffs being exclusive heirs of Gaimda Singh and Dial Kaur by relying upon finding on issue no.1-A was decided in favour of plaintiffs.

The findings on issue nos.3 and 9 were rendered by holding that there was no evidence of mortgage and exchange in favour of defendants by noticing sale deeds Ex.DX1 to Ex.DX7, executed by defendants no.1 and 2 in favour of defendants no.3 to 17. The sale deeds, Ex.DW15/4/1, Ex.DW15/4/2 and Ex.DW15/4/3 were held to be proved in favour of defendants no.15 to 17 by noticing that mutation of Gaimda Singh was sanctioned in favour of plaintiffs and Dial Kaur to the extent of 1/3 share each, rejected the plea of defendants to be bonafide purchasers for consideration and without notice, in result, decreed the suit by holding plaintiffs and Dial Kaur to be owners of the property but held defendants no.15 to 17 to be bonafide purchasers for consideration from Dial Kaur, one of the heir of Gaimda Singh, who succeeded to the property of deceased to

the extent of 1/3 share and sold her share so defendants no.15 to 17 succeeded to the property in dispute to the extent of 1/3 share each.

Four appeals were filed i.e. civil appeals no.34, 35 and 37 by various set of defendants and appeal no.36 by plaintiffs. The lower appellate Court dismissed all the appeals. It is in these circumstance, present appeals by two set of defendants have been filed.

Mr.Ashok Jindal, learned counsel appearing on behalf of appellants submitted that plaintiffs miserably failed to lead evidence in terms of Section 50 of Indian Evidence Act to establish that they were born out of wedlock of Chanan Kaur and Dial Kaur. The statement of Dial Kaur if read leads to irresistible conclusion that at time of marriage, she was 11 years old whereas as per statement suffered in 1973, her son was 27 years old that means he had taken birth in 1946 and cannot believed that from 1932 when her marriage was performed till 1947, she did not have any child as no proof of Naranjan Kaur being elder daughter has come on record. Voter list, Ex.D15 has not been rebutted which in no manner prove that Dhanna Singh and Chanan Kaur had been shown to be son and wife of Jagat Singh whereas all the witnesses who have given factum of alleged marriage and relationship between Chanan Kaur and Gainda Singh were not the close relatives.

Dhanna Singh's birth certificate Ex.DW1/2 reveals his date of birth as 10.01.1952. There is stark difference between statement of Chanan Kaur and aforementioned document. Appellant-defendants no.1 and 2 are none-else but nephews (bhanja) of Gainda Singh (sister's son) as he was

issueless. Dial Kaur has been proved to be wife of Gainda Singh and therefore, her share to the extent of 1/3 share in favour of defendants no.15 to 17, had been protected. There was no occasion for the Courts below to deny the benefit of Section 41 of Transfer of Property Act qua other sale deeds i.e. other 2/3 share.

Both Courts below abdicated in not referring to the statement of Wazir Singh, Scribe, who had been candid, coherent and consistent regarding execution of Will, much less did not disclose that Gainda Singh had married with Chanan Kaur and plaintiffs being his children. Ex.DX revenue record reflected the parentage of Gainda Singh as Jagat Singh. Similarly, jamabandi for the year 1970-71, Ex.DX1. Both Courts below abdicated in not referring to the documents particularly Lower Appellate Court being the last Court of fact and law. Diwan K.S.Puri statement cannot be believed as there was no occasion for him to compare the admitted signatures on the Will with other one. The plaintiffs attempted to place on record jamabandis and khasra girdawari by way of additional evidence. The trial Court vide order dated 1.2.1986 declined the same. In fact, Dial Kaur was murdered and plaintiffs were involved in FIR.

Per contra, Mr. Neeraj Khanna, learned counsel appearing on behalf of the respondents submitted that concurrent findings of fact and law cannot be interfered until and unless there is gross illegality and perversity. All witnesses as noticed by trial Court, have been categoric and coherent in proving that Chanan Kaur was the daughter of Gainda Singh and was turned out of house, thus, started living with Jagat Singh as his wife. The

defendants have failed to prove execution of Will. Witnesses of Will have not been coherent and consistent and not deposed in terms of provisions Section 63-C of Indian Succession Act. Report of K.S.Puri, document and handwriting expert reveals that thumb impressions on Will were not of Gaimda Singh. The alleged documents of revenue record and voter list have not been proved on record in accordance with law and therefore, rightly rejected by Courts below. The plaintiffs' witnesses deposed with regard to relationship of Chanan Kaur with Gaimda Singh and act of dissertation.

The defendants attempted to place on record many documents by way of additional evidence but the application was dismissed. Dhanna Singh and Chanan Kaur in examination-in-chief could not be shattered despite extensive cross-examination. The revenue appellate authority sanctioned the mutation in favour of plaintiffs by rejecting report of Patwari. DW3-Mohan Singh, Lambardar, alleged witness of Will could not prove execution of Will. In fact, Gaimda Singh and Jagat Singh were residing in same ahata and had common courtyard which was partitioned by small wall. The courtyard having 3-4 feet in height. Statement of DW5-Hazari Lal, Headmaster could not be looked into as he could not prove Dhanna Singh to be son of Jagat Singh. The trial Court and Lower Appellate Court examined the evidence threadbare and by noticing coherent and consistence evidence formed positive finding in favour of plaintiffs being children of Gaimda Singh and thus, urged this Court for dismissal of appeals.

I have heard learned counsel for parties, appraised judgments and decrees as well as record of Courts below and of view that there is force and merit in submissions of Mr. Ashok Jindal.

In view of the latest judgment rendered by the Hon'ble Supreme Court in **Civil Appeal No.4988 of 2019 titled as Kirodi (since deceased) through his LRs vs. Ram Parkash and others decided on 10.05.2019**, Substantial Question of Law in respect of regular second appeal is not required to be framed as provisions of Section 41 of the Punjab Courts Act, 1918 would be applicable.

It would be apt to reproduce Section 50 of Indian Evidence Act which lays heavy onus upon the party asserting deceased or a person whose estate is under consideration through testimony of witnesses:-

“50. Opinion on relationship, when relevant.—When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, or any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact: Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869) or in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860). Illustrations

(a) The question is, whether A and B were married. The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(b) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant. Comments Contradiction in evidence of relationship of witness of trifle nature, not material in a partition suit;”

All the witnesses except Dhanna Singh and Chanan Kaur, were not relatives of family of Gaimda Singh. Dhanna Singh in cross-examination admitted that plaintiff no.1 did not perform last rites as he received the information of death from Naranjan Kaur through telegram i.e. after 20 days but there is no such evidence. On the contrary, status of defendants no.1 and 2 being children of sister of Gaimda Singh was not denied. They being Class II heirs had right to succeed to the estate of Gaimda Singh. Dial Kaur always contested mutation of 2/3 share in favour of plaintiffs. Birth certificate, voter card and revenue record noticed above reflected Dhanna Singh to be son of Jagat Singh. In fact, no iota of evidence has been placed on record except oral testimony, though testimony of one of the witnesses, it has come on record that there was common courtyard. Probably under these circumstances, plaintiffs staked the claim believing that Gaimda Singh was their father. Science of DNA has come little later, had it been there, chaff could have been removed from the grain.

Be that as it may, even if the defendants have not been able to

prove Will but relationship of nephews has been admitted. The plaintiffs, in my view, as per evidence, failed to prove to be children of Gainda Singh. Dhanna Singh was cross-examined by various witnesses. There was no challenge to the sale deeds executed by defendants no.1 and 2 and Dial Kaur, though sale deed of Dial Kaur in favour of defendants no.15 to 17 had been held valid.

It is settled law that a person who asserts right particularly in a suit for possession has to discharge the onus strictly as per the provisions of Section 101 of Indian Evidence Act.

The plaintiffs miserably failed to prove their pleaded case through direct and cogent evidence except bald witnesses which cannot carry weight other than evidence brought on record.

As an upshot of my findings, judgments and decrees of Courts below are not sustainable in eyes of law and same are hereby set aside. The suit of respondent-plaintiffs is dismissed.

Resultantly, appeals stand allowed.

(AMIT RAWAL)
JUDGE

May 27, 2019

savita

Whether Speaking/Reasoned

Yes/No

Whether Reportable

Yes/No