

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

RSA No.963 of 2011(O&M)

Date of decision: 18.12.2019

Gurmail SinghAppellant

VERSUS

Jagpan Singh through LRs and othersRespondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Ms. Nupur Chaudhary, Advocate for the appellant.

Mr. Vikas Singh, Advocate for respondent No.1.

REKHA MITTAL, J.

Plaintiff No.1/appellant Gurmail Singh is in appeal to assail concurrent findings recorded by the Courts whereby his claim to inherit to the estate of Sh. Biru Singh son of Maru Singh son of Kanhaiya who died on 16.05.1999, on the basis of natural succession being agnates of Biru Singh has been rejected primarily on the ground that Jagpan Singh – defendant No.1/respondent No.1 is entitle to succeed to Sh. Biru Singh on the basis of testamentary succession in view of registered Will dated 23.05.1996 on the basis whereof mutation No.3147 was sanctioned on 14.09.1999 vide document Ex.D15.

The trial Court framed the following issues for determination:-

1. Whether Biru Singh executed will in favour of defendant No.1? OPD

- 1A. If Will is proved, whether the said Will and mutation No.3147 sanctioned in favour of defendant No.1 on the basis of Will are wrong, illegal, null and void and have no effect on the rights of plaintiffs? OPD
- 1B. Whether Biru Singh son of Marru Singh of village Dhanetha died intestate, unmarried and issueless leaving behind only the parties as his agnates?
2. Whether plaintiffs are entitled to declaration as prayed for? OPP
3. Whether the plaintiffs are entitled to permanent injunction as prayed for? OPP
4. Whether the suit of the plaintiffs is not maintainable in the present form? OPD
5. Whether the plaintiffs have no cause of action to file the present suit? OPD
6. Relief.

Issues No.1, 1A, 1B and 2 were taken up together for the purpose of discussion and decision and answered against the appellant and his co-plaintiff and in favour of respondent No.1. Issues No.3 to 5 were also decided against the plaintiffs and eventually the suit was dismissed vide decree and judgment dated 06.02.2008 passed by the Civil Judge (Junior Division), Samana (hereinafter referred to as 'the trial Court'). The appeal preferred by the unsuccessful appellant/plaintiff No.1 came to be dismissed by the Additional District Judge, Patiala vide decree and judgment dated 30.11.2010.

The subject matter of suit is land to the extent of half share of 184 kanal 19 marlas previously owned by Biru Singh comprising of khasra number detailed in the decree-sheet prepared by the trial Court. There is no doubt that Biru Singh was unmarried and had no issue. The plaintiffs claimed 1/9th share each along with the defendants being agnates of said Biru Singh. There is no dispute between the parties with regard to relationship of plaintiffs, contesting defendant No.1 and defendants No.2 to 7 (performa) with deceased Biru Singh.

Counsel for the appellant would argue that both the Courts have committed gross error rather perversity by upholding Will dated 23.05.1996 set up by Jagpan Singh – respondent No.1. It is vehemently argued that Jagpan Singh failed to prove the Will either in accordance with the provisions of Section 68 or Section 69 of the Indian Evidence Act, 1872 (in short 'the Act'). To bring home her contention, she had submitted that none of the attesting witnesses of the Will has been examined as they are stated to have expired. The respondent failed to adduce evidence that the Will has been thumb marked by Sh. Biru Singh and as such the respondent has failed to discharge onus to prove the Will in accordance with Section 69 of the Act. It is further submitted that there is cutting in the name of testator and the said fact assumes significance when the Court is dealing with a Will and executant is no longer available in the world. Counsel would pray that findings of the Courts in respect of Will set up by respondent No.1 are liable to be set aside and as a natural corollary, the heirs would be entitle to inheritance on the basis of natural succession, in view of the provisions of Hindu Succession Act, 1956.

Counsel would argue that the trial Court has wrongly answered issues No.4 and 5 against the plaintiffs and findings in this regard cannot stand the test of judicial scrutiny. It is argued that as the plaintiffs have claimed right to suit property on the basis of natural succession, there is no limitation for a true owner to seek declaration qua title unless the contesting party is able to allege and prove that title of the plaintiff is extinguished with passage of time by way of adverse possession. It is further argued that since defendant No.1 did not raise any such plea of adverse possession, question of suit being barred by limitation does not arise in the present scenario. In addition, it is argued that as per the settled position in law, mutation neither creates nor extinguishes right of ownership, therefore, filing of suit beyond three years from the date of sanction of mutation in September 1999 neither can make the suit defective/barred on the question of limitation nor the same can enure to benefit of respondent No.1 to deny right of inheritance to plaintiffs including the appellant.

Counsel representing respondent No.1, on the contrary, has supported concurrent findings recorded by the Courts with regard to Jagpan Singh – defendant being entitle to inherit to the suit property on the basis of testamentary succession on the basis of registered Will dated 23.05.1996 marked as Ex.D9. It is further argued that the Appellate Court has taken into consideration various other circumstances, oral and documentary evidence to believe that Biru Singh (deceased) had been reposing confidence in respondent/defendant No.1 and for that reason, he not only executed Will dated 23.05.1996 in favour of respondent but also executed Power of Attorney in his favour on the basis whereof defendant

No.1 executed sale deed Ex.D11 as an attorney of Sh. Biru Singh. It is further submitted that the Appellate Court has also rightly given weightage to a fact that Gurmail Singh and his brothers filed civil suit against Biru Singh wherein judgment dated 05.02.1996 Ex.D30 was passed by Civil Judge (Junior Division), Samana but the said decree and judgment was challenged by Biru on the ground of fraud and impersonation, set aside vide judgment and decree dated 02.08.1996 Ex.D2 and D3. A criminal case vide FIR No.123 dated 25.05.1996 in this regard was registered against Gurmail Singh and others and copy of the FIR is marked as Ex.D28, noticed in para 27 of judgment of first Appellate Court. It is vehemently argued that appellant and his co-plaintiff are guilty of making a wrong statement by alleging in para 8 of the plaint that no other litigation regarding subject matter of the suit had been filed nor was pending between the parties. According to counsel, the previous litigation namely civil suit No.570 dated 05.02.1996 decided on the same day and civil suit No.170-T/96 dated 12.06.1996 titled Bir Singh Vs. Gurmail Singh and others decided on 02.08.1996 pertain to the suit land. It is argued with vehemence that the appellant is guilty of concealing material facts in respect of earlier litigation between him and his brothers on one side and Bir Singh on the other, therefore, he otherwise is disentitled to get any relief.

I have heard counsel for the parties, perused the paper-book and records.

The first question that arises for consideration, is whether respondent/defendant No.1 is able to prove the registered Will dated 23.05.1996 in accordance with law or to say whether findings of the Courts on issue No.1, 1A, 1B and 2 are liable to be affirmed or otherwise.

Undenyingly, none of the attesting witnesses of the Will namely Ishar Singh (Lambardar) and Balkar Singh son of Wadhawa Singh has been examined to prove the Will in consonance with the provisions of Section 68 of the Act. The plea of respondent/defendant No.1 is that both these witnesses have since passed away, thus, were not available for examination in the Court. Counsel for the appellant has not made any submissions to dispute death of the attesting witnesses and their non-availability for examination in the Court. That being so, the Will was required to be proved by defendant No.1 in accordance with Section 69 of the Act and has rightly been so held by the Appellate Court.

A relevant extract from Section 69 of the Act, germane to the present controversy, reads as follows:-

"69. Proof where no attesting witness found.—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

The propounder of the Will examined Surinder Kumar Mittal, Deed Writer, Samana, scribe of the Will. He tendered into evidence his duly sworn affidavit Ex.DE. In para 2 of the affidavit, he had stated that Will dated 23.05.1996 was scribed by him at the instance of Bir Singh son of Maru Singh. After scribing the Will, the same was read-over to Bir Singh and witnesses Ishar Singh and Balkar Singh and thereafter they affixed their thumb impression and signatures on the Will. He has further deposed that at the time of execution of Will Bir Singh was alright and he

executed the Will in favour of Jagpan Singh son of Sardara Singh in his sound disposing mind and the same was entered in his register at Sr. No.437 dated 23.05.1996 and photocopy of the entry is Ex.D23. The witness has also deposed about attorney dated 20.05.1996 executed by Bir Singh in favour of Jagpan Singh entered at Sr. No.393 dated 20.05.1996 in his register, photocopy whereof is marked as Ex.D24. However, a relevant extract from his cross examination, reads as follows:-

“I cannot tell the person coming to me as Bir Singh was wearing spectacles or not. I cannot tell the person coming to me as Bir Singh was using some stick for support or not. Out of the persons who came to me with regard to the document stated by me, I knew Ishar Singh Lambardar personally and no other person was known to me. I do not know that Ishar Singh Lambardar of village Dhanetha used to sign the documents. Vol. he put his thumb impression on my seat always....”

Perusal of the judgments passed by the Courts makes it evident that they have heavily relied upon testimony of Surinder Kumar Mittal to conclude that the Will has been proved in accordance with law. The testimony of Surinder Kumar Mittal, at best, can prove that Will was thumb marked by Ishar Singh (Lambardar) in his presence. Since he did not know Bir Singh and other attesting witness namely Balkar Singh personally, his testimony is not at all sufficient to prove attestation of Will either by the testator or other attesting witness namely Balkar Singh.

The question that now arises for consideration is whether the propounder has been able to prove that the Will in question bears thumb

impressions of Bir Singh. The respondent did not adduce any evidence to prove that purported thumb impressions of Bir Singh on the disputed Will tally with his standard impression available on a document proved, in accordance with law. Both the Courts have failed to appreciate that respondent/defendant No.1 failed to establish that purported thumb impression of Bir Singh on the Will is that of Bir Singh, alleged testator. As such, it can safely be held that respondent No.1 has failed to prove the Will in accordance with the provisions of Section 69 of the Act. Had the propounder been able to discharge the onus to prove the Will either in consonance with Section 68 or Section 69 of the Act as the case may be, respondent No.1 would have derived advantage to his contentions from other materials to establish that the Will represents the true and genuine expression of wish of the deceased. The Appellate Court misdirected itself by considering other documents to arrive at a conclusion that disputed Will has been proved in accordance with law. In this view of the matter, I find merit in contention of the appellant that findings of the Courts on the question of Will suffer from a serious legal flaw and cannot stand the test of judicial scrutiny. Accordingly, findings of the Courts that Bir Singh executed a valid Will in favour of respondent No.1 are set aside.

The trial Court answered issues No.4 and 5 against the plaintiffs with the observations that simplicitor suit for declaration without seeking relief of possession is not maintainable and the suit is barred by limitation. A relevant extract qua findings of the trial Court on the question of limitation, reads as follows:-

“...More over the mutation on the basis of will dated 23.5.1996 was sanctioned in favour of answering-defendant

on 14.9.1999 in the presence of plaintiff Jagrup Singh @ Roop Singh, as is apparent from copy of Mutation No.3147 Ex.D15/Ex.D29. The present suit has been filed by the plaintiffs on 20.11.2002. The period of limitation for setting aside a document is three years from the date of its knowledge as per Article 59 of the Limitation Act. The plaintiffs filed the present suit after the expiry of three years from the date of knowledge of the Will and the Mutation No.3147 dated 14.9.1999 sanctioned in favour of Jagpan Singh on the basis of said Will and as such it is barred by period of limitation...”

Perusal of the judgment of Appellate Court makes it evident that findings of the trial Court on issues No.4 and 5 were not sought to be assailed during the course of hearing nor the Court has adverted to findings of the trial Court on issue No.4 and 5. Meaning thereby that findings of the trial Court on issues No.4 and 5 attained finality for want of challenge before the Appellate Court.

No such plea has been raised by the appellant in the grounds of appeal before this Court that arguments were made before the Appellate Court to assail findings of the trial Court on issues No.4 and 5 but the Court in appeal had failed to take cognizance thereof or did not address the question of maintainability of the suit and suit being barred by limitation despite challenge to findings on the said issues. No sooner, the appellant did not challenge findings of the trial Court on issues No.4 and 5 and the same have attained finality, he cannot get any relief despite this Court having reversed findings on the question of Will.

This apart, so far as question of limitation is concerned, the plaintiffs, in para 5 of the plaint, had averred that defendant No.1 got sanctioned mutation in his name alleging some Will without showing other parties as legal heirs and without serving any notice to legal heirs entitle to succeed to Sh. Biru Singh on the basis of natural succession. They further averred that mutation No.3147 got sanctioned by defendant No.1 is totally illegal, null and void being ex parte as got sanctioned by defendant No.1 at the back of remaining persons who are party to the suit and without notice to them. With regard to cause of action, in para 9 of the plaint, it has been pleaded that cause of action accrued to the plaintiff on account of death of Biru Singh and finally yesterday when the plaintiffs requested defendant No.1 to admit their claim but he refused and threatened to illegally dispose of the suit property.

Jagroop Singh or Roop Singh – plaintiff No.2 appeared in the witness box. In cross examination, he had stated that he moved application for contesting the mutation proceedings. He admitted that mutation proceedings in which he moved application was entered on the basis of Will executed by Bir Singh in favour of Jagpan Singh. He further stated that he did not remember when he moved application before A.C. Ist Grade for deciding mutation proceedings. He had not engaged counsel in mutation proceedings. He got typed the application filed before the A.C. Ist Grade.

Perusal of Ex.D15 (mutation) makes it apparent that Jagroop Singh raised objection against sanction of mutation on 01.08.1999 and proceedings were adjourned to 04.08.1999. In note dated 04.08.1999, there is reference to presence of Jagroop Singh and his having filed an

application raising objection against sanction of mutation. In column No.13 of Ex.D15, there is reference to Will dated 23.05.1996 and mutation qua inheritance to Biru Singh who died on 16.05.1999. There is note dated 10.08.1999 that Jagroop Singh withdrew his objections and made a statement that compromise was effected and for that reason he has got no objection. Taking into consideration the notings/orders of A.C. IInd Grade in mutation proceedings coupled with facts elicited in testimony of plaintiff – Roop Singh, it is difficult to accept contention of the plaintiffs that mutation was sanctioned at their back or they did not have knowledge of the Will set up by Jagpan Singh or mutation proceedings that culminated in sanction of mutation on 14.09.1999, therefore, instant suit filed in November 2002 is clearly beyond three years from the date of accrual of cause of action, thus, hit by law of limitation. Since suit filed by the plaintiffs is barred by limitation, they cannot claim any relief qua their title to the suit property to the extent of 2/9 shares. The matter would have been different had the mutation been sanctioned without knowledge of the plaintiffs because in that eventuality they could either file the suit for declaration from the date of knowledge of mutation or could raise the plea that there is no limitation for a true owner to seek declaration unless his title is extinguished by prescription.

The plaintiffs, in para 8 of the plaint have alleged that no other litigation regarding subject matter of the suit has been filed nor is pending between the parties. No doubt, Biru Singh is not a party to the present litigation and previous litigation was between Gurmail Singh and others versus Biru Singh. However, it remains a fact that Gurmail Singh and his brothers obtained a decree dated 05.02.1996 against Biru Singh in

respect of the suit land which was later challenged by Biru Singh on the grounds of fraud and impersonation and set aside on the basis of no objection raised by Gurmail Singh and others in view of compromise effected with intervention of Panchayat of the village, marked as an exhibit by respondent/defendant No.1. These facts show that the plaintiffs are guilty of concealing material facts with regard to previous litigation qua the suit property wherein they got the consent decree dated 05.02.1996 against Biru Singh but later set aside in appropriate proceedings vide judgment passed in August 1996. It shows that the appellant did not approach the Court with clean hands, as such, he is not entitle to any relief.

For the foregoing reasons, the appeal fails and is accordingly dismissed leaving the parties to bear their own costs.

DECEMBER 18, 2019

‘D. Gulati’

(REKHA MITTAL)

JUDGE

Whether speaking/reasoned : yes/no

Whether reportable : yes/no