

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

RSA-4269-2012(O&M)

Date of decision:-15.2.2019

Dilbagh Singh and others

...Appellants

Versus

Jarnail Singh and others

...Respondents

CORAM: HON'BLE MR.JUSTICE H.S.MADAAN

Present: Mr.D.S. Gandhi, Advocate
for the appellants.

H.S. MADAAN, J.

Briefly stated, facts of the case as set up by the plaintiffs in their pleadings are that plaintiffs Jagjit Singh since dead now represented by his LRs; Sawaran Kaur and Harbhajan Kaur along with defendant Jagir Singh since dead now represented by his LRs were legal heirs and successors-in-interest of their mother Smt.Basant Kaur wife of Sh.Sadhu Singh with regard to the property left by her in equal shares and are also in possession of the same; that Smt.Basant Kaur had love and affection for her children and she stayed with them from time to time, however before her death, she had gone to stay with Sawaran Kaur and Harbhajan Kaur at Chandigarh from there, she proceeded to Delhi to see the defendant

and the grand children; that she fell ill at Delhi and remained confined to bed; that after recovering from her illness, she returned to her village Chak Mishri Khan and stayed with the plaintiffs in a happy atmosphere; that in May/June, 1998, defendant took Smt.Basant Kaur with him with consent of other heirs of Smt.Basant Kaur; that Smt.Basant Kaur never expressed her intention to make any testamentary disposition, however in the month of June, 1998, Smt.Basant Kaur, while staying with the defendant expired; that the plaintiffs also went to place of defendant and all the ceremonies were jointly performed by them, however, defendants produced a fraudulent and illegal Will before Assistant Collector IInd Grade for sanctioning of mutation regarding property left by Smt.Basant Kaur and Halqa Patwari entered mutation on the basis thereof; that the plaintiff No.1 had filed objections which were forwarded to Assistant Collector IInd Grade, however, Assistant Collector IInd Grade without adopting proper procedure and giving notice to the affected parties sanctioned mutation in favour of the defendant No.1. According to the plaintiffs the will set up by defendant No.1 is null, void, inoperative and its registration was also wrongly done; the mutation sanctioned on the basis of the will is inoperative and wrongly sanctioned; that the suit property is joint inheritance of both the parties; that the defendants No.2 to 5 had purchased share of Gurpreet Singh son of Jagir Singh vide sale deed dated 28.3.2000

during pendency of the suit; that this sale is hit by principle of *lis pendens* and is illegal, null and void not binding on the rights of the plaintiff; that when the defendants refused to admit the claim of the plaintiffs, then the plaintiffs brought suit in question in the Court seeking a decree for declaration that Will dated 31.7.1996 is illegal, fraudulent, null and void inoperative qua rights of the plaintiffs and that mutation No.2632 was illegal and wrong besides asking for relief of joint possession of the suit property, as a consequential relief asking for decree for permanent injunction restraining the defendants from alienating the suit property in any other way after declaring sale deed dated 28.3.2000 in favour of the defendants No.2 to 5 to be null and void not binding upon the plaintiffs.

Notice of the suit was issued to the defendant but defendant not turn up despite through publication, as such was proceeded against ex parte.

In order to prove their case, the plaintiff Balraj Singh got his statement recorded as PW1 and he further examined Sh.Shangara Singh as PW2.

After hearing learned counsel for the parties, the suit was decreed ex parte to the effect that Will dated 31.7.1996 executed and registered at Delhi in respect of the land bearing Khasra No.4/19/3/1(6-14), 20(8-0), 31/17 (8-0) and 31/18/2/2(3-1), marlas situated at Chak Mishri Khan along with construction over the plot

measuring 15 x 12 etc. and a *baithak* and courtyard etc. is null and void and as such set aside and the defendant was further restrained from alienating, mortgaging the same in any manner as well as further restrained from dispossessing the plaintiffs forcibly and illegally except in due course of law.

The judgment and decree were challenged before the Appellate Court by the Dilbagh Singh and others by way of filing an appeal. Learned District Judge, Amritsar vide judgment dated 18.4.2009 allowed the appeal, set aside the judgment and decree dated 11.8.2008 and remanded the case to the trial Court further directing the appellants to move application for their impleadment in the suit directing the trial Court to allow the said application and implead them as defendants in the suit and further directed the trial Court to decide the suit afresh after taking written submissions from the appellants.

Accordingly, the trial Court in compliance of the said order passed by District Judge, Amritsar, allowed the application of the defendants for impleadment.

Defendants No.2 to 5 contested the suit by filing written statement raising preliminary objections challenging the maintainability of the suit further contending that suit is time barred; that plaintiff had concealed the material facts and had not approached the Court with clean hands. On merits such defendants defended the

impugned will to be legal and valid executed by the testatrix in sound disposing mind further stating that mutation sanctioned on the basis thereof is also valid. The answering defendants denied that possession of the property was with plaintiff during life time of Smt.Basant Kaur, rather according to them since Smt.Basant Kaur was absolute owner of the suit property, as such she was free to alienate the property by way of sale, gift, exchange or lease, accordingly she had executed will dated 31.7.1996 in favour of her son Jagir Singh – defendant No.1; that the will was registered in the office of Sub Registrar after death of Smt.Basant Kaur in accordance with law and after death of Jagir Singh on 30.6.1999, his son Gurpreet Singh became owner of the suit property; that the defendants purchased that property besides some other land vide sale deeds dated 28.3.2000 and they are in actual cultivating possession thereof since then and the entry to that effect has been incorporated in the jamabandi for the year 1997-98, 2002-03 and khasra girdawari from Sarni 2007 to Hari 2008; that the defendants No.2 to 5 are bona fide purchasers for valuable considerations and without any notice of pendency of the suit and since their names had been entered in the mutation No.2696 to 2701 qua different sale deeds, they cannot be held to be trespassers. The defendants refuted the remaining allegations in the plaint contending that the testatrix was being looked after by Jagir Singh only, who was providing food and other

necessities of life to his old mother since plaintiffs had neglected her in her old age; that the will executed by Smt.Basant Kaur in favour of Jagir Singh is perfectly legal and valid. These defendants craved for dismissal of the suit.

It may be mentioned here that defendant No.1 Jagir Singh had died during the pendency of the suit and his LRs were brought on record but they did not appear in the Court to offer contest as such were proceeded against ex parte.

The plaintiffs had filed replication controverting the allegations in the written statement, whereas reiterating the averments in the plaint.

On the pleadings of the parties, following issues were framed:

1. Whether the Will allegedly executed by Basant Kaur on 31.7.1996 is null and void and inoperative qua the legal rights of the plaintiff? OPP.
2. Whether mutation no.2632 dated 4.9.1998 is illegal, null and void and not binding on the plaintiff? OPP.
3. Whether the plaintiff along with defendant is entitled to inherit the property? OPP.
4. Whether the sale deed in favour of defendants No.2 to 5 is hit by doctrine of lis pendense? OPP.
5. Whether Will alleged by Basant Kaur is legal and valid? OPD.

6. Whether the defendants NO.2 to 5 are bonafide purchaser without notice? OPD.
7. Whether the sale deed in favour of defendants No.2 to 5 is hit by doctrine of lis pendense? OPP.
8. Relief.

In order to prove their case, plaintiffs examined Sh.Balraj Singh as PW1, Sh.Sangara Singh as PW2.

On the other hand, the defendants examined Sh.Joginder Singh as DW1, Sh.Raghubir Singh as DW2, Sh.Malook Singh as DW3, Sh.Sukhjinder Singh as DW4, Sh.Dilbagh Singh as DW5, Sh.Naresh Parashar as DW6. Then after tendering some documents, evidence of the defendants stood closed.

After hearing the learned counsel for the parties, the trial Court decided issue No.1 against the defendants and in favour of the plaintiff, issue No.2 in favour of the plaintiffs and against the defendants, issue No.3 in favour of the plaintiffs and against the defendants, issue No.4 in favour of the plaintiffs and against the defendants, issue No.5 against the defendants and in favour of the plaintiffs, issue No.7 was decided partly in favour of the plaintiffs and partly in favour of the defendants, issue No.7 was drafted again through issue No.4 had been already decided, so findings on issue No.4 were to be read on this issue. Resultantly, the suit of the plaintiffs was partly decreed to the effect that plaintiffs were owner

of the suit property to the extent of 3/4th share and the Will dated 31.7.1996 allegedly executed by late Smt.Basant Kaur, was null and void and was inoperative, qua rights of the plaintiffs and mutation No.2632 dated 4.9.1998 was also ordered to be set aside and that the defendants No.2 to 5 were owners of the suit property to the extent of 1/4th share only and defendants were restrained from alienating the suit land in any manner more than 1/4th share. This was so done vide judgment and decree dated 19.4.2010.

Feeling aggrieved by the said judgment and decree, the defendants No.2 to 4 had filed an appeal in the Court of District Judge, Amritsar, which was assigned to learned Additional District Judge, Amritsar, who vide judgment and decree dated 6.6.2012 dismissed the same., which left the defendants No.2 to 4 aggrieved and they had filed the present regular second appeal before this Court, notice of which was issued and the respondents. Respondents No.1 to 8 had appeared through counsel. Respondent No.9 was found to be proforma respondent, as such his service was dispensed with. Subsequently counsel for respondents No.1 to 8 stopped appearing in the Court.

I have heard learned counsel for the appellants besides going through the record and I find that there is absolutely no merit in the appeal.

The present appellants drive their title from the defendant

Jagjit Singh, who in turn had based his claim on the will executed by Smt. Basant Kaur in his favour. That will has not been proved in evidence in accordance with law since Section 68 of the Evidence Act, which deals with proof of execution of documents required by law to be attested provides that it cannot be used in **evidence** until at least one attesting witness, if alive, had been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. The proviso under the Section does not waive this proof. Examination of an attesting witness in case of will is a must. Admittedly, no attesting witness of the will was examined to prove its execution. The defendants had closed their evidence without examining any of the attesting witness of the will. It is not their case that no attesting witness of the will was alive. Even if it was so, they could have led other evidence available in the form of examining persons acquainted with handwriting/signatures of the testator and attesting witnesses scribe of the will, official from the office of Sub Registrar, where it was registered but nothing of that sort was done, therefore the will remained unproved.

Under the circumstances, if the defendant No.1 did not acquire any title on the basis of the will said to have been executed by Smt. Basant Kaur in his favour, he/his legal heir could not possibly pass a better title to the defendants No.2 to 5, who are appellants

before this Court. The sale deed so executed by Gurpreet Singh son and legal representative of deceased Jagir Singh defendant in their favour was allegedly declared to be null and void and no fault can be found with the same. Both the Courts in light of the facts and circumstances of the case by proper appraisal and appreciation of evidence and correct interpretation of law have returned concurrent findings against the defendants-appellants. No reason is there to upset such findings rather no substantial question of law arises.

No other point was pressed or put forward on behalf of the appellants.

Finding no merit in the present appeal, the same stands dismissed with costs.

15.2.2019
Brij

(H.S.MADAAN)
JUDGE

Whether reasoned/speaking: Yes/No

Whether reportable : Yes/No