

In the High Court of Punjab and Haryana at Chandigarh

Date of Decision: 30.8.2019

RSA No. 966 of 2012 (O&M)

Naresh and another

---Appellants

vs.

Deepak Singh and others

---Respondents

RSA No. 1086 of 2012 (O&M)

Naresh and another

---Appellants

vs.

Smt. Nirmala and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. S.K.Garg Narwana, Senior Advocate with
Mr. Japjit Singh Johal, Advocate
for the appellants

Mr. Sumit Sangwan, Advocate
for the respondents

Rekha Mittal, J.

This order will dispose of RSA No. 966 and 1086 of 2012 as identical questions of law and fact are involved for adjudication. For facility of reference, facts are taken from RSA No. 966 of 2012.

The present litigation pertains to land left behind by Nafe Singh who died issueless. Said Nafe Singh was son of Bhartu and Bhartu is the

brother of Naubat. Plaintiff Kamla is the daughter of Naubat and Deepak Singh, plaintiff No. 1 is the grand son of Naubat being son of Rajender and nephew of Smt. Kamla. Defendants No. 3 and 4 namely Nirmala and Indra Wati are also daughters of Sh. Naubat. The contesting defendants Naresh and Suresh (appellants herein) are the sons of Mahender who is also collateral of Nafe Singh but degree of ascent of Suresh and Naresh viz-a-viz Nafe Singh is more as compared to plaintiff Kamla.

The plaintiffs filed the suit claiming inheritance to the estate of Nafe Singh. They challenged judgment and decree dated 2.10.1996 purported to be suffered by Sh. Nafe Singh in favour of defendants No. 1 and 2 and Will dated 15.8.1996 propounded by defendants No. 1 and 2 to be executed by Sh. Nafe Singh. It is contended that Nafe Singh was an illiterate person and he did not have rational thinking as he was not of sound disposing mind. Defendants No. 1 and 2 exercised undue influence on deceased Nafe Singh and fraudulently obtained decree dated 2.10.1996 and Will dated 15.8.1996. No family settlement was arrived as alleged in Civil Suit No. 960 of 1996 titled "Suresh and others vs. Nafe Singh". Nafe Singh neither appeared before the court nor engaged a counsel nor filed written statement and made statement before the court admitting claim of defendants No. 1 and 2. The impugned decree was obtained on the basis of impersonation. Defendants No. 1 and 2 had no pre-existing right in the suit property and the decree is not a registered document.

The appellants-defendants No. 1 and 2 filed the written statement and contested claim of respondents-plaintiffs. It is averred that answering defendants are nephews of Nafe Singh who was unmarried and

issueless. Nafe Singh was Jat by caste. He was having power to alienate his properties in any manner. Nafe Singh transferred his land in favour of defendants No. 1 and 2 under a family settlement. All other material averments of the plaint have been denied on the basis whereof plaintiffs challenged judgment and decree dated 2.10.1996 and Will dated 15.8.1996. They raised preliminary objections regarding maintainability, estoppel and locus standi.

The trial court framed issues vide order dated 28.1.2003, reproduced in para 6 of judgment of said court. The parties were permitted to adduce evidence in support of their respective contentions. Having heard counsel for the parties in the light of materials on record, the trial court dismissed the suit with costs.

Appeal preferred by Deepak Singh in which Smt. Kamla was arrayed as respondent was allowed by the Additional District Judge, Jhajjar. The judgment and decree passed by the trial court was set aside. Plaintiffs and defendants No. 3 and 4 are held entitle to possession of suit property being collaterals of Nafe Singh and inherit the same in equal shares.

Counsel for the appellants raised a preliminary issue that suit filed by the respondents-plaintiffs is bad for non-joinder of necessary parties and liable to be dismissed on this score. To bring home his contention, it is argued that as per pedigree table, reproduced in the plaint, Naubat had four daughters namely Guddi, Nirmala, Kamla, Indra Wati and one son namely Rajender. It is argued that Guddi and Rajender have not been impleaded as party in the suit, therefore, suit is liable to be dismissed. In support of his contention, he has relied upon judgment of Hon'ble the Supreme Court

Kanakarathanammal vs. V.S.Loganatha Mudaliar and another 1965

AIR (SC) 271. Further reference has been made to judgment of Hon'ble the Supreme Court **Udhav Singh vs. Madhav Rao Scindia AIR 1976 Supreme Court 744** to contend that such an objection can be raised for the first time in second appeal.

To assail the judgment with regard to decree dated 2.10.1996 passed in Civil Suit No. 960 of 1996, it is argued that the respondents-plaintiffs failed to produce evidence that written statement filed by Nafe Singh and statement recorded in the Court admitting claim of appellants in respect of land subject matter of the said suit does not bear thumb impressions of Sh. Nafe Singh. It is further argued that there is not even an iota of evidence to substantiate plea of the respondents-plaintiffs that Nafe Singh had any mental disability much less he was not in sound disposing mind to make a rational decision. It is argued that Sh. Nafe Singh was identified by Hari Ram Lambardar of village Dighal and he was examined by the appellants. It is further argued that respondents-plaintiffs did not examine an expert witness on the basis of comparison that written statement and statement of Nafe Singh in the previous litigation does not bear his thumb impressions. It is argued with vehemence that the First Appellate Court has failed to appreciate in right perspective that respondents failed to adduce sufficient much less cogent and convincing evidence to prove that judgment and decree dated 2.10.1996 suffer from any factual or legal flaw. It is argued that the appellants are not strangers to Nafe Singh, therefore, family settlement even with collaterals having more degrees of ascent cannot be rejected merely because collaterals of fewer

degrees of ascent were also in existence. In addition, it is argued that consent decree does not require registration particularly in the circumstances that the appellants are not strangers to Sh. Nafe Singh.

Counsel has assailed findings of the First Appellate Court in respect of the Will set up by the appellants purported to be executed by Sh. Nafe Singh. It is argued that one of the attesting witnesses of the Will had already passed away, therefore, he was not available for examination before the Court. Satyanarain DW3 in his cross examination has candidly stated that he did not want to depose in the case since both the parties are the members of same family. It is further argued that mere fact that Satyanarain refused to give a correct version with regard to the Will in question, he cannot be permitted to ransack the registered Will executed by Sh. Nafe Singh. According to counsel, even if attesting witness of the Will did not support cause of the appellants, the Will can be proved on the basis of other evidence on record. For this purpose, reference has been made to Section 71 of the Evidence Act.

Counsel has made an attempt to argue that Smt. Kamla, one of the plaintiffs examined in the case had stated that the appellants had taken away Sh. Nafe Singh on the pretext of getting medicine for him and got executed the Will and made him to suffer decree in favour of the appellants. It is argued that this statement of Kamla proves that the Will, written statement in the civil suit aforesaid and statement of Nafe Singh recorded by the Court bear thumb impressions of Sh. Nafe Singh. He has also tried to derive some advantage from the suggestions put to Sh. Satyanarain DW3 at the behest of counsel for the respondents-plaintiffs in the concluding para of

testimony of Satyanarian. He has further argued that the appellants examined Sh. V.B.Kashyap, Handwriting and Finger Print Expert, Jhajjar to prove that Will dated 15.8.1996 bears thumb impression of Sh. Satyanarain and there is no rebuttal to testimony of Sh. V.B.Kashyap by the respondents-plaintiffs. Counsel would argue that in view of evidence on record coupled with that the Will in question is a registered document, findings recorded by the First Appellate Court in respect of the Will in question cannot be allowed to sustain. In support of his contention, he has relied upon judgment of Hon'ble the Supreme Court **Rabindra Nath Mukherjee vs. Panchanan Banerjee (dead) by Lrs 1995 (4) SCC 459.**

Counsel representing the respondents-plaintiffs would fairly concede that suit filed by Deepak plaintiff No. 1 to claim inheritance to estate of Sh. Nafe Singh on the basis of natural succession is not maintainable as Smt. Kamla and other paternal aunts (Buas) of Deepak Singh were alive at the time when Sh. Nafe Singh passed away. It is argued that the appellants did not raise an issue with regard to suit being barred for non-joinder of necessary parties and they cannot be permitted to raise this plea for the first time in second appeal. It is further argued that even otherwise, all necessary parties, collaterals of Nafe Singh namely Smt. Kamla, Nirmala, Indra Wati daughters of Naubat are party to the suit. Guddi another daughter and Rajender son of Naubat and father of Deepak Singh had already passed away, therefore they could not be joined in the suit. It is further argued that Smt. Kamla in her testimony had categorically deposed about death of Guddi and Rajender.

Counsel would argue that Section 12 of the Hindu Succession

Act, 1956 (in short “the Act”) deals with order of succession among agnates and cognates and in the said Section, Rules 1 to 3 provide as to how order of succession among agnates and cognates shall be determined in accordance with rules of preference laid down therein. It is argued that as number of degrees of ascent in respect of daughters of Naubat is the same, they would be preferred over Deepak Singh who had more degrees of ascent viz-a-viz Sh. Nafe Singh.

With regard to judgment and decree dated 2.10.1996, it is argued that the appellants did not avail services of Handwriting and Finger Prints Expert by getting compared the disputed thumb impressions of Nafe Singh on written statement and statement recorded in the court with his standard thumb impressions. It is argued that had it been true that Nafe Singh actually appeared in the court for admitting claim of the appellants, there was no reason for them not to get him identified from a respectable of the *patti* to which Nafe Singh belonged. It is further argued that as Nafe Singh was residing with family of Naubat and being rendered services by them, there was no reason for him to transfer his land in favour of the appellants who otherwise are not entitle to inherit to Nafe Singh in preference to children of Naubat. He has also supported findings of the First Appellate Court that the decree cannot operate for want of registration.

Counsel has refuted contention of the appellants that they have proved the Will in question, in consonance with the provisions of Section 68 or 69 of the Evidence Act. It is argued that appellants have failed to examine a witness to establish identity of Nafe Singh to be executant of the Will or the Will having been thumb marked by said Nafe Singh much less

executed by him after understanding its contents to be correct and true and in his sound disposing mind.

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

Indisputably, the appellants-defendants No. 1 and 2 did not raise any such plea that suit is bad for non-joinder of necessary parties since Guddi and Rajender, other children of Naubat were not impleaded as a party in the suit. Smt. Kamla in her statement on oath had categorically stated that Guddi and Rejender have already passed away. Counsel for the appellants has not disputed that Guddi and Rajender are still alive. Since the appellants did not raise an issue with regard to non-joinder of Guddi and Rajender, there was no occasion for the plaintiffs to prove that Rajender and Guddi were not alive either at the time of death of Nafe Singh or at the time of institution of the suit. The appellants did not adduce any evidence to prove that Guddi and Rajender were alive at the time of death of Nafe Singh much less at the time of institution of the suit. In the given circumstances, it is difficult to accept contention of the appellants that suit filed by the plaintiffs is bad for non-joinder of necessary parties. In the given scenario, the appellants cannot derive any advantage to their contention from the cited judgments.

Plaintiffs have challenged judgment and decree dated 2.10.1996 and Will dated 15.8.1996 on the grounds culled out in sub paras (i) to (ix) of para 6 of the plaint. They have raised the plea that Will, judgment and decree dated 2.10.1996 and mutations are illegal, null and void, based on fraud, misrepresentation, undue influence and obtained by way of

impersonation. The judgment and decree have also been challenged on the grounds that Nafe Singh used to reside with the plaintiffs, there was no need to execute the Will if he had given the property to the appellants in a family settlement and the decree is bad for want of registration as appellants had no pre-existing right in the property.

Except bald statement of Smt. Kamla that Nafe Singh was taken away by the appellants on the pretext of getting him medicine and got executed the Will and made him to suffer the decree, there is no other evidence on record to prove misrepresentation, undue influence, fraud etc. As per settled position in law, fraud is required to be proved akin to a criminal charge. Kamla in her cross examination had stated that she was not present when Nafe Singh was allegedly taken away by the appellants and in this regard she was informed by her 'Bhabhi'. Testimony of Kamla on this aspect of the matter is a mere hearsay. Said 'Bhabhi' of Kamla was not examined for the reasons best known. It appears that Kamla is referring to widow of Rajender and mother of Deepak Singh but she has not appeared in the witness box even to support cause of her son. In this view of the matter, it can safely be held that the respondents-plaintiffs failed to lead satisfactory much less tangible evidence to establish their plea that the decree and Will are the result of fraud, misrepresentation or undue influence. Similarly, there is nothing on record suggestive of the fact that Sh. Nafe Singh had a fragile mental status much less he did not have sound disposing mind. The Court in Appeal has wrongly relied upon testimony of Kamla to find fault in the judgment and decree dated 2.10.1996 in respect of factual contentions. Nafe Singh remained alive for certain years after the

judgment and decree dated 2.10.1996 was passed. As per case of the plaintiffs, he had been residing with family of Naubat subsequent to decree dated 2.10.1996. Nafe Singh did not challenge the judgment and decree on any ground whatever.

The First Appellate Court has also rejected the decree for want of registration. The first question for consideration is whether Nafe Singh could challenge the judgment and decree for want of registration. The answer appears in the negative. No person can take advantage of his own wrong. Secondly, the judgment and decree is based upon consent and do not require registration. This apart, the appellants are not strangers to family of Nafe Singh. Rather they are nephews of Nafe Singh though they have more degrees of ascent than that of Smt. Kamla and others, children of Naubat. A family settlement can be arrived at even with the members of extended family. In this view of the matter, it is difficult to sustain findings of the First Appellate Court that judgment and decree dated 2.10.1996 is not valid for want of registration. Accordingly, findings of the First Appellate Court setting aside the judgment and decree dated 2.10.1996 suffer from gross error both factually and legally and accordingly set aside. On the basis of judgment and decree dated 2.10.1996 the appellants are to be held owners and in possession of land, subject matter of the judgment and decree aforesaid.

This brings the court to the controversy in respect of Will dated 15.8.1996. There is no dispute that Will has to be proved by its propounder and he has to dispel suspicious circumstances, if any, surrounding the Will. If one of the attesting witnesses of the Will is available for examination in

the court, the Will is required to be proved in consonance with the provisions of Section 68 of the Evidence Act. However, if none of the attesting witnesses is available for examination, the same is required to be proved under Section 69 of the Evidence Act.

The first question that falls for adjudication is whether the appellants have successfully discharged onus of proving the Will in question, in accordance with law?

The appellants examined Satyavir Singh Saini, Advocate DW2, Satyanarain DW3 and V.B. Kashyap Handwriting and Finger Prints Expert to prove the Will in question. Satyavir Singh Saini, Advocate is scribe of the Will. In the opening line of his cross examination, he had stated that he did not know Nafe Singh personally and as such testimony of Satyavir Singh Saini is not relevant to prove that the Will was scribed by him at the behest of Nafe Singh son of Bhartu. Satyanarain, attesting witness of the Will failed to support cause of the appellants and he was declared hostile at request of counsel for the appellants before the trial court and they were allowed to put him questions in the form of cross examination. He has candidly stated that he did not want to depose in the case as Naresh and Deepak Singh, contesting parties are members of the same family. Testimony of Satyanarain is not at all sufficient to prove due and valid execution of the Will much less that the Will was executed by the deceased according to his free volition and in sound disposing mind.

V.B.Kashyap DW4 has merely proved that the Will has thumb impression of Satyanarain. Though the appellants availed services of Sh. V.B.Kashyap to prove that the Will bears attestation by Sh. Satyanarain

DW3 but they did not get the disputed thumb impressions of testator Sh. Nafe Singh compared with his standard thumb impressions or to prove that thumb impressions on the Will do or do not tally with thumb impressions purported to be affixed by Nafe Singh on the written statement and statement recorded in the court in the civil suit that culminated in the judgment and decree dated 2.10.1996. There is nothing on record suggestive of the fact that any such plea was raised by the appellants that standard thumb impressions of Nafe Singh were not available for comparison with disputed thumb impressions. They did not examine the concerned Sub Registrar to prove that the Will was read over to its executant or he appended his thumb impressions after understanding and accepting its contents to be true and correct.

Counsel for the appellants tried to draw some support from testimony of Kamla that she had indirectly admitted that the Will bears thumb impressions of Sh. Nafe Singh as she stated that Nafe Singh was taken away by the appellants on the pretext of getting him medicine and got executed the Will. As has been noticed hereinbefore but for the sake of repetition, testimony of Kamla in this regard is mere hearsay evidence and has been rejected to assail the decree and Will. This Court is not oblivious of the fact that statement made by a party if advantageous to the contesting party, can be used against him/her. However, proving a Will viz-a-viz proving any other disputed fact stands at different footing. The Will is a sacred document. Its alleged executant is no more in the world. It is the obligation of the propounder to lead cogent and convincing evidence that can satisfy conscience of the court that Will represents genuine and true

wish of the deceased as to how his/her property would be dealt with after his departure from the world. In the given circumstances, the aforesaid statement of Kamla, by no stretch of imagination, can be used to accept contention of the appellants that the same is sufficient to prove that the Will in question bears thumb impression of Sh. Nafe Singh. I would hasten to add that Kamla in her cross examination by counsel for the appellants had stated that Nafe Singh never told them about the appellants having obtained his thumb impressions on any document or Will. She has admitted that whenever Nafe Singh was taken away by the appellants, on the very same day, he came back to family of Naubat and remained residing there. In view of the above, effort made by counsel for the appellants to derive benefit from testimony of Kamla to prove the thumb impression of testator on the Will in question is far-fetched and does not carry any weight.

No doubt, the Will is a registered document and may invite some weightage viz-a-viz an unregistered Will even though the Will does not require to be registered compulsorily. However, merely because the Will in question is a registered document, in absence of appellants having proved the same in accordance with law, they can not derive any aid to condemn findings of the Appellate court much less to say that it suffer from serious error or perversity. In this view of the matter, findings recorded by the First Appellate Court rejecting the Will in question cannot be faulted with. Since plaintiff No. 2 and defendants No. 3 and 4, daughters of Naubat have fewer degrees of ascent viz-a-viz the appellants in relation to Sh. Nafe Singh, plaintiff No. 2 and defendants No. 3 and 4 are entitle to inherit to the entire estate left behind by Sh. Nafe Siingh except the land subject matter

of decree dated 2.10.1996. The plaintiff No. 2 and defendants No. 3 and 4 would inherit to that estate simultaneously in equal share, in consonance with Rule 3 of Section 12 of the Act.

In view of what has been discussed hereinabove, the appeals are partly allowed. The appellants are the owners and in possession of suit land, subject matter of judgment and decree dated 2.10.1996. Suit filed by plaintiff No. 2 in respect of the said land fails and is accordingly dismissed. The plaintiff No. 2 and defendants No. 3 and 4 are declared to be co-owners of remaining suit land and they are entitle to recover its possession from the appellants/defendants No. 1 and 2. Accordingly, suit filed by plaintiff No. 2 in respect of the said land is decreed. In view of peculiar facts and circumstances, the parties are left to bear their own costs.

(Rekha Mittal)
Judge

30.8.2019
paramjit

Whether speaking/reasoned: Yes
Whether reportable : Yes