

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

SAO No. 8 of 2018 (O&M)

Date of Decision: 03.04.2019

Santokh Singh and another

...Appellants

VERSUS

Balwinder Singh and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. G.S. Sirphikhi, Advocate
for the appellants.

Mr. Karanjit Singh, Advocate
for respondent no. 1.

SURINDER GUPTA, J.

Heard.

2. Balwinder Singh, plaintiff-respondent no. 1 filed suit seeking the relief of joint possession of land situated in villages Khapar Kheri, Wadali Guru and Basarke, *tehsil* and district Amritsar and declaration to the effect that mutation bearing no. 2753 on inheritance of Jasbir Singh recorded in favour defendant no. 1-Jagroop Singh (respondent no. 2 in this appeal) is illegal, null and void. He put forth his claim on the basis of Will executed in his favour by Kulwant Kaur, his sister alleging that she was married with Jasbir Singh.

3. Pleadings of parties led to framing of the issues by the trial Court as follows:-

- (1) Whether the plaintiff is entitled to relief of joint possession of suit land as prayed for? OPP
- (2) Whether the plaintiff is entitled to relief of declaration as prayed for? OPP
- (3) Whether the plaintiff is entitled to relief of permanent

injunction as prayed for? OPP

- (4) Whether the suit is not legally maintainable? OPD
- (5) Whether the suit is within limitation? OPP
- (6) Whether the defendants are bona fide purchaser of the suit land? OPD
- (7) Whether the plaintiff has no locus standi to file the present suit? OPD
- (8) Whether the plaintiff has no cause of action to file the present suit? OPD
- (9) Whether the plaintiff is estopped by his own act and conduct from filing the present suit? OPD
- (10) Whether the suit is not properly valued for the purpose of Court fee and jurisdiction? OPD
- (11) Relief.

4. While recording findings on issues no. (1) to (3) and (5), learned trial Court observed that marriage of Jasbir Singh with Kulwant Kaur is not proved. The Will of Kulwant Kaur was also not proved as per provisions of Section 68 of the Evidence Act and the suit was held to be barred by limitation. The findings on above referred issues were recorded against plaintiff-respondent no. 1 while findings on other issues were recorded against defendants and the suit was ordered to be dismissed.

5. Plaintiff filed appeal before Additional District Judge, Amritsar. Learned Ist Appellate Court reversed the findings of trial Court on “various issues” and remanded the case to trial Court for fresh decision. The relevant observations of Ist Appellate Court as contained in para 13 are reproduced below:-

“13. Now the question before this Court for determination is that whether Kulwant Kaur executed a Will dated 22.08.2001 in favour of Balwinder Singh her brother. Copy of the Will is Ex. PA. Sajjan Singh, Chowkidar and Numberdar Kundan Singh are the attesting witnesses of

the said Will. In the Ex. P4 i.e. the suit filed by Jagroop Singh against Balwinder Singh etc., issue No. 1-A was framed as under:-

“Whether deceased Smt. Kulwant Kaur had executed a valid Will dated 22.08.2001 in favour of defendant no. 1 while being in her sound disposing mind, as alleged? OPD (defendant no. 1).”

On this issue, the findings was given by the then Presiding Officer that Kulwant Kaur executed a valid Will dated 22.08.2001 in the additional evidence before this Court. Copy of the order of Shri Ajit Atri, learned Additional District Judge, Amritsar, dated 20.09.2016 has been brought on the file in which Balwinder Singh filed an appeal against Gurdavinder Singh. In that appeal, there is reference of Will executed by Kulwant Kaur in favour of Balwinder Singh on 22.08.2001, but from the perusal of the file it is clear that Will is not proved as per the provisions of Section 68 of the Indian Evidence Act. Learned counsel for the appellant-plaintiff relied upon the judgment Ex. P4 of Shri R.L. Chauhan, learned Civil Judge (Senior Division), Amritsar. In that judgment Numberdar Kundan Singh appeared as DW but as per the Section 41 of the Indian Evidence Act, conclusive findings are required to be given in the matter in dispute. Section 41 of the Indian Evidence Act is reproduced as under:-

“41. Relevancy of certain judgments in probate, etc. jurisdiction : - A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when

the existence of any such legal character, or the title of any such person to any such thing, is relevant.

“Such judgment, order or decree is conclusive proof -

that any legal character which it confers accrued at the time of when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, 'order or decree' declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, 'order or decree' declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled as the property of that person at the time from which such judgment, 'order or decree' declares that it had been or should be his property.”

But in the present suit, the Will is not proved by the appellant/plaintiff as per the provisions of Indian Evidence Act. Accordingly, the findings of the learned court below on various issues are reversed. The impugned judgment alongwith decree is set aside. The matter is remanded back to the learned trial Court for fresh decision in accordance with the law after taking evidence of both sides and in view of the observations made above.....”

6. Learned counsel for the appellant has argued that the dispute pertains to marriage of Kulwant Kaur and Will executed by her. Ist

between plaintiff-Balwinder Singh and defendant no. 1-Jagroop Singh. The judgment of that suit was on record and could be interpreted by Ist Appellate Court to find as to whether Will was duly proved. Learned trial Court has recorded conclusive findings on issues no. (1) to (3) and (5). If findings are not based on proper appreciation of evidence, Ist Appellate Court could re-appreciate the evidence to record its own finding instead of remanding the case.

7. Learned counsel for respondent no. 1 has argued that no specific issue with regard to Will of Kulwant Kaur was framed. Ist Appellate Court has observed that judgment in the previous suit between plaintiff and defendant no. 1 was a relevant piece of evidence, which has not been looked into by the trial Court and due to this the case was remanded.

8. As per provisions of Order XLI Rules 23, 23-A and 25 of Code of Civil Procedure (CPC), remand of the case can be ordered by the Ist Appellate Court under following circumstances:-

“23. Remand of case by Appellate Court -

Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate court may, if it fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

23A. Remand in other Cases -

Where the Court from whose decree an appeal is

preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23].

25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from -

Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together its findings thereon and the reasons therefor [within such time as may be fixed by the Appellate Court or extended by it from time to time].

9. Ist Appellate Court has not framed any additional issue, as such, remand of the case ordered by Ist Appellate Court is not covered by provisions of Order XLI Rule 25 CPC. Trial Court has not disposed of the suit on a preliminary point. The order of remand is also not as per spirit and scope of Order XLI Rule 23 and 23A CPC.

10. The question, which arises for consideration is as to whether Ist Appellate Court could remand the case on the ground that judgment in the previous suit is a relevant piece of evidence as per provisions of Section 41 of the Evidence Act. The above fact could be considered by Ist Appellate Court on merit as it is within the domain of Ist Appellate Court to re-appreciate the evidence on record. Though, no separate issue with regard to

Will of Kulwant Kaur was framed but this fact was discussed while deciding issues no. (1) to (3) and (5) and parties were well aware of the controversy, as such, non-framing of specific issue in this regard has not prejudiced either of the party.

11. Ist Appellate Court instead of appreciating the evidence on record and deciding the appeal on merit had adopted a short cut method to dispose of the appeal by remanding the case without making out any reason as per spirit and scope of Order XLI Rules 23, 23-A and 25 CPC. The order passed by Ist Appellate Court is not sustainable and is set aside.

12. Consequently, this appeal is accepted. Parties are directed to appear before Ist Appellate Court/successor Court on 02.05.2019 on which date the file of appeal shall be taken on board and Ist Appellate Court will proceed further to decide the same on merit in accordance with law.

April 03, 2019
jk

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned:

Yes/No

Whether Reportable:

Yes/No