

**IN THE HIGH COURT OF PUNJAB AND HARYANAAT
CHANDIGARH**

Regular Second Appeal No. 1737 of 2018(O&M)

Date of Decision: January 17 , 2019.

Nachhattar Singh through LRs

..... APPELLANT (s)

Versus

Darshan Singh and others

..... RESPONDENT (s)

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr. Vikram Anand, Advocate
for the appellant.

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

LISA GILL, J.

Appellant/plaintiff (now represented by his legal representatives) is aggrieved of judgments and decrees dated 01.08.1997 and 31.03.2016 passed by the learned Civil Judge(Senior Division), Fatehgarh Sahib and the learned Additional District Judge, Fatehgarh Sahib, respectively, whereby suit filed by the plaintiff has been dismissed.

Appellant/plaintiff filed a suit for declaration to the effect that he is owner of the land as detailed in the plaint to the extent of 2/3rd share and defendants No.3 and 4 were averred to be owners in equal shares of 1/3rd share of the total land measuring 60 kanals 14 marlas as described in the plaint. The

plaintiff claimed his right on the basis of a Will dated 28.01.1991 executed by Bachan Singh in favour of the plaintiff, defendants No.3 and 4 as well as on the basis of judgment and order dated 23.01.1957 passed by the learned Sub Judge, First Class, Samrala. It is further stated that mutation dated 13.05.1993 in favour of the plaintiff, defendants No.1 and 2 was illegal, null and void and not binding on the rights of the plaintiff and defendants No.3 and 4. Relief of permanent injunction for restraining defendants No.1 and 2 from alienating the suit property or interfering in his possession was sought. It was pleaded by the plaintiff that Bachan Singh father of the plaintiff, defendants No.1 and 2 was the owner of the suit property situated at village Barwali Khurd, Tehsil Samrala, District Ludhiana. It was stated that Bachan Singh alongwith his brothers Ajaib Singh, Naib Singh, Dhiraj Singh and Jeon Singh were owners of properties in villages Barwali Khurd, Barwali Kalan, Heddon and Mal Majra. A memo of partition dated 27.02.1955 was stated to have been executed between Bachan Singh and his brothers. Dhiraj Singh and Jeon Singh were dead. Their legal representatives were impleaded as respondents No.7 to 9 in the plaint. A civil suit was stated to have been filed by Bachan Singh against his brother Ajaib Singh etc. which was decided on the basis of a compromise on 23.01.1957 in which the property in question was given to Bachan Singh who continued to be the owner-in-possession of the suit property.

Bachan Singh, it was further pleaded, had two sons i.e., the plaintiff and Darshan Singh, besides, a daughter Smt. Kirpal Kaur. She was married and adequate amount of money was spent by Bachan Singh on her marriage. Darshan Singh elder son of Bachan Singh had strained relations with his father and started

living at Ludhiana. Bachan Singh was claimed to be residing with the plaintiff during his life time. Bachan Singh died on 21.06.1992 and he was averred to have executed a Will dated 28.01.1991 in favour of the plaintiff to the extent of 2/3rd share of his property and to the extent of 1/3rd share in favour of defendants No.3 and 4 i.e., the minor sons of Darshan Singh. Mutation in favour of the plaintiff and defendants No.1 and 2 was however wrongly sanctioned on 13.05.1993 by the Assistant Collector, First Grade, Samrala by ignoring Will dated 28.01.1991. As defendants No.1 and 2 started threatening the possession of the plaintiff over the suit land and sought to alienate the same on the basis of mutation dated 13.05.1993, the present suit was filed.

Defendants No.1 to 4 resisted the suit and filed their written statement while pleading that the plaintiff's suit was not maintainable as he had earlier withdrawn the suit regarding the property in dispute without permission of the court to file afresh on the same cause of action. Averments on merits were controverted. It was stated that Bachan Singh (deceased) was the owner of the land situated in village Barwali Khurd, Barwali Kalan, Mal Majra and Heddon as a co-sharer with all his brothers. Defendants No.1 and 2 claimed to have succeeded to the entire property of Bachan Singh alongwith the plaintiff. It was further averred that the plaintiff being aggrieved of mutation sanctioned vide order dated 13.05.1993 had filed an appeal which was dismissed by the learned ADC, Ludhiana vide order dated 15.10.2009. The mutations sanctioned by the revenue authorities were challenged on the basis of Will dated 28.01.1991 which was stated to be a forged and fabricated Will. Plaintiff's claim was rejected.

Plaintiff, it was claimed, was barred by his own act and conduct from filing the

present suit. Dismissal of the suit was prayed for.

None of the remaining defendants chose to appear, despite service. They were accordingly proceeded ex parte. Replication to the written statement filed by defendants No.1 to 4 was filed. On the basis of the pleadings of the parties, following issues were framed:-

1. Whether deceased Bachan Singh executed a valid will dated 28.1.1991 in favour of the plaintiff? OPP
2. Whether deceased Bachan Singh filed a suit against Ajaib Singh and others which was decided on 23.1.1957 by by SJIC, Samrala and property in dispute was given to him and since then, he remained owner with possession of the same? OPP
3. Whether plaintiff is entitled to declaration as prayed for? OPP
4. Whether the suit is barred U/o 2 rule 2 CPC? OPD
5. Whether the plaintiff has no cause of action to file the present suit? OPD
6. Whether plaintiff is barred to file the suit by his own act and conduct? OPD
7. Whether the suit is bad for mis-joinder of necessary parties? OPD
8. Whether defendants are entitled to special costs U/s 35A of the CPC? OPD
9. Relief.

Both the parties led evidence to substantiate their respective claims/stands.

Learned trial court on considering the facts, circumstances and evidence on record concluded that the plaintiff failed to prove his case. Will dated 28.01.1991, it was held, was not proved on record, neither could the plaintiff prove that the land in question was in fact partitioned between his father

Bachan Singh and brothers of Bachan Singh. Appeal preferred by the present appellant was dismissed by the learned Additional District Judge, Ludhiana vide impugned judgment and decree dated 31.03.2016. Aggrieved therefrom, present appeal has been filed.

Learned counsel for the appellant argues that it is proved by the evidence on record that the plaintiff's father Bachan Singh was the exclusive owner in possession of 60 kanals 14 marlas of land and he had bequeathed the same in favour of the plaintiff to the extent to 2/3rd share and in favour of defendants No.3 and 4 i.e., sons of Darshan Singh to the extent of 50% share in rest of the 1/3rd land, vide registered Will dated 28.01.1991. It is submitted by learned counsel for the appellant that testimony of PW2 Pritam Singh i.e., one of the attesting witness of Will dated 28.01.1991 has been wrongly discarded by the learned courts below. Moreover, once the deed writer PW3 Girdhari Lal specifically stated that the witness in question was present, the Will was scribed by him and after its execution, the same was entered by him in his register, the plaintiff has successfully proved execution of the Will. There are no suspicious circumstances surrounding the Will in question as observed by the learned courts below. It is vehemently argued that both the learned courts below have grossly erred in dismissing the suit filed by the plaintiff/appellant. It is thus prayed that both the impugned judgments and decrees dated 01.08.1997 and 31.03.2016 passed by the learned Civil Judge(Senior Division), Fatehgarh Sahib and the learned Additional District Judge, Fatehgarh Sahib be set aside. Consequently, suit filed by the plaintiff/appellant be decreed throughout.

I have heard Learned counsel for the appellant and have gone

through the file.

Plaintiff/appellant has pleaded that Bachan Singh i.e., the father of the plaintiff, defendants No.1 and 2, was the owner-in-possession of the suit property situated at village Barwali Khurd, Tehsil Samrala. Bachan Singh became the owner in exclusive possession of the property in dispute on the basis of memo of partition dated 27.02.1955 allegedly executed between Bachan Singh and his four brothers. It is claimed that Bachan Singh filed a suit in the year 1956 against his brothers Ajaib Singh, Dhiraj Singh and Naib Singh as well as Smt. Gurdial Kaur. The suit was decided by way of a compromise decree dated 21.03.1957. However, it is a matter of record that said compromise decree dated 21.03.1957 is not a part of the record. Plaintiff while deposing as PW1, in his cross-examination admitted that the land (including the suit land) which was held jointly by Bachan Singh and his brothers was not partitioned during the life time of Bachan Singh though all the brothers were claimed to be in possession of the land as per their shares. It is further admitted by the plaintiff that his father Bachan Singh during his life time filed a suit for declaration against his brothers on 19.04.1991 claiming that Bachan Singh was the owner-in-possession of the land situated at Barwali Khurd on the basis of partition deed dated 04.02.1955. When Bachan Singh passed away, the said suit was carried forward by the present plaintiff. However, the said suit was dismissed in default on 20.05.1993 (Ex.D3). It is rightly observed by the learned courts below that in case partition as claimed had indeed taken place on the basis of the partition deed 04.02.1955 and given the shape of decree dated 23.01.1957, there was no necessity for Bachan Singh to have filed another suit on 19.04.1991 seeking the declaration as

above. It is further relevant to note that so-called partition deed (Ex.P1) does not even contain the signatures or thumb mark of Bachan Singh. As noticed earlier, the so-called decree dated 23.01.1957 is admittedly not a part of the record of this case. Therefore, it is not proved on record that the land in question was in fact partitioned between Bachan Singh and his brothers as alleged.

In respect to the Will dated 28.01.1991, the plaintiff examined PW2 Pritam Singh, one of the attesting witness, on the basis of which the plaintiff claims to be the owner of $\frac{2}{3}^{\text{rd}}$ share alongwith defendants No.3 and 4 (to the extent of remaining $\frac{1}{3}^{\text{rd}}$). Testimony of PW2 Pritam Singh, one of the attesting witness is extremely telling. PW2 Pritam Singh stated that Bachan Singh in his presence executed Will (Ex.P2) in favour of his sons Darshan Singh and Nachhattar Singh. However, this is contrary to the contents of the Will (Ex.P2). PW2 Pritam Singh has not specifically testified whether Bachan Singh appended his signatures in the presence of the attesting witnesses of the Will or that Pritam Singh attested the Will in the presence of Bachan Singh. PW3 Girdhari Lal, the deed writer of the said Will (Ex.P2) while stating that the witness appended their signatures in his presence has not testified whether Bachan Singh appended his signatures in the presence of the attesting witnesses. Furthermore, PW3 Girdhari Lal has stated that he entered the Will in his register, but the said register was not produced by PW3. It is pertinent to note at this stage that it was disputed that Bachan Singh could append his signatures. DW1 Kirpal Kaur and DW2 Labh Singh have categorically testified that Bachan Singh was illiterate and used to append thumb impressions on documents. Not even a suggestion has been put to the said witness that Bachan Singh used to append his signatures on the

documents. The plaintiff in his examination has stated that his father Bachan Singh had executed another Will prior to 28.01.1991, but the same stood revoked. However, details regarding the said earlier Will were not brought on record. Though, exclusion of some of the natural heirs or legal representatives of the testator by itself is not a suspicious circumstance, in the present case there is not an iota of evidence on record to prove that Bachan Singh had strained relations with his elder son Darshan Singh. It is rightly held by both the learned courts below that Will (Ex.P2) was shrouded in suspicious circumstances and does not stand proved on record. Moreover, learned Additional District Judge, Fatehgarh Sahib has rightly held that once PW1, the plaintiff, in his cross-examination admitted that he filed a suit for partition against the defendants on 01.06.1992 but withdrew the suit and he did not give any specific answer whether he was afforded permission to file a fresh suit, the suit in hand was rightly held to be barred.

Therefore, both the learned courts below have rightly dismissed the suit filed by the plaintiff and have rendered concurrent findings of fact on the basis of proper appreciation of the evidence on record which do not call for any interference by this Court.

No other argument has been raised.

Learned counsel for the appellant/plaintiff is unable to point out any question of law, much less substantial question of law, which may be involved for consideration in this Regular Second Appeal.

There is a delay of 604 days in refiling and one day in filing of this appeal. Keeping in view the fact that the matter has been decided on merits, the

question of delay in filing and refiling of this appeal has been rendered academic.

Applications are accordingly disposed of.

Keeping in view the facts and circumstances as discussed above, I do not find any infirmity, illegality or perversity in the impugned judgments and decrees dated 01.08.1997 and 31.03.2016 passed by the learned Civil Judge (Senior Division), Fatehgarh Sahib and the learned Additional District Judge, Fatehgarh Sahib, respectively, which warrant any interference by this Court.

Present appeal is, consequently, dismissed with no order as to costs.

(LISA GILL)
JUDGE

January 17 , 2019.
'om'

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No