

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 27th August, 2019**

+ **CS(OS) 1299/2007**

HARDEEP SINGH

..... Plaintiff

Through: Mr. Rajat Aneja with
Ms. Chandrika Gupta, Advs.

Versus

WASAN SINGH AND OTHERS

..... Defendants

Through: Mr. S.S.Yadav, Adv. for D-1, 3
and 4.
Mr. S. Muthukrishnan with
Ms. Divya Chaudhary, Adv. for
D-2.

AND

+ **CS(OS) 218/2009**

MAHINDER KAUR

..... Plaintiff

Through: Mr. S.S.Yadav, Adv.
Versus

HARDEEP SINGH & ANR.

..... Defendants

Through: Mr. Rajat Aneja with
Ms. Chandrika Gupta, Advs.
for D-1.
Mr. S. Muthukrishnan with
Ms. Divya Chaudhary, Adv. for
D-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. CS(OS) No.1299/2007 has been filed by Hardeep Singh, against his (a) grandfather Wasan Singh, (b) father Kulwant Singh (c) paternal grandmother Mahinder Kaur, and (d) father's brother Surinder Singh,

for partition of (i) property no.6/4 Furniture Block, Kirti Nagar, New Delhi; (ii) agricultural land and houses situated in Village Mamecheck, District Gurdaspur, Punjab; and, (iii) property no. 3238, Ranjeet Nagar, New Delhi.

2. CS(OS) No.218/2009 has been filed by Mahinder Kaur for recovery of possession of third floor of property no.3238, Ranjeet Nagar, New Delhi from Hardeep Singh and his wife Nam Simran Kaur.

3. CS(OS) No.218/2009 was initiated prior in point of time, before the District Court. Finding the claim of Hardeep Singh in CS(OS) No.1299/2007 to be the same as his defence in the previously instituted CS(OS) No. 218/2009, vide order dated 1st August, 2008 in CS(OS) No.1299/2007, the proceedings therein were ordered to be stayed. Hardeep Singh preferred FAO(OS)450/2008 against the said order and which was disposed of vide order dated 3rd December, 2008 of the Division Bench of this Court, by transferring the previously instituted CS(OS) No.218/2009 to this Court and by directing the two suits to be disposed of together. In pursuance thereto, the suit filed by Mahinder Kaur against Hardeep Singh and his wife Nam Simran Kaur, for recovery of possession, was transferred to this Court and numbered as CS(OS) 218/2009

4. In the aforesaid scenario, on 28th January, 2009, the following order was passed in both the suits:-

“+ CS(OS) No. 1299/2007 and CS(OS) 218/2009

Vide order dated 1st August, 2008, the proceedings in this suit were stayed under Section 10 of the CPC owing to pendency of a previously instituted suit by the defendant No. 3 against the plaintiff,

before the District Court. In FAO(OS) No. 450/2008 preferred by the plaintiff against the order dated 1st August, 2008, vide order dated 3rd December, 2008, the suit pending in the District Court has been ordered to be transferred to this Court for trial of the two suits together.

The file of the suit pending in the District Court has been received. Let the same be numbered.

CS(OS) No. 1299/2007 and CS(OS) No. 218/2009

CS(OS) No. 1299/2007 has been filed by the plaintiff for partition on the plea that Late Sh. Tara Singh great grandfather of the plaintiff was the karta and head of the family and along with his Son, Sh. Wasan Singh (the defendant No. 1 and grandfather of plaintiff) constituted a Joint Hindu Family which owned properties as listed in para 3 of the plaint. The plaintiff has however in para 3 of the plaint stated that Late Sh. Tara Singh was the owner of the said properties and died leaving the grandfather of the plaintiff Sh. Wasan Singh (the defendant No.1) as his son. Though the plaintiff has not mentioned the date of demise of Late Sh. Tara Singh but the defendants have pleaded that Late Sh. Tara Singh had died on 4th October, 1988 and which fact is not disputed by the plaintiff. The plaintiff claims to be entitled to a share in the properties by birth.

The defendants have in their written statement pleaded that Late Sh. Tara Singh was the sole owner of the properties and has bequeathed the properties as per his will. The defendants have denied the existence of any joint Hindu family. The other suit was filed by the defendant No. 3 against the plaintiff for possession of the portion of the residence, which the plaintiff was earlier allowed to occupy as a family member. Issues have been framed in the said suit and though affidavit by way of evidence has been filed by the plaintiff in the other suit but the cross-examination has not begun.

Since Late Sh. Tara Singh died in 1988 i.e. after coming into force of Hindu Succession Act, 1956, the properties left by him shall not become ancestral in the hands of his son (defendant No.1) for the plaintiff to acquire any interest or share therein. Thus, the plaintiff shall not acquire any rights in the properties left by Sh. Tara Singh merely for the reason of his grandfather (defendant No.1) or his father (defendant No.2) inheriting the same from Shri Tara Singh. Further, since the son of Shri Tara Singh is still alive, the plaintiff was not a natural heir of Late Sh. Tara Singh and would have no claims to his properties.

Only way the plaintiff can have a claim to the properties is if the properties were of the joint Hindu family and not of Shri Tara Singh individually. The defendants in their joint written statement have also pleaded that Shri Tara Singh left a Will. The plaintiff not being a natural heir of Shri Tara Singh is not entitled to challenge the said Will also.

If the properties are found to be of joint Hindu family, the

plaintiff shall have a share therein and the same will have to be partitioned and the suit for possession will be dismissed. Conversely if the properties are not found to be of joint Hindu family, the suit for partition will be dismissed and the suit for possession shall be decreed.

The Apex court has held that in a suit for possession, mesne profits can be awarded even if not claimed.

Accordingly, the suit for partition (CS(OS)No.1299/2007) is treated as lead case in this consolidated trial and reference to parties is by nomenclature therein only. The issues earlier framed in other suit are struck off.

The following issues for consolidated trial in two suits are framed:-

- 1. Whether there was any joint Hindu Family of which Late Sh. Tara Singh was the karta and whether properties subject matter of the suit are the properties of the said joint Hindu family? OPP*
- 2. If the above issue is decided in favour of plaintiff, what is the share of plaintiff? OPP*
- 3. If the above issues are decided against the plaintiff to mesne profits at what rate and for what period is the defendant No.3 entitled to from plaintiff? OPD*
- 4. Relief.*

No other issue arises or is pressed.

The parties to file their list of witnesses within 15 days. The plaintiff to file affidavits by way of examination in chief of all his witnesses within six weeks. Evidence to be recorded before the Joint Registrar.

List before the Joint Registrar on 17th March, 2009 for fixing the dates for cross-examination of the witnesses of the plaintiff.”

5. The recording of evidence in the suits, in terms of order aforesaid, stands concluded and vide order dated 29th November, 2018, the suits were ordered to be listed for final hearing in the category of “After Notice Miscellaneous Matters”.

6. The counsel for Hardeep Singh and his wife Nam Simran Kaur has been heard and the occasion for hearing the other counsels has not arisen.

7. The counsel for Hardeep Singh and his wife has informed, (i) that Hardeep Singh in his evidence has examined four witnesses; (ii) that the opposite party has examined two witnesses; (iii) that Hardeep Singh has led evidence to the effect that all the three properties of which partition is sought, belonged to the Joint Hindu Family of which his great grandfather Tara Singh, grandfather Wasan Singh, father Kulwant Singh, grandmother Mahinder Kaur, uncle Surinder Singh as well as Hardeep Singh were members; (iv) that during the pendency of this suit, Wasan Singh, Kulwant Singh and Mahinder Kaur have died and their heirs have been substituted; (v) that Sh. Tara Singh along with his son Wasan Singh and his grandsons Kulwant Singh and Surinder Singh was carrying on joint business; and, (vi) that Hardeep Singh in his evidence has examined the witness from the office of the Delhi Development Authority as PW3 and who has proved the lease of property no.6/4 Furniture Block, Kirti Nagar, New Delhi having been granted in favour of 'M/s.Tara Singh & Sons'.

8. I have enquired, from the counsel for Hardeep Singh. the constitution of 'M/s Tara Singh & Sons'.

9. The counsel for Hardeep Singh states that the opposite party has not disclosed the said constitution.

10. I have further enquired from the counsel for Hardeep Singh, whether not the onus of proving that there was a Joint Hindu Family of which Tara Singh was the *Karta* and that the properties subject matter of this suit are the properties of the said Joint Hindu Family, was on Hardeep Singh and if it was so, whether not it was for the Hardeep Singh to prove the constitution of 'M/s Tara Singh & Sons'

i.e. that there was a Joint Hindu Family by the name of Tara Singh and sons.

11. The counsel for Hardeep Singh is unable to controvert.

12. I have further enquired from the counsel for Hardeep Singh the name and style in which Tara Singh, Wasan Singh, Kulwant Singh and Surinder Singh are claimed to be carrying on joint business.

13. The counsel for Hardeep Singh states that they were carrying on business in name and style of 'M/s Tara Singh & Sons' which was a partnership firm.

14. The same lets the cat out of the bag 'M/s Tara Singh & Sons' in whose name the perpetual lease deed of property no.6/4 Furniture Block, Kirti Nagar, New Delhi is stated to be existing was a partnership and not a Joint Hindu Family or a co-parcenory. Once it was/is so, the property at Kirti Nagar has to be of the said partnership only and the plea of Hardeep Singh, of the same being the property of Joint Hindu Family, fails.

15. On further enquiry, it is stated that Tara Singh, Wasan Singh, Kulwant Singh and Surinder Singh were the partners of "Tara Singh & Sons".

16. No other argument has been raised on any of the issues framed and no other evidence in proof of any of the issues, cited.

17. The only other argument of the counsel for Hardeep Singh is, that the Will of Tara Singh set up by the opposite party, has not been proved.

18. I have drawn attention of the counsel for Hardeep Singh to the order dated 28th January, 2009 reproduced above, in which no issue

was framed qua proof of the Will and for the reasons given therein. It was recorded that since Hardeep Singh is not a successor under the Personal Law of Succession applicable to Tara Singh and has no right to succeed to properties of Tara Singh in the event of intestacy of Tara Singh, he would have no caveatable interest to challenge the Will, if any, of Tara Singh. The said reason holds good today also. Reference, if any, required in this regard can be made to *Arjun Som Dutt Vs. Madhvi Bay* 2014 SCC OnLine Del 1365, *Pankaj Shah Vs. Rafat* 2018 SCC OnLine Del 8943 & order dated 31st May, 2013 in CS(OC) 1166/2013 titled '*Vinod Kumar Vs. Virender Kumar*', order dated 23rd July, 2012 in Test Cas No.41/1995 titled '*Prof. B.R.Grover Vs. The State*' and *Krishna Kumar Birla Vs. Rajendra Singh Lodha* (2008) 4 SCC 300.

19. The counsel for Hardeep Singh contends that the said reason does not hold good now, because though at the time of framing of issues on 28th January, 2009, the father of Hardeep Singh i.e. Kulwant Singh, was alive, he died during the pendency of the suit. It is suggested that Hardeep Singh, as an heir of his father, would be entitled to challenge the Will of Tara Singh.

20. I have enquired from the counsel for Hardeep Singh, whether Kulwant Singh in his lifetime had challenged the Will of Tara Singh.

21. The answer is in the negative.

22. Once it is so, Hardeep Singh, as an heir of Kuldeep Singh, cannot get any rights better than Kulwant Singh and cannot acquire a caveatable interest on the demise of his father. In *Imdad Ali Vs. Keshav Chand* (2003) 4 SCC 635 it was held to be well settled that a

person, by reason of inheritance or assignment does not derive any better title than his predecessor and thus, the right which the original tenant in that case did not possess, could not be passed on to his successor. Kulwant Singh, after admitting the Will of Tara Singh in his pleadings was estopped from challenging the said Will and Hardeep Singh as an heir of Kulwant Singh is similarly estopped. The claim of Hardeep Singh can at best be for a share in the portion of the property of Kulwant Singh under the Will of Tara Singh or in any other capacity.

23. No other argument has been urged by the counsel for the Hardeep Singh.

24. I have enquired from Mr. S.Muthukrishnan, Advocate appearing for the heirs of Kulwant Singh, whether Kulwant Singh has left any Will.

25. Mr. S. Muthukrishnan, Advocate states that he is not the main counsel and also does not know the name of the counsel on whose behalf he is appearing.

26. However the counsel for Hardeep Singh and the counsel for the other parties that no Will has been set up of Kulwant Singh.

27. The counsel for the LRs of Wasan Singh, LRs of Mahinder Kaur and Surinder Singh however states that the said defendants have proved before this Court as Ex.D4W2/2, the order dated 3rd September, 1990 of the Court of Sh. Satnam Singh, Sub-Judge, 1st Class, Delhi in Succession Petition No.93/1989, in which the Will of Tara Singh was proved, as well as the statements recorded in the said case of the witnesses examined, including one of the attesting witnesses to the said Will, as Ex.D4W2/1 and Ex.D4W2/3.

28. However a perusal of the aforesaid documents shows reference therein to a Will dated 25th June, 1981 of Tara Singh. On the contrary, in the pleadings in these suits, reference to a Will dated 20th May, 1987 registered on 16th June, 1987 of Tara Singh has been made and a photocopy of the said Will has been filed and which is found to be cancelling the earlier Will dated 25th June, 1981.

29. It is thus not open to the counsel for the LRs of Wasan Singh, LRs. of Mahinder Kaur and of Surinder Singh to contend that the Will dated 20th May, 1987 of Tara Singh has been proved.

30. In the aforesaid scenario, Hardeep Singh is found to have failed to prove issue No.1 supra. Neither has the existence of any Joint Hindu Family of which Tara Singh was the Karta, been proved nor has it been proved that the properties subject matter of the suit, are the properties of the said Joint Hindu Family.

31. Thus, CS(OS) No.1299/2007 for partition, is liable to be dismissed.

32. It was held in the order dated 28th January, 2009 reproduced above, and which has attained finality, that if the properties are not found to be of Joint Hindu Family, the suit for possession shall be decreed.

33. The only thing which remains to be considered is, whether Kulwant Singh, under the Will of Tara Singh, was entitled to the portion of the property in possession of Hardeep Singh and Nam Simran Kaur, inasmuch as if it is so, the question of a decree for possession being passed against them would not arise inasmuch as Hardeep Singh, as one of the heirs of Kulwant Singh, has right of residence in the said portion till partition between the heirs of Kulwant Singh.

34. I have perused the Will dated 20th May, 1987 of Tara Singh and it is found that no portion of property no.3238, Ranjeet Nagar, New Delhi, from a portion whereof decree for possession of Hardeep Singh and Nam Simran Kaur is sought, was bequeathed to Kulwant Singh. The said property is found to have been bequeathed to Mahinder Kaur and Sewa Singh, being another son of Tara Singh.

35. The counsel for Hardeep Singh however contends that the Will dated 20th May, 1987 has not been proved. Reliance is placed on ***Janki Narayan Bhoir Vs. Narayan Namdeo Kadam***, (2003) 2 SCC 91 holding as under:

“Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has 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 an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be

noted is that that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of [Section 63](#), viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under [Section 63](#) of the Succession Act. Where one attesting witness examined to prove the will under [Section 68](#) of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of [Section 68](#) of the Evidence Act."

36. I am afraid, the aforesaid contention holds no water in the present case.

37. In the present case, as already held in order dated 28th January, 2009 and which I reiterate has attained finality, it was held that Hardeep Singh being not entitled to a share in the property of Tara Singh even in the event of intestacy of Tara Singh, has no caveatable interest to object to or challenge the Will dated 20th May, 1987 of Tara Singh. The father Hardeep Singh viz. Kulwant Singh who has died during the pendency of this suit and through whom Hardeep Singh now claims, in his written statement in CS(OS) 218/2009 had admitted the Will dated 20th May, 1987 of Tara Singh whereunder he did not get any share in the property from a portion of which decree for possession of Hardeep Singh and Nam Simran Kaur is sought. As aforesaid, Hardeep Singh on demise during the pendency of this suit of his father Kulwant Singh, would not get any better rights than his

father Kulwant Singh and is bound by the admission of his father Kulwant Singh of the Will dated 20th May, 1987.

38. I may in this respect also record, that the Hardeep Singh even on the demise of his father Kulwant Singh, did not assert that any independent rights had accrued to him and did not file any additional pleading or amend his pleadings or seek variation of the order dated 28th January, 2009. No issues were framed on 28th January, 2009 with respect to the validity of the Will dated 20th May, 1987 of Tara Singh and the parties proceeded to go to trial only on the issues as framed on 28th January, 2009. It is now not open to Hardeep Singh, to defeat the decree for possession to which the Mahinder Kaur has become entitled in terms of order dated 28th January, 2009, by setting up such a plea.

39. Issue no.3 framed on 28th January, 2009 being with respect to *mesne profits* and Hardeep Singh and Nam Simran Kaur having become liable for a decree for *mesne profits*, I have enquired from the counsel for the Mahinder Kaur, whether any evidence has been led as to *mesne profits*.

40. The counsel for Mahinder Kaur states that no evidence has been led but Hardeep Singh, in his cross-examination, has admitted that the portion in his possession is capable of fetching rent of Rs.5,000/- per month. The counsel for Mahinder Kaur is however unable to show any such admission.

41. The counsel for Hardeep Singh, at this stage states that, Mahinder Kaur having also died during pendency of this suit, plaintiff as an heir of Mahinder Kaur, would have a right/share in her estate

including the portion of property at Ranjeet Nagar, New Delhi bequeathed under the Will of Tara Singh in her favour.

42. On enquiry, it is stated that Mahinder Kaur pre-deceased Kulwant Singh.

43. The counsel for the LRs of Wasan Singh, LRs of Kulwant Singh and for Surinder Singh now states that a notice has been proved, whereunder Kulwant Singh had disinherited Hardeep Singh.

44. It has been held by the Division Bench of this Court in ***Preeti Satija Vs. Raj Kumar*** 2014 SCC OnLine Del 188 that public notice of disinheritance cannot take place of the Will and cannot exclude the heir from a share in the estate.

45. On enquiry, it is stated that no Will of Mahinder Kaur has been set up.

46. What follows is, that on demise of Mahinder Kaur, her share/portion of property no. 3238, Ranjeet Nagar, New Delhi, a portion of which is in possession of Hardeep Singh and his wife Nam Simran Kaur, would be inherited by her heirs including Kulwant Singh, and on demise of Kulwant Singh, the share of Kulwant Singh, inherited from Mahinder Kaur, would be inherited by his heirs including Hardeep Singh. Once Hardeep Singh is found to be having a share, however miniscule, in the property in his possession, the other owners thereof i.e other heirs of Mahinder Kaur and Kulwant Singh are not entitled to dispossess Hardeep Singh therefrom and can claim only partition.

47. Thus, though at the time of institution of the suit for recovery of possession, Mahinder Kaur had cause of action therefor, but owing to

subsequent events the said cause of action does not survive and consequently, no relief sought can be granted.

48. It is unfortunate that the parties/counsels, even after the cause of action extinguished , continued to litigate.

49. Thus, CS(OS) No. 218/2009 is also liable to be dismissed.

50. Thus, CS(OS) No.1299/2007 as well as CS(OS) No.218/2009 are dismissed.

No costs.

Decree sheets be drawn up.

RAJIV SAHAI ENDLAW, J.

AUGUST 27, 2019

‘ak/gsr’