

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-100-2015(O&M)
Date of decision: 30.01.2020

Harbans Kaur @ Rani

.....Appellant

Versus

Darshan Singh and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr.Avnish Mittal, Advocate for the appellant

Ms. Ritu Punj, Advocate and
Mr. Abhishek Singla, Advocate for respondent No.1

ANIL KSHETARPAL, J.

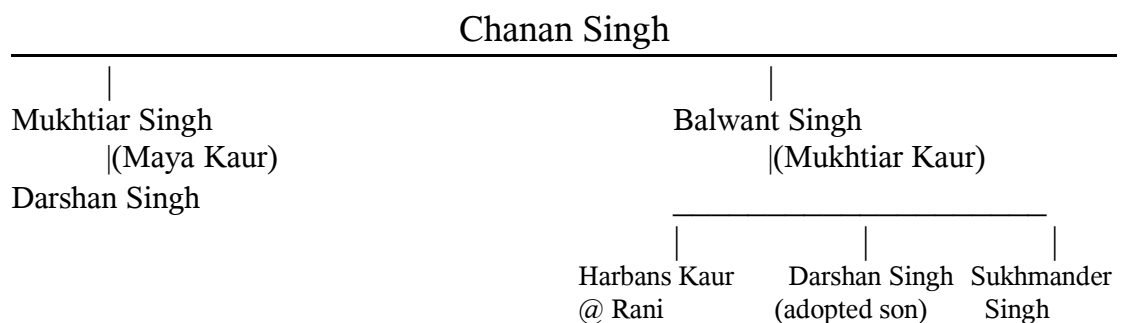
The plaintiff-appellant has filed the present appeal against concurrent findings of facts arrived at by the courts below while dismissing suit filed by her. In the considered view of this Court following questions of law arises for its consideration:-

“i) Whether in the facts and circumstances of the case, first Appellate Court was correct in setting aside the decree passed by the Civil Court on 9.10.1995 acknowledging a family settlement, on the ground that the defendant No.1 could not be validly adopted in view of bar contained in Section 11 (i) of the Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as the ‘Act of 1956).

ii) Whether in the facts and circumstances of the present case the Court should exercise powers

under Order 41 Rule 33 CPC to set aside the findings against the defendant No.1 recorded by the First Appellate Court even in absence of cross appeal or cross objections.”

To understand inter se relationship between the parties, it would be appropriate to draw a pedigree table:-



Note:- As per the findings of both the Courts below, Darshan Singh on the death of his mother Maya Kaur (sister of Mukhtiar Kaur) was adopted by Balwant Singh and Mukhtiar Kaur.

Mukhtiar Singh and Balwant Singh two brothers had married two sisters Maya Kaur and Mukhtiar Kaur respectively. Maya Kaur is stated to have died on the birth of child- Darshan Singh. Balwant Singh also had another son Sukhmander Singh, who was mentally retarded.

Present suit was filed by Harbans Kaur @ Rani (daughter of Balwant Singh) on 16.7.2008. She claims declaration that she is owner of the land measuring 13 kanals and Civil Court judgment and decree dated 9.10.1995 by the Court in civil suit No. 231 of 18.7.1995 titled as 'Darshan Singh vs. Balwant Singh' and mutation sanctioned thereupon is illegal, null and void, not binding on the rights of the plaintiff. As a consequential relief sale deed No. 2611 dated 8.11.2006 executed by defendant no.1 in favour of defendants No. 2, 3, 4 and 4 (a) regarding half share of the suit land as also sale deed dated 3.1.2008 executed by

defendant Nos. 2, 3, 4 and 4 (a) in favour of defendants No. 5, 6 and 7 are illegal, null and void. It is further prayed that decree for permanent injunction be granted restraining the respondents from alienating any part of the property. She also claimed relief of possession.

The plaintiff filed the present suit on the premise that she is sole surviving heir of Balwant Singh who died on 11.10.2011. On the other hand, defendant no.1 contested the suit on the plea that he was adopted by Balwant Singh and Mukhtiar Kaur in the year 1958 just after his birth as his natural mother Maya Kaur had died and thereafter he always treated Balwant Singh and Mukhtiar Kaur as his father and mother. It was further pleaded that when he was adopted Sukhmander Singh was already 10 years old, but was mentally retarded being of unsound mind. It was further asserted that defendant No.1 has performed all duties and responsibilities of a son qua Balwant Singh and Mukhtiar Kaur till they were alive. The marriage of defendant no.1 was solemnized by Balwant Singh and Mukhtiar Kaur as his parents on 26.10.1978. It was further asserted that pursuant to a family settlement Balwant Singh acknowledged defendant no.1 to be the owner of the suit land and the Civil Court judgment and decree was passed declaring defendant no.2 to be owner in possession of the suit property on 9.10.1995. Defendant No.1 also pleaded that when Sukhmander Singh was alive Balwant Singh had executed a registered Will in favour of Sukhmander Singh and defendant no.1. However, on the death of Sukhmander Singh, i.e, on 5.8.2001 Balwant Singh executed another Will bequeathing the entire property to defendant no.1 on 9.9.2001. Both the

Courts on appreciation of evidence have concurrently found that adoption of Darshan Singh- defendant no.1 by Balwant Singh and Mukhtiar Kaur stands proved. Both the Courts have noticed that from childhood defendant no.1 is residing with the family of Balwant Singh and Mukhtiar Kaur and entire record produced prove that Darshan Singh defendant no.1 had disclosed name of his father as Balwant Singh and not Mukhtiar Singh since the time of his birth. Defendant no.1 has produced copies of record from Food & Supplies Department, Electricity Department, Telephone Department and his own driving licence. Apart from that Balwant Singh had purchased some property in the name of Darshan Singh, while specifying that Darshan Singh was his adopted son when Darshan Singh was minor. Both the Courts have also held that the Will dated 9.9.2001 has been proved in accordance with Section 68 of the Indian Evidence Act, 1872 on deposition of both the attesting witnesses namely Bawa Singh-Nambardar (DW8) and Angrej Singh-DW9.

However, learned First Appellate Court has chosen to set aside the civil Court judgment and decree dated 9.10.1995 passed in favour of defendant no.1 on the ground that adoption of Darshan Singh by Balwant Singh and Mukhtiar Kaur during the lifetime of Sukhmander Singh (their natural born son) was invalid in view of Section 11(i) of the Act of 1956. Defendant no.1 has not filed any appeal as no appeal is maintainable. First appeal filed by the plaintiff has been dismissed on the ground that the Will dated 9.9.2001 has been proved.

This Court has heard learned counsel for the parties at length and with their able assistance has gone through the judgments passed by

the Courts below and the requisitioned record.

Learned counsel for the appellant has submitted that the Will dated 9.9.2001 is surrounded by various suspicious circumstances and therefore, it cannot be relied upon. While elaborating he submitted that Will dated 9.9.2001 is not a registered Will whereas the previous Will dated 26.5.1978 was a registered Will. He further submitted that Balwant Singh used to sign whereas the Will dated 9.9.2001 allegedly bears his thumb impression. He further submitted that the scribes of both the Wills have not been examined. He further submitted that no reason has been disclosed in the Will dated 9.9.2001 to discard the natural heirs. The previous Will dated 26.5.1978 has also not been revoked while executing a new Will. Balwant Singh had died soon after the execution of the second Will dated 9.9.2001.

On the other hand, learned counsel for the respondent has submitted that the first Will, which is registered, is also in favour of the defendant no.1. At that time, the executor had bequeathed the property equally between his two sons i.e defendant no.1 and 2 late Sh. Sukhmander Singh. However, since Sukhmander Singh had died on 5.8.2001. Therefore, the testator has bequeathed his entire property in favour of defendant no.1. She further contended that even finding of the First Appellate Court while setting aside judgment and decree dated 9.10.1995 is erroneous. She, hence, submitted that this Court should exercise powers under Order 41 Rule 33 CPC to set aside the aforesaid findings.

On careful analysis of the arguments of the learned counsel

for the parties, this Court proceeds to examine the entire dispute. It would be apt to notice that Darshan Singh is natural son of Mukhtiar Singh and Maya Kaur. Mukhtiar Singh and Balwant Singh were brothers whereas Maya Kaur and Mukhtiar Singh were sisters. Balwant Singh was having a son-Sukhmander Singh, who was mentally retarded. Maya Kaur had died while giving birth to Darshan Singh. In these circumstances, Mukhtiar Singh had given Darshan Singh in adoption to Balwant Singh and Mukhtiar Kaur (wife of Balwant Singh). In other words, one brother has given his son to other brother in adoption. It is to be kept in mind that natural son of Balwant Singh was mentally retarded. In these circumstances, particularly, when Balwant Singh had executed a registered Will, when Sukhmander Singh was alive dividing the property equally between Darshan Singh and Sukhmander Singh and on the death of Sukhmander Singh subsequently bequeathed the entire property to Darshan Singh, cannot be viewed with suspicion. The Will is not compulsorily required to be registered. It is registered, at the option of testator. Hence, non-registration of the subsequent Will dated 9.9.2001 cannot itself be sufficient to hold that the Will is surrounded by suspicious circumstances. With regard to signatures of Balwant Singh on the first Will dated 26.5.1978 and thumb impression of Balwant Singh on the Will dated 9.9.2001 it has to be noticed that there is a gap of almost 23 years. Balwant Singh had become old by the year 2001. He had also recently lost his biological son Sukhmander Singh.

Section 63 (c) of the Indian Evidence Act, 1925 requires that a Will can be signed or thumb marked by the testator. Rather

Section 63 uses the words that the testator may sign or affix his mark to the Will. There is no evidence that Balwant Singh had not thumb marked the subsequent Will dated 9.9.2001. In such circumstances, particularly, when 23 years had elapsed from the date the first Will was executed, it is not unusual that the testator put his thumb impression rather than signing the Will.

Non-examination of scribe cannot also be viewed with suspicion once both the attesting witnesses of the Will have appeared and deposed in the Court. As regards argument of the learned counsel for the appellant that no reason has been mentioned in the Will, although, appears to be attractive in the first blush, however, on deeper examination is found to be without substance. Harbans Kaur @ Rani has admitted that she was married 30 to 40 years before the institution of the suit. Therefore, one can safely assume that she was married in early 1970s. The Will was being executed after a period of 30 years from the date of her marriage. There were lot of developments in between. Sukhmander Singh, brother of Harbans Kaur @ Rani and son of Balwant Singh had died. Harbans Kaur @ Rani was not a member of the family after she was married. She was settled in her in laws house. In these circumstances, the second Will cannot be said to be suspicious on the ground that why Harbans Kaur @ Rani has not been given any share in the property.

As regards argument of the learned counsel for the appellant that previous Will dated 26.5.1978 has not been revoked while executing the subsequent Will dated 9.9.2001, it is well settled that the last Will is

enforceable and all previous testamentary dispositions stand superseded automatically. Therefore, it is not necessary that previous Will must be revoked before a subsequent Will is executed.

Last argument of the learned counsel for the appellant that Balwant Singh died soon after the execution of the subsequent Will dated 9.9.2001 is also without substance because Balwant Singh died after a period of 32 days. In view of the aforesaid facts which have been noticed in detail, the Will executed by Balwant Singh is found to be natural, beyond any suspicion.

At this stage, this Court is required to examine whether the judgment and decree dated 9.10.2005 has been correctly set aside or not. Order 41 Rule 33 CPC mandates that the Appellate Court while deciding the appeal is required to decide the case in accordance with law irrespective of the fact as to whether the findings arrived at against the respondent has been challenged by filing cross objection or cross appeal. Phraseology used in Order 41 Rule 33 CPC is explicitly clear. The Appellate Court is required to decide the appeal in accordance with law. While deciding the appeal if the Appellate Court arrives at a conclusion, that a particular finding given in the impugned judgment is erroneous, the appellate Court has the power to pass any decree or make any order which ought to have been passed or made, even if the respondent may not have filed any appeal or cross objections.

The facts which have already been noticed. Keeping in view the relationship between the parties and the fact that the adoption of Darshan Singh has been held to be invalid only on a technical ground, the

First Appellate Court erred in setting aside the judgment and decree dated 9.10.1995. Voluminous record has been produced to prove that Darshan Singh was always treated as son of Balwant Singh and Mukhtiar Kaur. The judgment and decree is based upon a family settlement. In the previous suit Balwant Singh had not only filed his written statement, but appeared in the Court and deposed that he admits the claim of Darshan Singh. Darshan Singh is otherwise also natural born son of Mukhtiar Singh, brother of Balwant Singh. The learned First Appellate Court has set aside the judgment and decree on the ground that adoption of Darshan Singh is invalid. For the purpose of family settlement, the word 'family' is to be considered with a broader prospective. Hon'ble Supreme Court in case titled as '**Ram Charan Das vs. Girja Nadini Devi and others**' AIR 1966 Supreme Court 323 has already examined this issue in detail. Darshan Singh in any case is a member of larger family. In such circumstances, the judgment and decree which is based on admission of Balwant Singh acknowledging a prior family settlement cannot be set aside only on the ground that the adoption of Darshan Singh is in violation of Section 11 of the Act of 1956.

Keeping in view the aforesaid facts, findings of the learned First Appellate Court with regard to validity of judgment and decree dated 9.10.1995 are set aside.

Consequently, the appeal is dismissed.

30.01.2020

rekha

Whether speaking/reasoned

Whether Reportable

(ANIL KSHETARPAL)

JUDGE

Yes / No

Yes / No