

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA No.4043 of 2019 (O&M)
Date of decision: 9th August, 2022

Harinderpal Singh

... Appellant

Versus

Moninder Pal Singh Kahlon @ Mohinderpal Singh & others

... Respondents

CORAM: HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

Present: Mr. Ajay Pal S. Rehan, Advocate for the appellant.

MANJARI NEHRU KAUL, J.

Harinderpal Singh, defendant No.1, has challenged the judgment and decree dated 07.11.2016 passed by the learned trial Court vide which suit for partition of the two houses situated in the Abadi of village Kalanaur, Tehsil and District Gurdaspur, duly described and detailed in the plaint (hereinafter referred to as, 'the suit property') was decreed with costs and the judgment and decree dated 06.05.2019 of the learned first appellate Court whereby the appeal preferred by him was dismissed. The parties to the *lis* hereinafter shall be referred to by their original position in the suit.

The pleaded case of the plaintiff may be noticed as thus:

Kirpal Singh, father of the plaintiff as well as defendant No.1 Harinder Pal Singh, was owner of the suit property. Kirpal Singh expired in the month of February 1974 while mother of the plaintiff Baljit Kaur passed away in April 2008. Defendants No.1 and 2 are real brothers of the plaintiff; whereas defendant No.3 is the widow, defendant No.5 is the

son and defendants No.4, 6 and 7 are the daughters of deceased brother of the plaintiff Parminder Pal Singh. The plaintiff had retired from Indian Army on 28.02.2007, his brother defendant No.2 had settled in USA after leaving his job in the Indian Army and his third brother late Parminder Pal Singh had left behind defendants No.3 to 7 as his legal heirs. The property left behind by the parents of the plaintiff had thus devolved upon their legal heirs including the defendants in equal shares. As such, the plaintiff was entitled to 1/4th share in each of the two houses. The defendant No.1 had been allegedly threatening to alienate the suit property beyond his 1/4th share and hence partition of the suit property by metes and bounds had become necessary. Since defendant No.1 had entered into an agreement to sell the suit property with Pardeep Kumar Sachar and Rajesh Kumar Sachar, the plaintiff had served notice upon them through registered cover asking them not to get the sale deed of the suit property executed. Defendant No.1 had also refused to accede to the request of the plaintiff for admitting to his genuine claim over the suit property. Left with no other option, the plaintiff instituted the suit in question.

Defendant No.1 filed written statement wherein the inter-se relationship of the defendants and the plaintiff was not denied. However, it was submitted that Kirpal Singh, father of both the plaintiff and defendant No.1, had executed a Will with respect to the suit property, which was situated within the Lal Lakeer of village Kalanaur, in his sound disposing mind in favour of defendant No.1 on 15.09.1973. It was

also claimed by the defendant that one house constructed on 6 Marlas of plot had been rented out to Punjab Home Guard C-Company from where defendant No.1 had been receiving rent since the year 1988. It was further alleged that the original Will of Kirpal Singh dated 15.09.1973 was in the possession of the plaintiff.

In the replication filed by the plaintiff, he denied the submissions made by the defendant No.1 in his written statement and reiterated his averments made in the plaint. On the basis of material and evidence led, both the courts below concurrently concluded that the defendants failed to prove the execution of the Will dated 15.09.1973.

Learned counsel for the appellant has vehemently argued that both the Courts below failed to appreciate that the defendant/appellant had become owner of the houses/suit property on the basis of an unregistered Will executed by his late father Kirpal Singh. The execution of the unregistered Will stood duly proved in the evidence of DW-5 Balraj Singh, who was the grandson of Sharam Singh, one of the attesting witnesses of the Will and DW-6 Jatinder Singh who was the son of late Jagir Singh, another attesting witness of the Will in question. It was also submitted that it stood clearly proved during the evidence of DW-1 Inderjit Singh, Junior Assistant from the office of Punjab Home Guard that the appellant had been in possession of the suit property being its owner and no objection had ever been raised by anyone, much less the plaintiff.

I have heard learned counsel for the appellant and perused the relevant material on record.

The suit in question was filed for partition and consequential relief of permanent injunction in respect of the suit property. The moot issue which arises for consideration in the instant case is whether the suit property had been bequeathed to defendant No.1 by way of a Will dated 15.09.1973 by his late father Kirpal Singh or whether the suit property was liable to be partitioned between the legal heirs of late Kirpal Singh. The onus was on the plaintiff to prove that he was entitled to the relief of partition by way of metes and bounds and on the other hand onus to prove whether late Kirpal Singh had executed a valid Will dated 15.09.1973 in favour of defendant No.1 was upon the defendants.

Before proceeding further, it would be apposite to refer to an application filed under Section 65 of the Evidence Act by the Appellant wherein he pleaded that the original Will dated 15.09.1973 was in the possession of the plaintiff who had been intentionally withholding it from the Court. The plaintiff also moved an application before the trial Court under Order XI Rule 14 CPC for directing the appellant/defendant No.1 to produce the original Will dated 15.09.1973. In his reply to the application under Order XI Rule 14 CPC, the appellant stated that his father late Kirpal Singh had executed a Will dated 15.09.1973 in his favour which though had been in his possession however in the year 2005, when he along with his family went to Greece, the original Will was handed over to his mother Baljit Kaur. Defendant No.1 remained in

Greece till 2009 and during that time, their mother Baljit Kaur went to the house of the plaintiff at Chandigarh. Ever since then the Will had been in the possession of the plaintiff. During his cross-examination, the appellant while stepping into the witness box as DW3, however contradicted himself as he admitted that he had been told about the Will dated 15.09.1973 by his mother, some time in the year 1976-77 and still further the Will had been in possession of his mother and it was she, herself who had handed over a copy of the Will to him. This statement on the face of it is at complete variance with the reply dated 28.05.2012 given by him to the application filed by the plaintiff, under Order XI Rule 14 CPC. At the risk of repetition, in his reply to the application under Order XI Rule 14 CPC, he had stated that the original Will had been in his possession till he went to Greece in the year 2005, when he handed over the same to his mother Baljit Kaur. This major contradiction, without a doubt raises eyebrows and also a big question mark about the truthfulness of the appellant. Still further, appellant/defendant examined DW-4 Daljit Singh son of Deed Writer Darshan Singh, to prove that the suit property had been bequeathed to him vide Will dated 15.09.1973. Besides him, DW-5 Balraj Singh grandson of one of the attesting witnesses of the Will namely Sharam Singh and DW-6 Jatinder Singh son of the other attesting witness of the Will namely Jagir Singh was also examined by the appellant, however none of the two alleged attesting witnesses of the Will, Sharam Singh and Jagir Singh, were examined to prove the due execution of the Will. The appellant, as already noticed

earlier, did examine the grandson of Sharam Singh and son of Jagir Singh, however no evidence was brought on record to prove that both these attesting witnesses were no longer alive. The least that could have been done by the appellant was to produce the death certificates of the attesting witnesses in case they had actually expired.

A Will cannot be admitted in evidence unless the conditions stipulated in Section 68 of the Indian Evidence Act, 1862 are complied with, which can be discerned from a reading of Section 68 of the Indian Evidence Act, 1862, which is as follows:-

“68. Proof of execution of document required by law to be attested. — *If a document is required by law to be attested, it 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 evidence:*

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”

The Courts below thus did not commit any error in concluding that the appellant had miserably failed to prove the due execution of the Will dated 15.09.1973 by his late father, in his favour.

It would be relevant to observe that the learned counsel for the appellant also argued that the suit of the plaintiff was not

maintainable as he had not sought possession of the suit property but had merely sought the relief of partition of the suit property. This Court does not find any merit in this submission. It needs to be reiterated that the remedy of co-owner who is not in possession of the suit property, is by way of a suit for partition or for actual joint possession. The present suit has been filed for partition by metes and bounds on the ground that the plaintiff is Class-I legal heir of the original owner Kirpal Singh and thus entitled to his share. A co-owner has an interest in the whole property including every parcel of the property.

On being pointedly asked, learned counsel has failed to bring to the notice of this Court any material on record from which it could be inferred that the conclusions drawn by both the courts below were either contrary to the record or suffered from any material illegality. In the foregoing facts and circumstances of the case, this Court does not find any error in the concurrent findings recorded by both the Courts below which accordingly are upheld and the present appeal being devoid of any merit is hereby dismissed.

(MANJARI NEHRU KAUL)
JUDGE

August 9, 2022

rps

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No