

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

RSA-1392-2022 (O&M)

Date of Decision: October 06, 2023

GURINDER SINGH

..... Appellant

Versus

JATINDER PADAM PAL SINGH AND ANOTHER

..... Respondents

CORAM: HON'BLE MR. JUSTICE HARKESH MANUJA

Present: Mr. Arun Jindal, Advocate for the appellant.

Mr. Amit Jain, Sr. Advocate with

Mr. Anupam Mathur, Advocate for respondents No.1 and 2.

HARKESH MANUJA, J. (ORAL)

By way of present appeal, challenge has been laid to the judgments and decrees dated 27.04.2018 and 13.12.2021 passed by the Courts below whereby, a suit for separate possession by way of partition besides for grant of permanent injunction, filed at the instance of respondents-plaintiffs has been decreed against the appellant-defendant.

2. Briefly stating, being the natural successors of the original owner, namely, Nirmal Singh, respondents-plaintiffs filed a suit for declaration and separate possession seeking partition as well as for grant of permanent injunction with a prayer for restraining the appellant-defendant from creating any third party rights during pendency of the suit qua the property in question. In the plaint, it was submitted that the suit property i.e. House No.329, Sector 35-A, Chandigarh was allotted in favour of father of the parties, Nirmal Singh vide conveyance deed

dated 25.03.1970; who unfortunately died on 09.11.1987 leaving behind the parties to the present lis besides, his widow-Lakhbir Kaur. It was further pleaded that Lakhbir Kaur expired on 24.02.1996 thereby, leaving the parties to the lis being the Class-I legal heirs and successors to the extent of 1/3 share each in the suit property.

3. The suit was filed through Special Power of Attorney Mr. Jasjeet Singh Brara and the pleadings were signed on the basis of by Special Power of Attorney, 09.09.2015 (Ex.P-1).

4. In response, appellant-defendant filed written statement while stating that a family settlement was arrived at between the parties and in terms thereof, respondent-plaintiff No.1 relinquished her share in favour of appellant-defendant and a document in this regard was duly signed and executed between them. It was further averred that respondent-plaintiff No.2 relinquished his share in favour of appellant-defendant in terms of an oral family settlement. In addition, the appellant-defendant had set up a registered Will dated 24.03.1995 executed by their deceased-mother whereby, she bequeathed her share in his favour as well as in favour of respondent-plaintiff No.2 in equal share followed by the aforementioned oral family settlement between the appellant-defendant and respondent-plaintiff No.2.

5. The trial Court vide judgment and decree dated 27.04.2018 decreed the suit filed at the instance of respondents-plaintiffs while holding the parties to the litigation having 1/3rd share each in the suit property i.e. H.No.329, Sector 35-A, Chandigarh being the Class-I Legal Heirs of deceased-Nirmal Singh.

6. Aggrieved thereof, the appellant-defendant filed First Appeal, however, the same was dismissed by the Addl. District Judge vide judgment and decree dated 13.12.2021.

7. Impugning the aforementioned judgments and decrees passed by the Courts below, learned counsel for the appellant submits that specific averments/pleadings were made in the written statement as regards execution of registered Will dated 24.03.1995 by the mother of the parties in favour of appellant-defendant and respondent-plaintiff No.2 bequeathing her share in their favour in equal proportion, yet, no replication controverting the aforesaid averments was filed at the instance of respondents-plaintiffs. He further submits that despite there being no replication filed by the respondents-plaintiffs, the Courts below in the impugned judgments wrongly recorded the factum of filing of replication. Learned counsel further submits that though the registered Will dated 24.03.1995 was part of the record as Mark D-1, yet, both the Courts in the impugned judgments recorded that the said Will was not produced on record. It has also been argued that taking into consideration the power conferred upon the Special Power of Attorney, the suit could not have been entertained, being not signed by the respondents-plaintiffs themselves besides they having not even appeared as witness in support of averments made therein. In this regard, learned counsel places reliance upon decision rendered by Hon'ble Supreme Court in case of **"Man Kaur Vs. Hartar Singh Sangha"** 2011(1) RCR (Civil) 189.

8. On the other hand, learned Senior counsel representing respondents submits that in the present case, non-signing of pleadings by respondents-plaintiffs, besides their non-appearance as witness cannot be taken against them as the plaint was signed by the duly appointed Special Power of Attorney which was proved on record as Ex.P-1 and Ex.P-2 in consonance with the provisions of Section 85 of Indian Evidence Act, 1872 (for short '1872 Act'). He further submits that in the present case, the law cited at the instance of learned counsel representing the appellant was not applicable as the Special Power of Attorney in the present case was never proving any transaction/document executed at the hands of the original plaintiffs but was merely proving the plaint-pleadings which were filed under their signatures. He also pointed out that the judgment cited at Bar on behalf of learned counsel for the appellant i.e. **Man Kaur's case** (Supra) cannot be relied upon against respondents-plaintiffs and rather places reliance upon Para 12(a) thereof to support his submissions. Referring to the written statement filed on behalf of the appellant-defendant, learned Senior counsel points out that the specific case set up therein was of a family settlement having been entered into between the appellant-defendant and respondent-plaintiff No.1 and that too in writing, signed and executed by them, yet, no such document was ever produced or proved on record by the appellant-defendant and rather a new case was being tried to be set up in his evidence by relying upon the power of attorney Ex.D-2/1 and the affidavit Mark D-3.

9. I have heard learned counsel for the parties and gone through the paper-book as well as records besides, law cited at Bar. I am unable to find substance in the submissions made on behalf of the appellant.

10. The first and the foremost question to be adjudicated upon by this Court in the present appeal would be the valid filing of the plaint-suit through Special Power of Attorney. In this regard, a perusal of Ex.P-1 and Ex. P2 i.e. two special Power of Attorneys duly notarized and attested by Consulate General have been proved on record and thus carry presumption about valid execution in terms of Section 85 of Indian Evidence Act, 1872 which is reproduced hereunder for reference:-

"85. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice-Consul, or representative of the Central Government, was so executed and authenticated."

My afore-stated view is also derived from the judgment passed by Hon'ble the Apex Court in case of "**Manik Majumder and Ors. Vs. Dipak Kumar Saha (Dead) through LRs. And Ors.**", reported as 2023 AIR(Supreme Court) Pg-506. Relevant observations made in Para 29 thereof are reproduced hereunder:-

"A power of attorney is not a compulsorily registrable document when it is duly notarized. It carries the presumption of being valid in view of Section 85 of Evidence Act."

11. Though a plea has been raised in Para 1 of the written statement to contend that Special Power of Attorneys were forged and fabricated documents, yet, neither any specific issue was ever pressed by the appellant-defendant nor any evidence to support such plea was lead. Moreover, this submission was never seriously pressed before the Courts below. The appellant-defendant even failed to adduce any evidence on record so as to rebut the statutory presumption attached to the valid execution of these documents and in the absence thereof, valid execution of the Special Power of Attorneys Ex.P1 and Ex.P-2 was duly established on record. Thus, the argument raised at the instance of appellant-defendant questioning the valid execution of Power of Attorneys as well as filing of the suit was not made out from the facts and circumstances of the present case.

12. Having said that, the next question which arises in the present appeal is as to whether Special Power of Attorney holder who signed the plaint could have deposed in support of the contents thereof, while appearing as PW-1 so as to support the claim made in the suit at the instance of respondents-plaintiffs. In this regard, learned counsel for the appellant-defendant has relied upon decision rendered by Hon'ble Supreme Court in case of **Man Kaur** (Supra) to contend that the Special Power of Attorney was neither conversant with the property in question nor with the facts and circumstances of the present case which was discernable from his cross-examination even. However, in the facts and circumstances of the present case wherein, the Special Power of Attorney holder who himself signed the plaint which merely pertained

about the factum of original allotment of property in question in favour of Nirmal Singh vide Conveyance Deed dated 25.03.1970 besides, the case set up by the respondents-plaintiffs, claiming 1/3rd share based on natural succession being daughter and son of deceased-Nirmal Singh. Once both the facts i.e. allotment of property in question in favour of Nirmal Singh vide conveyance deed dated 25.03.1970 besides, respondents-plaintiffs being the sister and brother of present appellant-defendant, were not been denied or disputed in the written statement, the Special Power Of Attorney while appearing as PW1 was not there to prove on record any other special fact or execution of any specific transaction regarding which he needed any special information that could be within the personal knowledge of the respondents-defendants themselves. It cannot be held by any stretch of imagination that the deposition of Special Power of Attorney was liable to be discarded in terms of the law laid down in **Man Kaur's case (Supra)**, rather on the other hand, the observations laid down by the Hon'ble Apex Court in Para 12 Clause-a thereof supports the cause of respondents-plaintiffs wherein, it has been laid to the following effect:-

“12. We may now summarize for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.”

13. Another submission raised on behalf of appellant-defendant

is that once the factum of family settlement as well as execution of registered Will dated 24.03.1995 was specifically pleaded in the written statement but not controverted by way of filing replication and thus, a presumption was required to be drawn in favour of appellant-defendant about validity of the family settlement besides the valid execution of registered Will as well. In humble opinion of this Court, no merit can be found in this submission made on behalf of the appellant. The Code of Civil Procedure nowhere enjoins the plaintiff to file replication to the written statement and not even the replication forms part of pleadings as per Order 6 Rule 1 CPC, unless the same is taken on record with the permission of Court and thus mere non-filing of replication in the present facts cannot be taken to be an admission to the facts pleaded in the written statement. Moreover, once the relationship between the parties was admitted and the claim made by the respondents-plaintiffs was merely on the basis of natural succession, which was disputed by the appellant-defendant having set up family settlement and also by way of registered Will dated 24.03.1995, the burden of proof was always on the appellant-defendant to prove the factum of valid execution of family settlement as well as registered Will dated 24.03.1995. In the present case, as a matter of fact, no document whatsoever was proved or produced on record to show any valid family settlement having been executed between respondent-plaintiff No.1 and the appellant-defendant as pleaded in the written statement. Besides it, none of the attesting witnesses to the registered Will dated 24.03.1995

was ever produced before the trial Court so as to establish the valid execution of the same in consonance with Section 65 of Indian Succession Act, 1925 read with Section 68 of the 1872 Act. In terms thereof, once the primary burden to prove was upon the appellant-defendant himself that the line of natural succession was diverted by virtue of execution of family settlement besides, the registered Will, he having failed to discharge the same, the onus to rebut the same never shifted upon the respondents-plaintiffs and, therefore, there was no question of drawing any kind of adverse inference against them merely for not having filed any replication to the written statement.

14. Learned counsel for the appellant has also argued that although the registered Will dated 24.03.1995 was part of record as Mark D-1 though not having been proved on record, yet an observation made by the Courts below that the same was never produced on record reflected perversity in the impugned judgments, however, in absence of any valid execution of Will dated 24.03.1995 as discussed hereinabove, this plea has no force in law and is thus, liable to be rejected.

15. Lastly, while pointing out to Power of Attorney (Ex.D2/1) dated 25.04.1988 executed by respondent-plaintiff No.1 in favour of appellant-defendant as well as an affidavit of even date i.e. 25.04.1988 (Mark D-3), it has been argued that respondent-plaintiff No.1 virtually relinquished her share in the suit property in favour of her mother, namely, Lakhbir Kaur who in turn executed the Will dated 24.03.1995 thereby, making appellant-defendant as well as respondent-plaintiff

No.2 to be owners to the extent of half share each in the suit property.

Learned counsel further submits that Power of Attorney Ex.D-2/1 was validly proved on record through DW-2, namely, Sukhdev Singh, however, the said two documents were wholly ignored by the Courts below and were never discussed, while passing the judgments. I am afraid, no merits can be found in the afore-stated plea as no such pleadings *viz-a-viz* the relinquishment of right by respondent-plaintiff No.1 in favour of her mother, namely, Lakhbir Kaur were ever set up in the entire written statement and thus, no evidence in this regard could be considered or relied upon, therefore the documents, Power of Attorney (Ex.D2/1) and Affidavt (Mark D-3) were rightly ignored being beyond pleadings.

16. In view of the discussions made hereinabove, finding no illegality or perversity with the concurrent findings of fact recorded by Courts below, there being no misreading of pleadings or the evidence on record nor any material evidence having being ignored, the present appeal is dismissed.

17. Pending application(s), if any, shall also stand disposed of.

06.10.2023
tejwinder

(HARKESH MANUJA)
JUDGE

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether Reportable</i>	<i>Yes/No</i>