

2023:PHHC:112173

1. With the consent of the learned counsel representing the parties, this judgment shall dispose of two connected Regular Second Appeals, filed separately by the different set of defendants, to challenge a common judgment passed by the First Appellate Court.

2. The trial court dismissed the plaintiff's suit, however, the First Appellate Court has decreed the suit while reversing the judgment passed by the trial court.

3. In order to comprehend the controversy involved in the present case, some relevant facts, in brief, are required to be noticed.

4. The dispute in the present case is with regard to inheritance of the property left behind by late Sh.Kartar Singh. According to the plaintiffs, late Sh.Kartar Singh was married to late Smt.Tej Kaur, who died somewhere around 1945-46 while leaving behind his three children; Mohan Singh, Mohinder Singh and Surjit Kaur (plaintiffs). They claim that the mutation of inheritance of the property entered in favour of Smt. Rattan Kaur (alleged second wife) is illegal, null and void and they are entitled to inherit the property in dispute.

5. On the other hand, Smt. Rattan Kaur and various other defendants have claimed that Sh. Kartar Singh, after the death of his first wife, married Smt. Rattan Kaur. He was residing with her at the time of his death. They have also claimed that during his lifetime, late Sh.Kartar Singh transferred certain property in favour of Mohan Singh and Mohinder Singh and married his daughter Surjit Kaur. Thereafter, he started residing with second wife Smt. Rattan Kaur. It is also alleged that

late Sh.Kartar Singh executed a Will in favour of Smt. Rattan Kaur (2nd wife) on 09.12.1989 (Ex.D1). Defendant 12 and 13 filed separate written statements while alleging that Harinder Pal Singh borrowed a loan from the Punjab Financial Corporation and late Sh.Kartar Singh stood as a guarantor. In those proceedings, since there was a default in the repayment of the loan amount, 8 kanals 4 marlas land was auctioned by the Punjab Financial Corporation, which was purchased by the defendant no.12 and 13.

6. In order to prove their case, in the oral evidence, the plaintiffs examined PW1 Sarwan Kumar, Registration Clerk, PW2 Atma Ram, Numbardar, PW3 Balkar Singh Sekhwan, Advocate PW4 Mohan Singh, plaintiff, PW5 Isher Singh. In the documentary evidence, they produced the various sale deeds executed either by Smt. Rattan Kaur or Sh.Rajinder Singh son of Smt. Rattan Kaur or by the Punjab Financial Corporation.

7. On the other hand, the defendants in the oral evidence examined DW1 Paramjit Singh (defendant no.3) in evidence. Apart from him, they also examined Netar Singh, Assistant Officer, Kanungo, who appeared as DW2, Kanwar Dilbagh Singh, the scribe as DW3, DW4 Sham Singh, the brother of late Sh.Jai Singh, Numbardar, attesting witness of the Will, DW5 Sher Singh, vendee from Smt. Rattan Kaur and Rajinder Singh, DW6 Navdeep Gupta, handwriting and finger print expert, DW7 Jagjit Singh, another purchaser of the property of late Sh.Kartar Singh, DW8Ranbir Singh, retired Superintendent, Deputy

Commissioner's officer were examined. In the documentary evidence various documents were produced.

8. It has come on record that previously a civil suit was filed by Smt. Rattan Kaur. Simultaneously, the mutation proceedings of the estate left behind by late Sh.Kartar Singh was referred to the Assistant Collector, First Grade. In those proceedings the original Will dated 9.12.1989, was produced and Jai Singh, Numbardar, one of the attesting witnesses proved the aforesaid Will. In the mutation proceedings, the learned counsel representing the plaintiffs were given an opportunity to cross-examine the witness. Ultimately, the Assistant Collector ordered sanctioning of mutation in favour of Smt. Rattan Kaur, which was upheld in appeal by the Collector. Thereafter, in two previously filed suits, Smt. Rattan Kaur filed applications for permission to withdraw the suit while claiming that the mutation of the property has been entered in her name and she has been in the continuous possession of the property. However, the trial court, without giving her an opportunity to prove her case, dismissed the suit on merits. In the first appeal filed by Smt. Rattan Kaur, judgments and decrees passed by the trial court were reversed and Smt. Rattan Kaur was permitted to withdraw both the suits in view of her statement on 22nd October 2002. The plaintiffs filed the present suit and as already noticed, the trial court dismissed the suit. Whereas the First Appellate Court has set aside the judgment and decree passed by the trial court, in substance, after recording the following reasons for setting aside the judgment:-

(i) In the previous suit, Smt. Rattan Kaur admitted that Mohan Singh is in possession of the property and while withdrawing the suit, her statement was not recorded and only the statement of her learned counsel was recorded.

(ii) In the previous suit, the interlocutory order was passed in favour of Mohan Singh etc. (the plaintiffs).

(iii) Original will has not been produced on record and it is not explained as to how Sher Singh came in possession of a copy of the aforesaid Will.

(iv) The death certificate of Sh. Vidya Bhushan, one of the attesting witnesses has not been proved.

(v) The death certificate of Sh. Jai Singh, Numbardar has not been produced.

(vi) The register of the scribe has not who has scribed the Will has not been signed by the attesting witnesses.

(vii) The statement of Sh. Jai Singh, Numbardar before the revenue authorities, in the mutation proceedings, is alone not sufficient.

(viii) Ex. P-22 proves that the ashes of late. Sh. Kartar Singh were immersed by his son Mohinder Singh at Gurdwara Kartarpur Sahib.

9. In these circumstances, the following issue arises for consideration before this Court:-

“If in the mutation proceedings, the Will is proved by recording the statement of one of the attesting witnesses, while giving an

opportunity to the opposite party to cross examine the witness, then can the photocopy of the same be proved by secondary evidence, in the civil court, particularly when a detailed entry in the notebook/register of the professional scribe is thumb marked and signed by the testator and such entry is produced and proved?”

10. Heard the learned counsel representing the parties at length and with their able assistance perused the paperbook alongwith the requisitioned record of the trial court as well as written note of their submissions filed by the learned counsel representing the parties. Learned counsel representing the plaintiffs has filed a detailed note of his submissions, which is extracted as under:-

1. That Rattan Kaur claiming to be beneficiary of one WILL dated 09.12.1989 filed a suit for permanent injunction i.e. Civil Suit no. 250 of 1990 restraining the applicants/respondents No.1 and 2 from interfering in her possession. Thereafter she filed another suit for declaration and possession bearing Civil Suit No.82 of 1993 seeking declaration of the alleged will dated 09.12.1989 in her favour. Both the suits were consolidated and thereafter the same were dismissed on merits. Ratan Kaur preferred appeal whereby the judgment and decree of said suits was set aside and it was ordered that the suit be treated as dismissed as withdrawn vide judgment and decree dated 14.12.2001.

The Ld. Appellate Court therein had relied upon the statement of the plaintiff therein but ignored the statement made by the counsel for the defendant therein-i.e. present plaintiffs- respondent no.1 &2.

2.Even an order dated 31.10.1996 was passed on the same day closing the evidence of the plaintiffs therein. Plaintiff-respondent No.I relies upon the said order dated 31.10.1996. Attached as Annexure R-1 with CM No. 3753 of 2022.

3. In the present suit, the respondents No.1 and 2 sought declaration that the sale deeds entered by Ratan Kaur through her alleged son Rajinder Singh who mentions him to be son of Kartar Singh (whereas he is son of Mehar Singh and has no connection with Kartar Singh) in the said sale deeds and appears as attorney of Ratan Kaur apart from other reliefs. The suit was dismissed. The appeal filed by respondents No.1 and 2 before the Ld. Lower Appellate Court was allowed.

4. It was clearly stated in the para 9 of the plaint that no will was ever executed by the Kartar Singh in favor of Rattan Kaur and if any produced or proved by the said Rattan Kaur the same is false, fictitious and forged.

That the Rattan Kaur claims to be beneficiary of the alleged Will dated 09.12.1989 and as such claiming to be owner of the property has entered into sale deeds. Once, she could not prove the Will, she could not be treated as owner and has no right to execute the sale deeds. In the written statement para 9 -Rattan Kaur claims herself to be divorcee from her earlier husband Mehar Singh but has not placed on any such document of divorce. In the same breath she claims that the whereabouts of Mehar Singh are not known for the last 6-7 years.

There was a specific issue Le. issue No. 4A with regard to execution of WILL.

"Whether Kartar Singh executed WILL dated 09.12.1989 in favor of defendant No.1, if so its effects? OPD

That Kartar Singh died on 15.12.1989 and the alleged WILL is shown to be of 09.12.1989 just 6 days before the death of Kartar Singh.

That the initial onus stood discharged by the plaintiffs. It was for the defendants-appellant to have proved the alleged WILL as the onus to prove the same was on them. The said WILL has not been proved by the appellant as per law. Once, the WILL could not be proved, the said Ratan Kaur had no right to execute the sale deed or give GPA in favor of any body or to sell the said property.

It has come on record that none of the witness to the WILL has been examined. One of the witness -Vidya Bhushan was stated to have expired and the report is otherwise. However, no death

certificate was proved. The other witness-Jai Singh was said to have expired on 09.01.2012 but no death certificate of Jai Singh has been placed on record.

Even, the Will has been placed on record by way of secondary evidence that too after making an application by Sher Singh -appellant dated 19.03.2014 after 12 years of filing of suit. The existence of WILL was not proved. The execution of WILL has not been proved. Even the loss of original Will has not been proved. Thus Secondary evidence to prove the WILL cannot be allowed. The Rattan Kaur died on 30.06.2005.

Apart from this, the WILL was never brought on record of the earlier suit inspite of fact of pendency of matter for more than six years. The order dated 31.10.1996 to this effect is clear.

The alleged WILL has been produced only after the death of the Kartar Kaur. The source of production of WILL has not been given. The Civil suit was filed on 22.10.2002. Written statement was filed after four years on 20.03.2006 after 4 years and still no copy of WILL was filed with the written statement.

The appellant-Sher Singh is a property dealer who has managed the grabbing of property of Kartar Singh and has produced alleged WILL in secondary evidence.

5. Rattan Kaur said to have executed GPA in favor of Rajinder Pal Singh i.e. her son. Whereas in the sale deeds he (Rajinder Singh) mentions himself as son of Kartar Singh instead of Mehar Singh who is father of Rajinder Pal Singh and husband of Rattan Kaur. The GPA has not been proved on record.

It is not out of place to mention here that Rajinder Pal Singh is a non-existent person, in fact the Rattan Kaur had one Son Harinder Pal Singh who had been appearing as Rajinder Pal Singh for execution of the sale deeds. The defendants in connivance with each other were hiding their identity in order to escape the legal process.

That it was clearly observed in para 20 of the judgment dated 08.09.2021 that the execution

of Will dated 09.12.1989 cannot be presumed to be proved. Once, the WILL is not proved then sale deeds has no legal force and are liable to be set aside.

6. That now two of the purchasers from said Rattan Kaur are in appeal before this Hon'ble Court. The appellants have not given the true facts before this Hon'ble Court and have tried to mislead this Hon'ble Court. The appellant Sher Singh has no share and has no locus standi to file the present case. The same is a proxy litigation by the appellant-Sher Singh, who happens to be a property dealer. He had brought in picture one Rajinder Singh son of Kartar Singh who has executed the sale deeds claiming to be attorney of Ratan Kaur. At some places he claims himself to be the son of Ratan Kaur through the loins of Mehar Singh. It is important to mention here that Mehar Singh and Ratan Kaur had only one son namely Harinderpal Singh. Rajinder Singh is a non-existing person and somebody in the name of Rajinder Singh appeared/impersonated before the Ld. Courts below as Rajinder Singh never existed. This would also clearly show the mala fide of the Ratan Kaur and Sher Singh to usurp the property of Kartar Singh by forging the said alleged Will in favour of Ratan Kaur and then by selling the same through her attorney showing him to be Rajinder Singh son of Kartar Singh. The perusal of the same is apparent from the alleged sale deeds. The alleged sale deeds are on record.

7. That the sale of land by the PFC in favor of defendant No. 12 and 13 is totally on the basis of connivance by the said defendants with the Harinder Pal Singh and others. The said defendants never claimed any issue in respect of their claim and never proved their alleged claim. The said defendants are not entitled to any relief from this Hon'ble Court. It is fact that the loan was taken by Harinder Pal Singh who is none other but son of Rattan Kaur and had took the loan but did not pay back and even, the said sale was during the stay orders by Ld. Court below and it has also come on record that the said defendants were declined vacation of said stay order. The amount was to be recovered from the property of Harinder Pal Singh as he was the beneficiary of loan amount. No decree could be executed against the property of the plaintiffs. Even, the khasra nos of the mortgaged property are different from the property attached/ put to auction/sale. The defendants did not

appear before the Ld. Court below and were proceeded ex parte.”

11. Smt. Rattan Kaur died on 30th June, 2005, during the pendency of the suit. Thereafter, the suit was contested by the various vendees, who had purchased the suit property either from Sh.Kartar Singh or through the Punjab Financial Corporation or from Smt. Rattan Kaur and her son Sh.Rajender Singh. In order to prove the Will, the defendants produced the depositions of various witnesses recorded in the mutation proceedings, including that of Sh.Jai Singh, Numbardar, one of the attesting witnesses and Kanwar Dilbagh Singh, the scribe. In the Civil Court, Sham Singh, brother of late Sh.Jai Singh, Numbardar, was examined as DW4, who identified the signatures of his brother Late Shri Jai Singh on the Will. It was also proved that Sh. Vidya Bhushan the second attesting witness of the Will is missing for the last 19-20 years, as a notice sent to summon him was received back with the aforesaid report. Kanwar Dilbagh Singh, the scribe of the Will was examined as the DW3, who proved entry No. 684, dated 9th December, 1989 in his notebook. The summary of the Will is duly recorded in the notebook which was signed and thumb-marked by late Sh.Kartar Singh. He brought the original register in the court and proved the entry. Sh.Netar Singh, Assistant Kanungo, appeared as DW2 and proved that record of the mutation proceedings is not traceable. After taking court's permission to lead secondary evidence in the Civil Court, only a notarized photocopy of the Will was produced in evidence. The thumb impression and

signatures of Late Sh. Kartar Singh were also proved by examining the handwriting and fingerprint expert DW6 Sh. Navdeep Gupta.

12. The Bench now proceeds to analyse the reasons recorded by the First Appellate Court, while setting aside the judgment and decree. The first reason assigned by the court with reference to the failure of the court to record the statement of Smt. Rattan Kaur while permitting her to withdraw the suit has no significance, particularly when she filed an application before the trial court in the previous suit for permission to withdraw the suit on the ground that on sanction of the mutation in her favour, she has entered possession of the property. Moreover, Sh. Mohan Singh, one of the plaintiffs while appearing as PW4 has admitted that the possession of the land now is now with the various vendees who have entered possession of the property after purchasing the same by registered sale deed.

13. The second reason assigned by the First Appellate Court is insignificant as while deciding application for grant of temporary injunction, the court passes interlocutory order during the pendency of the previous suit. The observations made by the court while passing interlocutory order are based on prima facie facts. Such orders do not finally decide the rights between the parties. Hence, the second reason is also erroneous.

14. The reason No. 3 recorded by the First Appellate Court is with regard to the failure to produce the original Will in the suit. The court has held that the defendants have failed to explain how Sh. Sher

Singh came in possession of a copy of the Will. It may be noted here that Sher Singh is one of the vendee from Smt. Rattan Kaur. He has purchased the property through a registered sale deed. When Sh. Sher Singh appeared in evidence, no question was put to him in this respect. Moreover, Kanwar Dilbag Singh, the professional scribe has produced the entry No. 684, dated 6th December, 1989 with regard to the Will in his register. The aforesaid entry is the summary of the contents of the Will. This register is thumb marked as well as signed by Late Sh. Kartar Singh, although, the attesting witnesses have not signed the Will. However, the plaintiffs never made any attempt to prove that the aforesaid thumb impression and signatures of Sh. Kartar Singh have been fabricated by the defendants. Smt. Rattan Kaur had died on 30th June 2005, whereas the application for permission to lead secondary evidence was filed by Sher Singh on 19th March, 2014 which was allowed. In such circumstances, the First Appellate court erred in ignoring the Will on the ground that it has not been explained as to how Sher Singh came in possession of a copy of the Will.

15. The next reason assigned by the First Appellate Court regarding the death of Sh. Vidya Bhushan, one of the attesting witnesses not been proved, is also without substance as Ex. D34 is a copy of the notice sent by the court of First instance to summon him as a witness in the civil suit, which was returned by the process server with the report that Sh. Vidya Bhushan is missing for the last 19-20 years. In these circumstances, the First Appellate court has clearly erred in recording that the death of Sh. Vidya Bhushan has not been proved by the

defendants. It may be noted that as per Section 69 of the Indian Evidence Act, 1872, it is provided that if no attesting witness, can be found, then attestation of one of the attesting witnesses is required to be proved by examining a witness who has knowledge about the signatures of the attesting witness. In this case, Sh.Sham Singh, brother of late Sh.Jai Singh, another attesting witness was examined, who proved the signature of his brother. The next reason assigned by the First Appellate Court is also factually incorrect as the death certificate of Sh.Jai Singh has been produced as Ex. D 47. The First Appellate Court has overlooked the aforesaid evidence. Moreover, Sh. Sham Singh stated in evidence that his brother has died.

16. The next reason assigned by the First Appellate Court is with reference to the failure of the attesting witnesses to sign the entry of the Will in the register of the scribe. It may be noted here that the Will has not been proved solely on the basis of the entry in the register of the scribe. In fact, a photocopy of the Will was produced. The entry of the Will, which is duly thumb marked and signed by Late Sh. Kartar Singh has been produced to corroborate the photocopy which has been permitted to be produced. Moreover, the court has not elaborated on any practice or rule that requires the scribe to get the signatures of the attesting witness in his register. Rather on the other hand, the scribe has explained that there is no such practice that is being followed in normal parlance.

17. Reason No. (vii) assigned by the First Appellate Court that the statement of Jai Singh, Numbardar, before the court of the Assistant Collector First Grade in the mutation proceedings could not be solely relied upon as he has not been cross-examined by the other party is also erroneous. The First Appellate Court has overlooked the fact that in the contested mutation proceedings, Sh.Jai Singh, Numbardar not only appeared in evidence but he was duly permitted to be cross-examined by the learned counsel appearing for the plaintiffs. Since Sh.Jai Singh has died, therefore his evidence before the revenue authorities becomes important. In such circumstances, it would not be appropriate for the First Appellate Court to discard the evidence of late Sh.Jai Singh.

18. The last reason assigned by the First Appellate Court with regard to the immersion of ashes of late Sh. Kartar Singh by his son Sh. Mohinder Singh is without any firm basis as the aforesaid fact has not been proved. Moreover Sh. Mohinder Singh, while appearing in evidence, has stated that Sh. Kartar Singh died while staying with his second wife Smt. Rattan Kaur in village Dera and he has no knowledge about the date and month of the death of his father. He was specifically cross-examined with regard to his participation in the last rites of his father, however, he stated that he did not visit village Dera at the time of death of his father.

19. In fact, the deposition of Sh.Mohan Singh as PW4 proves the case of the defendants. He has admitted that at the time of the death of his father, he was a ration card holder. But in that ration card, his

father's name has not been included. He has admitted that even his brother's ration card does not include the name of his father late Sh. Kartar Singh. When specifically questioned he admitted that Sh. Kartar Singh died in the house of Smt. Rattan Kaur at village Dera. He admitted that he does not know the date and month when his father died. In fact, he is totally an unreliable witness as he has stated that he never filed an appeal against the order sanctioning the mutation whereas he filed appeal which was dismissed. He admitted that the vendees of the various sale deeds have taken the possession of the respective parcels of lands, purchased by them, but they have acquired the possession forcibly. It was also admitted that two purchasers out of the various purchasers have already constructed their residential house but they are not residing in the same. He has stated that some of the vendees have constructed the boundary walls of their respective plots whereas some plots are lying vacant. On the question with regard to the execution of Will, he stated that he does not know whether any Will was executed by late Sh. Kartar Singh in favour of Smt. Rattan Kaur or not. Moreover, the First Appellate Court has overlooked the sale deed Ex. D6, dated 16th February, 1981. Through this sale deed Sh. Achra Singh sold property in favour of Smt. Rattan Kaur wife of Sh. Kartar Singh and sale deed was signed and thumb-marked by Sh. Kartar Singh on behalf of the purchaser. Moreover PW5, Ishar Singh, a witness examined by the plaintiffs admitted that the name of the second wife of Sh. Kartar Singh was Smt. Rattan Kaur and he used to reside with her and she used to serve him during his last days. In view of the categorical admission of

Sh. Ishar Singh at page 200 of the trial court record, there was hardly any scope of doubt with regard to the marriage of Smt. Rattan Kaur with Sh. Kartar Singh, particularly when in the registered sale deed Ex. D 6, Kartar Singh admitted that Smt. Rattan Kaur is his wife and in the Will, Kartar Singh specifically stated that after death of his wife first wife, he married Smt. Rattan Kaur, who is serving him.

20. The First Appellate Court has overlooked the fact that sale deed of 8 kanals and 4 marlas land has not been executed by Smt. Rattan Kaur or her son. The aforesaid land was sold by the Punjab Financial Corporation on non-repayment of loan amount pursuant to the order of the court under the Punjab Financial Corporation Act. The First Appellate Court was not correct in setting aside such a sale deed as it was executed by the Punjab Financial Corporation, being the creditor. Similarly, the sale deed in favour of Jagjit Singh Ex.D7 dated 7th January, 1989 could not be set aside as it was executed by Late Sh. Kartar Singh himself.

21. While examining the written arguments, it may be noted that argument no.1 (paragraphs have been assigned numbers by this Court) has no substance as the First Appellate Court found in the previous round that the judgment passed by the court of first instance was perverse. Thus, the First Appellate Court permitted Smt. Rattan Kaur to withdraw both the suits and in the meantime, in the revenue record an entry in her favour has been made and she had entered into possession of the property.

22. The argument no.2 is based upon an interlocutory order passed by the Court on 31.10.1996 in the previous two suits. The final judgment passed in the aforesaid two suits has already been set aside by the First Appellate Court vide judgment and decree dated 14.12.2001. Hence, the interlocutory order closing the evidence of Smt. Rattan Kaur in the previous suit loses its significance. With reference to argument no.3 it may be noted that the dispute whether Sh.Rajinder Singh was son of Sh.Kartar Singh or Mehar Singh was never subject matter of dispute between the parties in this litigation. Hence, it will not be appropriate for the Court to examine the aforesaid fact in the second appeal, particularly when Smt. Rattan Kaur does not dispute that she authorized her son Sh.Rajinder Singh to sell the property.

23. With reference to argument no.4, it may be noted here that the defendants have proved the Will in accordance with Section 69 of the Indian Evidence Act, 1872 and this aspect has already been examined in detail and therefore, it requires no reiteration.

24. With reference to argument no.5, it may be noted that this submission was not the subject matter of adjudication before the courts below in this litigation and therefore, it will not be appropriate to answer the said argument. It has been proved that Smt. Rattan Kaur was residing with late Sh. Kartar Singh, who executed a Will in her favour.

25. With reference to argument no.6, it may be noted that appellants before this Court are vendees from Smt. Rattan Kaur or from Sh.Kartar Singh. Sh.Sher Singh (the appellant) is also vendee from Smt.

26. With reference to argument no.7, it may be noted that both the courts have not found that the sale of the property by the Punjab Financial Corporation was on the basis of connivance of the defendants.

28. All the pending miscellaneous applications, if any, are also disposed of.

Whether reportable : Yes/No