

inderpal Singh Etc. Vs. Inder Kaur Etc.

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Court : Delhi

Decided On : May-10-1991

Reported in : 44(1991)DLT399

Judge : S.B. Wad and; Usha Mehra, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 23, Rule 1(4)

Appeal No. : Regular First Appeal Nos. 164 and 165 of 1985

Appellant : inderpal Singh Etc.

Respondent : inder Kaur Etc.

Advocate for Def. : Mr. Mukul Rohtagi, Mr. Mukul Robtagi

Advocate for Pet/Ap. : R.B. Datar,; D.S. Narula,; Mukul Rohatagi,;

Judgement :

Usha Mehra, J.

(1) These two appeals have arisen out of a common judgment dated 4th March, 1985 passed by the learned Additional District Judge, Delhi in Suits No. 16 & 17 of 1984. Regular First Appeal No. 165/85 has been filed by the legal heirs of Late Shri Harnam Singh, (plaintiffs before the trial Court) because their suit for declaration and injunction was dismissed by the impugned judgment. Regular First

Appeal No. 164/85 has been filed by them because of the judgment and decree having been passed in favor of respondent no I in her suit for possession and injunction. The question which this Court is called upon to determine is whether any right accrued to plaintiff in the property in dispute on account of codicile and what is the effect of their withdrawal of the suit without permission. So far as R.F.A. No. 164/85 is concerned, we have to consider whether the Court was justified in decreeing the suit of respondent no. I without recalling the order of consigning the suit to record after staying the suit sine die.

(2) Shri Hardit Singh Multani was the original owner of property bearing No. XVI/10204 known as (Anand Bhavan), Gurdawara Road, Karol Bagh, New Delhi. He died on 19th April, 1957. He had executed a Will on 28th October, 1949 bequeathing whole of his property in favor of his wife Smt. Tej Kaur. Shri Hardit Singh Multani's eldest daughter Smt. Sewa Kaur, was married to Shri Harnam Singh. She was living in a portion of this house with her family during the life time of her father Shri Hardit Singh Multani. According to plaintiffs Shri Hardit Singh Multani before his death executed a codicile on 14th April, 1956 (Ex. P.I) in favor of his daughter Smt, Sewa Kaur thereby leaving 1/4th share of the property in her favor i.e. the portion which she Along with her family was occupying. Smt. Sewa Kaur died on 11th June, 1964 leaving behind Shri Harnam Singh, her husband, two sons and one daughter.' After the death of Smt. Sewa Kaur, Shri Harnam Singh, and others filed a suit for partition on 17th September, 1969 listed as Suit No. 374/65, against his mother-in-law Smt. Tej Kaur claiming 1/4th share in the property. In that suit of partition Smt. Tej Kaur was proceeded ex parte and preliminary decree was passed on 27th November, 1965. Smt. Tej Kaur having come to know of the ex parte preliminary decree filed an application under Order 9 Rule 13 of the Code of Civil Procedure, for setting aside that decree, on , November, 1965. Said application was ordered to be posted on 29th December, 1965 i.e. the next date of hearing. Before that date, Shri Harnam Singh made a statement that a compromise between the parties has been arrived at hence he be permitted to withdraw his suit. The same was dismissed as withdrawn on 27th December, 1965. During the pendency of that suit Shri Gurdeep Singh, D.W. 3 son of Smt. Tej Kaur came to India from West Germany. He pressurised Shri Harnam Singh and Smt. Tej Kaur to settle the dispute amicably. Because of his

efforts compromise was arrived at, pursuant to which the said suit was withdrawn. On 29th December, 1965 Smt. Tej Kaur 'came to know about the said withdrawal of the suit on the ground of compromise, she moved an application under Sections 151 & 152 Civil Procedure Code denying the alleged compromise. However, no order was passed on her application by the Court. It is further alleged that after withdrawal of the said suit a written, agreement was entered into between Shri Harnam Singh & Smt. Tej Kaur on 3rd January, 1966 whereby it was agreed that parties would not dispose of this property without each other's consent. Property would only be disposed of jointly. This Memorandum of Settlement was duly executed and attested by witnesses. After about four years Smt. Tej Kaur decided to dispose of this property without the knowledge of Shri Harnam Singh. She entered into a sale transaction. with Shri Jawahar Singh, brother and General Attorney of Respondent No. I, Smt. Inder Kaur. When sale negotiations were going on in May, 1969, Shri Harnam Singh came to know about the same, therefore, he filed a fresh suit for permanent injunction on 20th May, 1969 against his mother-in-law Smt. Tej Kaur basing his claim on codicile dated 14th April, 1956 and compromise dated 3rd January, 1966. In the meantime Smt. Tej Kaur executed the sale deed in favor of Smt. Inder J Kaur on 21st May, 1959 selling the entire property in question for a consideration of Rs. 75,000.00 . The sale deed was got registered on 2nd September, 1969. On account of registration of the sale deed the suit became infructuous hence dismissed on 12th August, 1970. After dismissed of that suit, Shri Harnam Singh and his children filed the present suit for declaration and injunction on 29th August, 1970 on the basis of the said codicile dated 14th April, 1956 and the compromise dated by 3rd January, 1956. He also challenged the sale made by Smt. Tej Kaur in favor of Respondent no. 1, Smt. Inder Kaur. The suit No. 16 of 1984 was ultimately dismissed against which the present appeal has been preferred.

(3) Smt. Inder Kaur purchaser of the property, the respondent no. I in the appeal had filed a suit on 24th October, 1977 for possession and damages in the High Court of Delhi against Shri Haroam Singh for getting unauthorisedly the possession of 1/4th portion of her property. This suit was transferred to the lower Court from the High Court and it was listed as suit No. 17 of 1984 which was ultimately decreed in favor of Smt. Inder Kaur vide the impugned judgment.

(4) From the admitted facts enumerated above, it is clear that Shri Harnam Singh with his family had been in occupation of 1/4th share of this property even during the life time of Shri Hardit Singh Multani. Shri Hardit Singh Multani Willed the whole property in favor of Smt. Tej Kaur vide Will dated 25th October, 1949. Shri Hardit Singh Multani died on 19th April, 1957 and Smt. Sewa Kaur, his eldest daughter who was married to Harnam Singh died on 11th June, 1964. It is also an admitted fact that .Shri Harnam Singh died on 11th June, 1964. It is also an admitted fact that Shri Harnam Singh filed the first suit for partition claiming 1/4th share in this property after the death of his wife Smt. Sewa Kaur on the basis of a codicile Ex. P. I dated 14th April, 1956. It is also on record that he withdrew that suit of partition without seeking the permission of the Court to file a fresh. It is also on record that Smt. Tej Kaur in her application under Order 9 Rule 13 Civil Procedure Code denied the execution of the alleged codicile Ex. P. I as well as the compromise stated to have been entered into between the parties. Smt. Tej Kaur has since died, therefore, the whole case of appellants depend upon the genuineness or otherwise, of the alleged codicile dated 14th April, 1956 and the agreement.

(5) Mr. R.B. Datar, Sr. Advocate appearing for the appellant contended that the impugned judgment cannot be sustained regarding issues No. 6, 3&4. While challenging issue No. 6, the learned counsel for the appellant contended that trial Court was in error to hold that suit was barred under Order 23 rule 1(4) CPC. Dismissal of the suit is based on erroneous proposition of law. To understand this contention, a few further facts have to be stated. The plaintiff. Shri Harnam Singh is the son-in-law of Smt. Tej Kaur and Shri Hardit Singh Multani is stated to have executed a codicile bequeathing 1/4th share of the property in question to his eldest daughter Smt. Sewa Kaur wife of Shri Hardit Singh. Parties were living happily even after the death of Smt. Sewa Kaur. It is somewhere in 1965 that relation between the mother-in-law and son- in-law became strained. therefore, Shri Harnam Singh filed a suit for partition against Smt. Tej Kaur seeking partition of his and his children's share. Summons of partition were served on Smt. Tej Kaur on 27th September, 1965. In October, 1965 Shri Gurdip Singh, DW3 son of Smt. Tej Kaur came from Germany and persuaded the parties to arrive at a settlement. It is alleged that in view of that settlement Smt. Tej Kaur did not appear

in that suit and got it proceeded ex parte. Preliminary decree was passed in favor of Shri Harnam Singh. Shri Gurdip Singh left India somewhere in November/December, 1965 and after his departure it is alleged that Smt. Tej Kaur filed an application for setting aside the ex parte decree. Shri Harnam Singh approached Smt. Tej Kaur in order to find out the reason for the same. She insisted that first the suit should be withdrawn and then agreement would be executed in writing. In pursuance to this he moved an application under Order 23 Rule 3 Civil Procedure Code for withdrawal on 27th December, 1965, The case was actually posted on 29th December, 1965, on which date Smt. Tej Kaur appeared and moved an application under Section 151 & 152 Civil Procedure Code stating that no compromise was arrived at. Except moving that application she did not take any other step. On 3rd January, 1966 it is alleged that a compromise was arrived at in writing between Smt. Tej Kaur and Shri Harnam Singh witnessed by Shri G.L. Grover, a family friend. In May, 1969 Smt. Tej Kaur started negotiating with Shri Jawahar Singh for sale of property. It is then that on 20th May, 1979 second suit for permanent injunction was filed. Smt. Tej Kaur had already sold the property including 1/4th share of Shri Harnam Singh, hence the suit became infructuous and was dismissed. Thereafter, the present suit for declaration and permanent injunction has been filed. Mr. Datar contended that the trial Court erroneously decided that the suit was barred under Order 23 Rule 1(4) Civil Procedure Code and that codicil (Ex.P. 1) was not executed by late Shri Hardit Singh. In a suit for partition the cause of action is a recurring one. There is no limitation for seeking such relief. Every time fresh cause of action arises. therefore, the provision of Order 23 Rule 1(4) Civil Procedure Code would not apply. In this regard he has placed reliance on the decision of Federal Court in *Re : Thota China Subha Rao and others v. Mattapalli Raju and others*, reported in A.I.R. (37) 1950 Federal Court p. 1. In fact relying on this judgment Mr. Datar contended that there was no abandonment of claim by the plaintiff in this case. Since fresh cause of action arises each time, hence the principle of Order 23 Rule 1(4) Civil Procedure Code would not be attracted. He has also drawn our attention to the decision of Jammu & Kashmir High Court in the case of *Ghulam Mohd, Sheikh v. Ahad Sheikh and others*, reported in A.I.R. 1952 J&K; 33 and of Supreme Court in the case of *Re : Vallabh Das v. Dr. and others*, reported in :

[1977]1SCR211 . Supreme Court while discussing the word 'Same subject matter' appearing under Order 23 Rule I Civil Procedure Code opined that the cause of action and the relief claimed in both the suits must be the same. In the case before Supreme Court, in the first suit the plaintiff sought to enforce his right to partition and separate possession while in the second suit, he had sought possession of the suit properties from a trespasser on the basis of his title. therefore, Supreme Court came to the conclusion that mere identity of some of the issues in the two suits will not bring about an identity of the subject-matter in the two suits. The subject matter in the two suits was not the same although the factum and validity of adoption of the plaintiff in both the suits came up for decision. The 'subject matter' means the bundle of facts which have to be proved in each case. therefore, Mr. Datar contended that the mere fact that the earlier suit for partition was based on codicil and so was the second suit for declaration and injunction but still both the suits had distinct cause of action. The bundle of facts were also different and distinct. Hence it can be said that the subject matter in both cases was different. In the second suit though he based his claim on codicil, yet the relief claimed was different i.e. declaration. Smt. Tej Kaur was denying his right in the property, therefore, he sought declaration of 1/4th share in the property and injunction seeking restraining order against Smt. Tej Kaur from dispossessing him or parting with possession of his part of the property. We agree with submissions of the learned counsel and hold that these facts clearly indicate that the 'subject-matter' 'and the cause of action in both the suits was distinct and different. It cannot be called the same though some of the facts may be the same. Different cause of action had arisen at different stages though facts leading to the same may be to some extent the same. The factum of Shri Harnam Singh being in possession of 1/4th share was not in dispute. - Shri Harnam Singh filed the suit for partition because he thought he was to protect his 1/4th share in the property. His mother-in-law Smt. Tej Kaur denied his right to 1/4th share in the property. The suit, however, due to the good-offices of his brother-in-law, Dw 3 was amicably compromised. He withdrew the said suit. But when he found that his mother-in-law was intending to sell away the whole property including his share, he sought declaration for his 1/4th share of the property which he alleged belonged to him and in order to protect his right he prayed that Smt. Tej Kaur should be restrained

from selling his portion of the property. These facts are by way of repetition in order to illustrate that the 'cause of action' and the 'subject-matter' means, to use the words of Order I Rule I 'the series of acts or transactions alleged to exist giving rise to the relief claimed'. Since the cause of action and the relief claimed in both the suits were not the same, therefore, the second suit could not be barred under the provisions of Rule I, sub-rule (4) of Order 23 CPC. The trial Court misinterpreted the provisions of Order 23 rule 1(4) while deciding issue no. 6. In view of the facts discussed above it cannot be said that the second suit was barred under the provisions of Rule I, sub-rule (4) of Order 23 CPC.

(6) So far as decision on issues No. 3 & 4 is concerned, to our mind, the trial Court fell in error by coming to the conclusion that Smt. Tej Kaur filed a joint written statement Along with Smt. Inder Kaur. The perusal of the written statement filed in this case would clearly show that it was signed only by Shri Jawahar Singh, General Attorney and brother of Smt. Inder Kaur as well as his lawyer Shri K.K. Mehra. therefore; the observation of the trial Court that Smt. Tej Kaur did not admit the execution of the codicile is patently wrong and erroneous also. In fact this observation is contrary to the record. There is no documentary evidence placed on record by which it could be inferred that Smt. Tej Kaur denied the execution of the codicile. Mr. Mukul Rohtagi appearing for the respondent contended that the denial should be inferred from the application filed under Order 9 Rule 13 as well as under Section 151 & 152 of the CPC. We are constrained to say that the denial cannot be inferred. Smt. Tej Kaur ought to have filed the written statement -taking whatever plea she wanted. So far as these applications are concerned no notice or decision on these was taken by the Court. Since these were not filed in this case, therefore, no cognizance could be taken. Rather adverse inference should have been drawn against Smt. Tej Kaur who being alive still chose not to file the written statement. The affidavit of Smt. Tej Kaur alleged to have been filed with the application under Order 9 Rule 13 Civil Procedure Code cannot be a substitute for an evidence nor for that matter it would amount denial of any fact. Because she did not stand the test of cross-examination. Had Smt. Tej Kaur appeared in the witness box and supported her earlier stand, things would have been different. It was for the respondent to produce her and prove that the codicile was not executed by her husband nor it bore her signature. She could

have also, if wanted denied the execution of the compromise Ex. C. 1. But she choose to remain indifferent. The trial Court also fell in error by observing that as only one attesting witness of the codicile namely, Shri Trilok Singh had been examined, thereforee, the codicile could not be relied upon. The reasoning given by the trial Court viz. that since Shri Gobind Ram another attesting witness had not been examined, even though alive, thereforee no reliance could be placed on the codicile, is not only erroneous but against the law. Even one attesting witness is sufficient to prove the document provided his testimony is worthy of reliance. The trial Court observation that Smt. Tej Kaur ought to have been produced by the plaintiff, does not appeal to reason. As a matter of fact Smt. Tej Kaur was cited a witness by the respondent. A local commissioner was also got appointed for examining her. But subsequently she was given up. thereforee, the inference ought to have been drawn against the respondent rather than against the plaintiff. Why should plaintiff prove the case of the defendant by producing defendant's witness As already observed above, the trial Court has not discussed the evidence of Shri Gurdip Singh, DW/3, who to our mind, as a very material and relevant witness. Being the son of Shri Hardit Singh and Smt. Tej Kaur, he identified the signature of Shri Hardit Singh as well as Smt. Tej Kaur on the codicile. He also testified that because of his good offices, a settlement was arrived at between Shri Harnam Singh and his mother. Why his testimony has been ignored or brushed aside cannot be made out from the impugned judgment. The codicile has not been found to be genuine by the trial Court because it is not registered and secondly it is observed that Smt. Tej Kaur had no reason to sign the same. These observation are against the well- settled principle of laws. Law does not require compulsory registration of the codicile.. The deceased might not have considered it necessary so to do. But at the time of executing the Will he decided to get it registered. Simply because codicile is not registered, it is no ground to doubt its authenticity provided it is otherwise validly proved. Nor the codicile can be rejected on the second ground. Moreover, it was for Smt. Tej Kaur to have denied its execution and her signature, on the same, but she chose not to do so. In the absence of Smt. Tej Kaur, the defendant still got it proved by the testimony of attesting witness as well as from the testimony of Shri Dalip Singh, DW. 3 son of Smt. Tej Kaur. Why Smt. Tej Kaur did not object to the execution of the codicile was for her

to explain and not for the trial Court to invent reasons for the same. She was very much alive when the evidence was recorded. Smt. Tej Kaur only died on 21st October, 1984. She was the best person to explain why she agreed for 1/4th share to be bequeathed by her husband in favor of the daughter nor she denied her signature on the same. Since the litigation was going on basing the rival claim of the parties on this codicil, it was all the more a reason for the respondent to have produced Smt. Tej Kaur in the witness box in order to explain these facts. Having not done so, inference ought to be drawn that had Smt. Tej Kaur appeared she would not have been in a position to deny the existence of the codicil and her signature on the same. It was because of this the respondent did not choose to examine her.

(7) The conclusion of the trial Court that there was no compromise or that the codicil was forged, cannot be made out from the record. Shri Harnam Singh had obtained an ex parte decree in his favor. in the suit for partition because Smt. Tej Kaur in spite of receipt of summons had not put in appearance. Having obtained ex parte decree, what prevented Shri Harnam Singh to get the final decree and why would he withdraw the suit after the ex parte decree unless there was a compromise arrived at between the parties, as alleged by plaintiff and proved from the testimony of Gurdip Singh, DW. 3 At this juncture the evidence of Shri Gurdip Singh, DW. 3 becomes very relevant. He happened to be the son of Smt. Tej Kaur and brother-in-law of Shri Harnam Singh. Having come to India he tried for a compromise between his brother-in-law and his mother. Because of his good offices better sense prevailed on them which resulted in the said compromise dated. 3rd January, 1966. This Explanationn of the plaintiff appears to be more plausible and convincing particularly when it is supported by the testimony of Shri Gurdip Singh. DW. 3. To our mind, the trial Court ought to have held that the compromise dated 3rd January, 1966 did take place between the parties. The evidence of Shri R.P. Singh, handwriting expert is not relevant because the signatory to the codicil (Ex. P. 1) i.e. Smt. Tej'Kaur being alive choose not to come in the Court to controvert the same. Rather Shri Gurdip Singh, son of Smt. Tej Kaur who was familiar with the handwriting of his mother and further came in the witness box and stated in no uncertain words that the codicil was genuine and bore the signature of his parents. He is not cross-examined on this question.

Handwriting expert's evidence is neither binding nor conclusive. It is a rebuttable evidence. In this case, to our mind, the same has been rebutted by the plaintiff from the testimony of DW. 3 Shri Gurdip Singh as well as by the testimony of the attesting witness to the codicile in whose presence Shri Hardit Singh and Smt. Tej Kaur signed. We see no reason to disbelieve their testimony which have stood the test of cross examination. In fact, so far as the genuineness of the signature of Smt. Tej Kaur and Shri Hardit Singh on Ex. P. I are concerned, there is no cross-examination of Shri Gurdip Singh as well as to Shri Trilok Singh on this part. It has also come on record that the General Attorney of the respondent no. 1 Shri Jawahar Singh knew that there existed a dispute between Shri Harnam Singh and Smt. Tej Kaur regarding this property. He also knew that Shri Harnam Singh was claiming his 1/4th share in this property. This is evident from the evidence of Shri Jawahar Singh, DW/12. This shows that the respondent purchased the property at her own risk. There is in fact, nothing on record by which it could be inferred that Shri Harnam Singh forged the codicile after the death of his wife. Observations of the trial Court to this effect are not borne out from the record. thereforee, the trial Court fell in error in holding that plaintiffs, Shri Harnam Singh and bids children were trespassers in the portion of their occupation in the property in question.

(8) Mr. Mukul Robtagi appearing for defendant drew our attention to the written statement filed by Smt. Tej Kaur in a suit filed by respondent no. 1 in the High Court. Respondent No. I had come to know that Smt. Tej Kaur was changing her stand, thereforee, she filed suit for possession. In her written statement which is the only written statement filed by Smt. Tej Kaur she for the first time recognised the right of Shri Harnam Singh. This she did because by then she had already sold the property to defendant no. 1. Now nothing of her was at stake so long this property was with her and had not been sold she had been disputing Will as well the claim of Shri Harnam Singh. These facts are not relevant for the purposes of this decision, but this definitely. show that not much reliance can be placed on the averments made by Smt. Tej Kaur at any time. She is not a reliable person. We have to go by evidence which has come on record and our decision for setting aside the judgment and decree of the trial Court is on the basis of the evidence which has come on record in this case. From the evidence on record it can be said that respondent has not been able to disprove the codicile as well as the

agreement which are the foundation stone and pillars of plaintiff's claim.

(9) For the above reasons, we set aside the judgment and the decree and hold that the codicile Ex. P. I was genuine and that the appellants are owner of the portion of the house which is in their exclusive use and occupation on the basis of the codicile Ex. P. 1. F.A.O. No. 164/85 is allowed with costs. R.F.A. No. 165/85 is also allowed and the judgment and decree in favor of Respondent No. I is set aside. Appellant will be entitled to costs.

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