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**(1992) 02 P&H CK 0018**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** C.R. No. 1039 of 1982

Banarsi Dass

APPELLANT

Vs

Kaur Sain

RESPONDENT

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**Date of Decision:** Feb. 14, 1992

**Acts Referred:**

- Transfer of Property Act, 1882 - Section 41

**Hon'ble Judges:** A.S. Nehra, J

**Bench:** Single Bench

**Final Decision:** Dismissed

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### **Judgement**

A.S. Nehra, J.

Banarsi Dass plaintiff-appellant has filed this appeal against the judgment and decree dated 16.3.1982 by which his appeal was dismissed and the judgment and decree dated 10.5.1979 of the trial court (dismissing the suit of the plaintiff-appellant) was upheld.

2. The plaintiff-appellant filed a suit for declaration that he and Om Parkash respondent (defendant No. 4) are the owners in possession of the suit land and consequently prayed for perpetual injunction restraining the defendants-respondents from effecting any transfer of the suit land or from disposing them forcibly. The plaintiff challenged mutation No. 11233 which was sanctioned on 26.7.1976 in favour of defendants Nos. 1 to 3 and further two sale deeds which were made by defendants Nos. 1 and 2 on 3.2.1977 in favour of defendants Nos. 5 to 9 on the basis of the aforesaid mutation sanctioned in their favour, stating that these two sale-deeds are inoperative qua the rights of the plaintiff and defendant No. 4.

The land in dispute, is 27 kanals 10 marlas and it, is said to be the joint Hindu family property of the plaintiff, defendants Nos. 1 to 4 and their father Babu Ram. It is alleged by the plaintiff that, in the lifetime of Babu Ram, a partition of the joint Hindu family property was effected among the coparceners and then a Memorandum of partition was reduced to writing; that according to that partition, the land, in dispute, was given to the plaintiff

and defendant No. 4 in equal shares; that a brick-kiln was already installed in the land, in dispute, and its license was in the names of Babu Ram and Banarsi Dass; that the suit land is mentioned as Bhathawali Arazi in the Memorandum of Partition; that Babu Ram, father of the plaintiff and defendants Nos. 1 to 4, expired about 3 years back and, before his death, he even executed a will regarding the land, in dispute, in favour of the plaintiff and defendant No. 4 and it was got registered on 10.10.1973; that the Will as made by Babu Ram of his own free Will and without any pressure, influence, or fraud of any kind; that defendants Nos. 1 to 3, in collusion with the revenue officers, got the mutation sanctioned in favour of the plaintiff and defendants Nos. 1 to 4 regarding the suit-land, in equal shares; that mutation is illegal and inoperative in the presence of the Memorandum of Partition and the Will executed by Babu Ram; and that defendants Nos. 1 and 2, taking undue advantage of the mutation, even sold some part of the suit land to defendants Nos. 5 to 9 on 3.2.1977 through two sale deeds which are inoperative qua the right of the plaintiff and defendant No. 4. It has been further alleged by the plaintiff that even now the defendants are bent upon alienating further land out of the land, in dispute; that defendants Nos. 5 to 9 making efforts to dispossess the plaintiff by force, that earlier suit had been filed by the plaintiff and defendant No. 4 jointly but, there being some formal defect in it, it was withdrawn on 5.4.1977 with the permission of the court to file a fresh suit on the same cause of action; that after the withdrawal of that suit, defendant No. 4 colluded with defendant Nos. 1 to 3 and therefore, he did not like to join as a co-plaintiff in the present suit; and that defend (sic) even sold some part of the suit land after the withdrawal of the previous suit;

3. Defendant No. 4 in his written statement, admitted the claim of the plaintiff in toto and explained the agreement of sale and the sale deed made by him in favour of Radha Krishan and stated that Radha Krishan got the sale deed registered in his favour by practising fraud on him by showing him owner of one-fifth share of the suit land while he was owner of half share of the suit land.

4. Defendants Nos. 5 to 9, in their written statement, denied that the plaintiff and defendant No. 4 were the owners of the suit land in equal shares; They pleaded that the plaintiff and defendants Nos. 1 to 4 were the owners of the suit land in equal shares. They denied that any partition took place between the alleged coparceners or that, later on, any Memorandum of Partition was reduced to writing. They also denied that any Will was ever executed by Babu Ram in favour of the plaintiff and defendant No. 4. They further pleaded that they purchased a part of the suit land belonging to defendants Nos. 1, 2 and 4 by way of three separate sale deeds and, since then, they had been in possession of the same; that they got constructed pillars around the purchased land and fitted the same by barbed wiring; that, in the alleged Memorandum of Partition, the Bhathawali land was mentioned as 28/30 Bighas, whereas the land, in dispute is only 27 Kanals and 10 Marlas; that, after the death of Babu Ram all his successors were owners in possession of the suit land in equal shares and the mutation was rightly sanctioned in their favour; that defendants Nos. 1, 2 and 4 rightly sold their share to them; and that they were bona

fide purchasers for value and paid the total amount to the vendors. The suit was challenged as being bad for non-joinder of necessary parties as Parvin Kumar and Ashok Kumar, who has also purchased a part of the suit land, were not made parties.

5. On the pleadings of the parties, the following issue were framed by the trial court:

1. Whether the plaintiff is owner in possession of 1/2 share of the land in suit?
2. Whether the suit is properly valued for the purposes of court fee and jurisdiction?
3. Whether the suit is bad for mis-joinder and non-joinder of parties.
4. Whether defendants Nos. 5 to 9 are bona fide purchasers and are protected u/s 41 of the Transfer of Property Act?
5. Whether the plaintiff is not bound by the sale deed mentioned in the plaint?

Later on, on the application of the plaintiff, the following two other issues were also framed:

6. Whether Babu Ram deceased executed any valid Will in favour of the plaintiff and defendant No. 4 on 10.10.1973?
7. Whether the suit is not maintainable in the present form?
8. Relief.

6. Issues No. 1 and 6 were decided against the plaintiff; issue No. 3 was decided against the defendants; issues Nos. 4 and 5 were not decided; issue No. 7 was decided in favour of the defendants; and the suit filed by the plaintiff-appellant was dismissed by the trial court on 10.5.1979.

7. The learned Counsel for the plaintiff-appellant has argued that the finding of the lower courts on issue No. 6 is wrong, because the Will, in dispute, is genuine and, therefore, the same ought to have been acted upon. The Will is Exhibit PB dated 10.9.1973 and was registered with the Sub Registrar on 10.10.1763. It was scribed by Jagan Nath petition-writer and bears the attestation of marginal witnesses, namely, Amar Nath Amrit Paul Joga and Ram Sarup. Ram Sarup PW2 has been examined by the plaintiff-appellant. Amrit Paul Joga DW3 has been examined by the defendants-respondents. DW3 has not supported the case of the plaintiff appellant regarding the genuineness of the Will. There are numerous suspicious circumstances and the propounder of the Will has failed to adduce cogent evidence to dispel or remove these suspicious circumstances. Firstly, there was a dispute regarding the mutation of the suit land before the revenue authorities and the Will, in question, was also set up there. But the perusal of the order dated 26.7.1976 passed by the Assistant Collector, a certified copy of which has been placed on the record by the appellant, reveals that neither of the

propounders, namely, Banarsi Dass and Om Parkash, appeared in the mutation proceedings, as a result of which both of them were proceeded ex parte. It is not open to dispute that, in pursuance of the order dated 26.7.1976 passed by the Assistant Collector, the suit land was mutated in favour of Banarsi Dass, Kaur Sain, Jagdish Rai, Om Parkash and Bachni Devi to the extent of one fifth share each. It thus follows that the legatees; i.e., Banarsi Dass and Om Parkash intentionally avoided to contest the mutation proceedings and prove the Will, in question, as, of course, the Will was propounded therein. No cogent explanation in this behalf has been put forth in the evidence adduced on the record.

Secondly, the appellant and Om Parkash (defendant No. 4) previously brought Civil Suit No. 21 dated 9.2.1977 against Kaur Sain and others. Om Parkash (defendant No. 4) sold the area measuring 2 kanals out of his one-fifth share in the suit land by means of a registered sale deed dated 23.2.1977 and thereafter an application under Order 23 Rule of the CPC was made before the court in which the aforesaid Civil Suit No. 21 was then pending. The court, vide its order dated 5.4.1977, allowed the withdrawal of Civil Suit No. 21 dated 9.2.1977 with liberty to file a fresh suit on the same cause of action. A perusal of the order dated 5.4.1977 (Exhibit PP) reveals that the consideration which weighed with the court in allowing the withdrawal of Civil Suit No. 21 dated 9.2.1977 was that Om Parkash (defendant No. 4) had sold his share in the suit land during the pendency of that suit, thereby according to that court, bringing a radical change in the subject matter of litigation. The point to note is that one of the legatees under the Will, namely, Om Parkash, chose to forego the benefits open to him thereunder inasmuch as he, in sale deed Exhibit D4, admitted himself to be owner to the extent of one fifth share in the suit land. It may be added that, on the basis of the disputed Will, his share in the suit land was one-half. That admission, being against his own interest, undoubtedly adversely affects the validity/genuineness of the Will.

Thirdly Babu Ram used to sign. To that effect, Memorandum of partition and the sworn affidavit dated 7.2.1961 bear testimony. Both these documents admittedly bear the signatures of Babu Ram, but the Will, in question, bears his thumb impression. It is true that on this score alone, the validity of the Will cannot be negatived but none-the-less the fact remains that there is no cogent evidence to explain under what circumstances Babu Ram did not sign the Will and rather chose to thumb mark it. It could be that he was unable to sign his name which, in turn, rendered his capacity to understand his good or bad doubtful. In other words, it is doubtful that Babu Ram was in sound disposing mind when he executed the Will, in question. There are no recitals in the Will to indicate as to why Babu Ram deprived his two sons and daughter of their rights of natural succession.

Fourthly, admittedly Banarsi Dass appellant and Om Parkash (defendant No. 4) were present when the Will, in question, was executed as well as when it was registered with the Sub Registrar about a month thereafter. Marginal witness Ram Sarup PW2 disclosed that Jagan Nath petition-writer scribed the Will at his cabin whereas Banarsi Dass appellant, appearing as PW4 stated that the Will was executed at the house of Jagan Nath petition writer. Again, according to Ram Sarup PW2, Banarsi Dass and Om Parkash appended their signatures to the Will but a bare look at the Will shows that neither of them signed it. Amrit Paul Joga DW3, who is also a marginal witness, stated that Banarsi Dass brought the Will at his

shop and, at his asking, he (DW3) signed it. Moreover, according to this witness, he signed the Will on the day it was registered with the Sub Registrar. The Will, Banarsi Dass appellant, the propounder of the Will, could not explain under what circumstances the Will could not be registered on the day it was executed or on the day next thereto. The very fact that one month elapsed between its execution and registration, gives rise to the suspicion that it might be that Babu Ram did not execute the Will of his own volition and free Will and that, therefore, he was not willing to get it registered. Therefore, it follows that it could be that, on finding a suitable opportunity the legatees, namely, Banarsi Dass and Om Parkash, got it registered with the Sub Registrar.

8. The learned Counsel for the appellant has argued that as Babu Ram appeared before the Sub Registrar at the time of registration of the Will therefore, the Will is genuine. The registration of the Will is of little consequence. The crucial consideration is that 30 days" time-gap did not occur without some reason and that reason could be the unwillingness of Babu Ram to get the Will registered. The appellant's omission or failure to cogently explain the time gap between the execution and the registration of the Will, in the evidence adduced on the record, aggravates the suspicion that Babu Ram did not execute the Will of his own accord and choice. Therefore, the Will, in question, is not a genuine document and, in no case, it is the product of a free mind.

9. The learned Counsel for the appellant has argued that the finding of the courts below on issue No. 1 is wrong; that the plaintiff-appellant is the owner in possession of one-half share of the suit land, because the partition was orally effected on 20.9.1960 and was, later on, reduced to writing as Yadasht on 1.11.1960. So far as the oral partition, allegedly made by Babu Ram on 20.9.1960 is concerned, there is no independent evidence that any such partition was really effected by the father of the plaintiff appellant between him and his other sons. The plaintiff-appellant alone appeared as PW4 to prove the oral partition. Rup Chand PW3 admitted in his cross-examination that the oral partition was not effected in his presence and he was only the attesting witness of the writing Exhibit DC. The plaintiff-appellant and Rup Chand PW3 appeared to prove Yadasht Exhibit PC dated 1.11.1960. There were other persons, namely, Jagdish Raj and Om Parkash (defendants), Amar Nath, Suraj Bhan, Devi Chand petition-writer and Megh (sic) petition-writer, who had attested Exhibit PC, but none of them has been produced to prove Exhibit PC. It is stated that Devi Chand petition-writer is dead. Rup Chand PW3 stated that he only attested Exhibit PC. Banarsi Dass appellant (PW4) in his examination-in-chief adopted an attitude of proving Yadasht Exhibit PC executed between, his father and his brothers but, in his cross-examination, he adopted a different attitude and meant to convey that Exhibit PC was incorrect and it was never acted upon. Exhibit PC, before it is discussed in detail, may be briefly summarized that it meant to show that the suit land, which was earlier owned by Babu Ram, was given to the plaintiff-appellant and Om Parkash (defendant No. 4) in equal shares. It also recites that Kaur Sain, other son of Babu Ram, had already been separated, he having been given a three-storeyed residential building, one plot and some other movable assets, i.e., cash

amount and ornaments etc. Babu Ram had four sons and, excluding Kaur Sain, what was given to the remaining three sons is all detailed in Exhibit PC. Babu Ram was left with no interest in the suit land after this partition. He, however, before his death, made a Will of the suit land in favour of the plaintiff-appellant and Om Parkash (defendant No. 4) and, in this will, he described himself to be the owner in possession of the land, in dispute. He mentioned in the Will that, after his death, the plaintiff-appellant and Om Parkash (Defendant No. 4) shall be owners of the suit land in equal shares. In a way, the Will, which has been proved as Exhibit PB, directly goes to denounce the oral partition and Yadasht Exhibit PC based on that oral partition.

10. The plaintiff-appellant, who alone come to prove the oral partition and Yadasht Exhibit PC, appeared as PW4 and stated that his father Babu Ram, at the time of execution of the Will, was the sole owner and in exclusive possession of the suit land. When asked which of the two documents, the Will (Exhibit PB) or the Yadasht (Exhibit PC) was correct, he chose to state that will Exhibit PB was correct and that the fact mentioned in Yadasht Exhibit PC that the suit land had been given in oral partition to him and Om Parkash (defendant No. 4) in equal shares, was incorrect. The further fact mentioned in Exhibit PC that possession of the suit land had been delivered to the plaintiff-appellant and Om Parkash (defendant No. 4) was also stated to be incorrect. The plaintiff-appellant (PW4) admitted the fact written in Exhibit PC that he had Om Parkash has been made owners of the suit land in equal shares, to be incorrect. He also stated that the factum regarding ownership of Babu Ram, as mentioned in Will Exhibit PB, was correct. Throughout his statement, the plaintiff-appellant denounced Yadhasht Exhibit PC and tried to maintain the correctness of Will Exhibit PB vide which the suit land was given by his father to him and Om Parkash (defendant No. 4) in equal shares. In the face of this type of evidence coming from the mouth of the plaintiff-appellant himself, it cannot be said that Yadhasht Exhibit PC was really reduced to writing on the basis of any oral partition. If there had been and oral partition effected by Babu Ram among his sons, there would have been no need for him to make will Exhibit PB, mentioning therein that he was dedicating the land, in dispute, to his sons Banarsi Dass plaintiff-appellant and Om Parkash (defendant No. 4) once more. This would only mean that, if at all Exhibit PC was reduced to writing, it was never meant to be acted upon and was factually left as otiose in character.

11. The matter, however, does not end here, the plaintiff-appellant produced two other documents on the file to show that the oral partition was duly effected and Exhibit PC, consequently, also came into existence. The first document in this connection is affidavit Exhibit PA. It has been proved by S.D. Gupta, Advocate (PW1). This document was executed on 7.2.1961 and was attested by the Oath Commissioner on the same day. In this affidavit, there is no mention that any oral partition was effected by Babu Ram in the month of September 1960 or a Yadasht on that basis was brought into existence on 1.11.1960. The affidavit only mentions that the brick-kiln on the land, in dispute; had been given by Babu Ram to his sons Banarsi Dass and Om Parkash in equal shares and that,

from then onwards, Banarsi Dass and Om Parkash would be taken as owners of the land under the brick kiln in equal shares. Since there is no mention in this affidavit that any oral partition was effected and that, on its basis, Yadasht Exhibit PC was, later on, written therefore, this affidavit cannot be taken to be valuable piece of evidence for evidencing the factum that a partition amongst Babu Ram and his three sons was effected or that a Yadasht, on that basis, was also written after some time.

12. The next document relied upon by the plaintiff appellant is the order dated 21.3.1968 (Exhibit PD) passed by the Income Tax Officer. This document is an order of assessment of income tax for the year 1963-64.

The Income Tax Officer has mentioned therein that the family of M/s. Babu Ram Banarsi Dass has partitioned the family movable and immovable properties and that the assessee has also filed a copy of the assessment order dated 31.3.1967 of the Excise and Taxation Officer in which the family partition was admitted to have been effected between the coparceners. The Income Tax Officer in the end of his order dated 21.3.1968 mentioned the following words:

Affidavits of all the coparceners have been taken and statement of Sh. Jagdish Rai has also been taken. I am, in view of the evidence produced, therefore, satisfied that the family has been divided completely during the assessment year under consideration.

This order in no uncertain terms mentions that the partition had been effected among the coparceners during the assessment year 1963-64. In no way does it show that the partition allegedly effected in 1960 was the partition approved in Exhibit PD. It speaks of some other partition effected by the coparceners during the year 1963-64 and that partition is not in dispute under this issue. Therefore, Exhibit PD is not helpful to the plaintiff-appellant to prove the oral partition allegedly made in September 1960 or the Yadasht Exhibit PC executed on 1.11.1960. Therefore, I have no hesitation in holding that Exhibit PC, if at all it is admitted to have been executed among the coparceners, was never meant to be acted upon and factually too it was never acted upon between the parties. Therefore, the plaintiff appellant has failed to prove that any oral partition was really effected between Babu Ram and his sons. The plaintiff-appellant has also failed to prove that he is the owners to the extent of one-half share in the suit land.

13. It was further contended by the learned Counsel for the plaintiff-appellant that it is proved from Exhibit PC that Banarsi Dass appellant and Om Parkash (defendant No. 4) were owners of the brick-kiln to the extent of one-half share each and that the brick kiln license too went to their share. His argument is that brick-kiln existed on the suit land and that, in the partition of the joint Hindu family property, the suit land together with the brick-kiln fell to the share of Banarsi Dass appellant and Om Parkash (defendant No. 4). Were it really so, then there could be no occasion for Babu Ram to execute the Will. The plaintiff-appellant and Om Parkash (defendant No. 4) to the owners or in possession of the suit land, were factually incorrect. Evidently, Exhibit PC is no evidence for proving the

plaintiff-appellant's claim of ownership or possession qua the suit land. To put it differently, it cannot be successfully agitated that the suit land alongwith the brick kiln existing thereon fell to the share of Banarsi Dass plaintiff-appellant and Om Parkash (defendant No. 4) in the partition, if any, of the joint property amongst Babu Ram, Banarsi Dass appellant, Kaur Sain, Jagdish Rai and Om Parkash.

14. In conclusion, I hold that the Will, in question is surrounded with suspicious circumstances and it does not satisfy what is commonly called the judicial conscience" of the court. As such, it cannot be acted upon and given effect to. Therefore, this appeal is dismissed with costs.