Before Anil Kshetarpal, J.

JOGINDER SINGH AND OTHERS—*Appellants*

versus

BOOR SINGH AND OTHERS—*Respondents*

RSA No. 414 of 2001

March 12, 2019

A) ***Civil Procedure Code, 1908—S.100—Second appeal—Whether a judgment and decree passed by Court acknowledging a prior family settlement with respect to a self-acquired property of a common ancestor is compulsorily registerable before it can be held to be binding— Held, No—A common ancestor is entitled to put property in common stock and thereafter, suffer a decree acknowledging a family settlement and such decree would not be required to be registered unless property is being transferred through a Civil Court decree—Once a decree acknowledges a family settlement arrived at prior in point of time, such decree would not require registration.***

Held that, the reason assigned by the First Appellate Court in the considered view of this Court is equally erroneous. Once existence of joint Hindu family is not disputed by the plaintiffs and rather it is their pleaded case, acknowledging a family settlement and distribution of the property through a family settlement is a well recognized mode of settling the disputes between the parties and for division of the property. The property purchased by a common ancestor is a self-acquired property, that would not itself debar the family members to divide amongst themselves. The Courts have always been leaned in favour of upholding a family settlement and refusing to re-open the disputes which have been settled between the family members by way of family settlement. It has been held that a memorandum of family settlement which acknowledges a settlement arrived at prior in point of time or a decree passed by the Court acknowledging a prior family settlement does not require registration. Reference in this regard can be made to the judgment passed by this Court in the case of Dhian Singh and others Vs. Mohinder Singh and others, 2017(4) PLR 729. For reasons recorded therein, it is held that a common ancestor is entitled to put the property in common stock and thereafter, suffer a decree acknowledging a family settlement and such decree would not be required to be registered unless the property is being transferred

through a Civil Court decree. Once a decree is acknowledging a family settlement arrived at prior in point of time, such decree would not require registration. Accordingly, question No.1 is answered in favour of the appellants.

(Para 11)

B) ***Civil Procedure Code, 1908—S.100—O.7 Rl.1—Clause j (as amended by State of Punjab)—Particulars to be contained in plaint— Whether a judgment and decree can be set aside on ground that a previous suit instituted has not been disclosed in subsequent suit (plaint)?—Held, under Order 7 Rule 1 Clause-j added by State of Punjab, plaint shall contain particulars of various facts including pendency of litigation between same parties or between parties under whom they or any of them claim litigation either pending or finally decided by Court—However, no attention drawn of Court to any provision either in Code of Civil Procedure or any other law which mandates Court to dismiss suit or reject plaint only on failure to disclose such facts—Thus, in absence of such provision, not proper for Courts to dismiss suits.***

Further held that, the next reason assigned by the First Appellate Court is required to be answered by answering question No.2 extracted above. It will be noted that under Order 7 Rule 1 Clause-j added by he State of Punjab, it is provided that the plaint shall contain particulars of various facts including pendency of litigation between the same parties or between the parties under whom they or any of them claim litigating either pending or finally decided by the Court. The amendment in Order VII(1)(j) is extracted as under:-

> "**Paritculars to be contained in plaint.-** The plaint shall contain the following particulars:-
>
> (a) ---------- (i)
>
> (j) A statement to the effect that no suit between the same parties, or between parties under whom they or any of them claim, litigating on the same grounds has been previously instituted or finally decided by a Court of competent jurisdiction or limited jurisdiction, and if so, with what results."

(Para 13)

Further held that, no doubt, the amendment incorporates that the plaint shall contain particulars. However, attention of this Court has not been drawn to any provision either in Code of Civil Procedure

or any other law which mandates the Court to dismiss the suit or reject the plaint only on failure to disclose such facts. In absence of such provision, it would not be proper for the Courts to dismiss the suits on this ground alone.

(Para 14)

(C) ***Civil Procedure Code, 1908—O.23 Rl.1(4)—Suit—Maintainability—Whether bar to maintainability of suit under O.23 Rl.1(4) of CPC i.e. with respect to institution of a previous suit can be invoked by a Court without examining pleadings of first and second suit?— Institution of subsequent or fresh suit in respect of such subject matter or such part of claim is barred—For proving that subsequent suit (fresh suit) is in respect of such subject matter or such part of claim as is in previous suit, it is mandatory for party asserting to prove on file plaint of first and second suit—In absence of pleadings of first and second suit, not proper for Court to record a finding that fresh suit is in respect of such subject matter or such part of claim.***

Further held that, on careful reading of Order 23 Rule 1(4), it is apparent that institution of subsequent/fresh suit in respect of such subject matter or such part of the claim is barred. For proving that subsequent suit (fresh suit) is in respect of such subject matter or such part of the claim as is in the previous suit, it is mandatory for the party asserting to prove on file the plaint of first and second suit. In absence of pleadings of first and second suit, it will not be proper for the Court to record a finding that fresh suit is in respect of such subject matter or such part of the claim. Still further, it will be noted that the word such subject matter or such part of the claim obviously make a reference to cause of action on the basis whereof a suit is instituted. For proving that both the suits were on the same cause of action, it is mandatory that the pleadings of both the suits are produced. In the present case, the plaintiffs have failed to prove on record pleadings of both the suits. No doubt, a copy of the plaints instituted on 30.01.1992 and 25.01.1992 are part of the record, however, both the plaints have not been proved. The plaint which was instituted on 30.01.1992 is marked P-1, however, the plaintiffs did not take steps to prove the plaint and get it exhibited. A document which has merely been marked cannot be read in evidence. Accordingly, this question is also answered in favour of the appellants. (Para 17)

(D) ***Evidence Act, 1872—S.68—Proof of execution for attestation—Whether a registered Will executed by a common***

ancestor duly proved on record in accordance with S.68 of the Evidence Act can be held to be surrounded by suspicious circumstances on basis of conjectures and surmises— Held, Courts no doubt are required to satisfy conscience while examining suspicious circumstances surrounding Will, however, suspicious circumstances have to be based on solid foundation and basis— Suspicious circumstances cannot be on whims and fancies of one party—Testator not only executed a Will in favor of two sons, but thereafter suffered a decree in favor of both—Thus, intention of testator clearly established— Hence, Will not surrounded by suspicious circumstances against defendants.

Further held that, the Courts no doubt are required to satisfy its conscious while examining the suspicious circumstances surrounding the Will, however, the suspicious circumstances have to have some solid foundation and basis. The suspicious circumstances cannot be on the whims and fencies of one party. There is a well settled rule of examining a Will and which is that the Presiding Judge should sit on the arm chair of the testator. Had the Courts applied that well settled rule, the result would have been different. It has been proved on file that the testator wanted to give the property to the families of his two sons namely Kala Singh Harnam Singh. He not only executed a Will in favour of two sons namely Kala Singh and Harnam Singh but also thereafter suffered a decree in favour of children of Kala Singh and Harnam Singh. Hence, the intention of the testator is clearly established.

(Para 21)

Gurbachan Singh Bhatia, Advocate
for the appellants.

Simronjot Singh, Advocate,
for P.S. Khurana, Advocate
for respondent No.2.

ANIL KSHETARPAL, J.

(1) Defendants No.1 to 4-appellants are in the regular second appeal against the judgments passed by the Courts below decreeing the suit filed by respondents No.1 and 2/plaintiffs for declaration declaring that the judgment and decree dated 20.04.1992 is void and hence, the plaintiffs are entitled to inherit the property along with defendants No.5 to 9 on the basis of natural succession in equal shares and defendants

No.1 to 4 are restrained from alienating the suit land on the basis of judgment and decree dated 20.04.1992.

(2) In the considered opinion of this Court, the following substantial questions of law arise for consideration:-

1. Whether a judgment and decree passed by the Court acknowledging a prior family settlement with respect to a self-acquired property of a common ancestor is compulsorily registered before it can be held to be binding?

2. Whether a judgment and decree can be set aside on the ground that a previous suit instituted has not been disclosed in the subsequent suit (plaint)?

3. Whether bar to the maintainability of the suit under Order 23 Rule 1(4) of the Code of Civil Procedure i.e. with respect to institution of a previous suit can be invoked by a Court without examining the pleadings of first and second suit?

4. Whether a registered Will executed by a common ancestor duly proved on record in accordance with Section 68 of the Evidence Act can be held to be surrounded by suspicious circumstances on the basis of conjectures and surmises?

(3) The inter se relationship between the parties can be understood from a short pedigree table which is drawn as under:-

Bahadar Singh
I
I
Munsha Singh
I ------- (Gango/Def .No.6)
I

I	I	I	I	I	I
Boor Singh (Pltf. No.1)	Gurdevan Bai (Pltf.No,2)	Kala Singh (Def.No.5)	Harnam Singh (Def.No.6)	Premo (Def.No.7)	Gulabo (Def.No.8)
		I	I		
		I	I		
		I	I		

I	I	I	I
Joginder Singh (Def.No.6)	Bachan Singh (Def.No.2)	Balbir Singh (Def.No.3)	Harmesh Singh (Def .No. 4)

(4) The present suit was filed by Boor Singh and Gurdevan Bai, son and daughter of Sh. Munsha Singh seeking declaration that the judgment and decree dated 20.04.1992 in Civil Suit No.313-1 of 1992

is illegal, null and void and ineffective with a consequential relief of permanent injunction restraining defendants No.1 to 4 from alienating the suit land.

(5) Facts which have come on record are that Sh. Munsha Singh, predecessor-in-interest of plaintiffs and defendants purchased the suit property i.e. measuring 16 kanals. It has come in evidence that the plaintiffs have been living separately for quite some time whereas Munsha Singh had got married his daughters and they were settled in their married life. Four grand-sons namely defendants No.1 to 4-appellants filed the suit on 07.04.1992 against their grandfather claiming that in a family settlement, the suit property had fallen to the share of defendants No.1 to 4-appellants. Munsha Singh filed admitting written statement and appeared in Court and conceded to the claim made in the plaint resulting into a decree passed by the Court under Order 12 Rule 6, CPC dated 20.04.1992.

(6) The plaintiffs filed the present suit on 20.04.1994 challenging the judgment and decree dated 20.04.1992. The suit was contested by defendants No.1 to 4 as well as defendants No.5 and 6. Defendants No.5 and 6 defended the suit apart from other grounds also on the basis of a registered Will executed by late Sh. Munsha Singh in their favour.

(7) Learned trial Court as well as First Appellate Court have set aside the judgment and decree dated 20.04.1992 and have also declared that the registered Will dated 31.12.1991 although, proved on file is surrounded by suspicious circumstances and therefore, cannot be relied upon.

(8) Learned First Appellate Court has recorded the following reasons to dismiss the appeal filed by defendants No.1 to 4:-

1. The judgment and decree was passed in a haste manner.

2. The judgment and decree dated 20.04.1992 is result of suppression of real facts.

3. The suit filed on 07.04.1992 which resulted into decree dated 20.04.1992 was barred and not maintainable under Order 23 Rule 1(4) of the Civil Procedure Code, 1908.

4. The plaintiffs had no pre-existing right in the suit property and therefore, the consent decree is required to be compulsorily registered before it can be held to be binding.

5. It is not proved on file that Munsha Singh suffered the decree to give effect to the family settlement.

6. The impugned judgment and decree was to frustrate the claim of the heirs of Munsha Singh and not for avoiding conflict.

7. The Will is surrounded by suspicious circumstances.

(9) As regards first reason, it will be noticed that the suit was filed on 07.04.1992 whereas judgment and decree was passed on 20.04.1992. Munsha Singh had appeared in Court and filed written statement admitting the claim of the plaintiffs. He had also appeared in Court and suffered a statement conceding the claim. In such circumstances, the Court passed a decree in accordance with Order 12 Rule 6, CPC. The judgment and decree passed by the Court on 20.04.1992 is extracted as under:-

"Present:- Counsel for the parties.

The defendant appeared and filed written statement in which he has admitted the claim of the plaintiffs. In this respect the statement of the defendant recorded in which also he has admitted to the claim of the plaintiffs. In these circumstances, the suit of the plaintiffs is decreed as prayed for. Parties are left to bear their own costs. Decree sheet be prepared and file be consigned to the record room, Ferozepur.

Announced

20-4-1992 Sub Judge I Class,
Fazilka"

(10) Once the parties were not at issue and the Court was not required to adjudicate upon any issue, the Court is not expected to take years to decide the suit. It will be noted here that the plaintiffs have not produced any evidence either to prove that Munsha Singh had not appeared in Court filed admitting written statement or he had not suffered statement in Court while appearing in evidence. In such circumstances, the Courts erred in returning a finding that the decree was passed in a haste manner.

Question No.1

(I)Whether a judgment and decree passed by the Court acknowledging a prior family settlement with respect to a

self-acquired property of a common ancestor is compulsorily registered before it can be held to be binding?

(11) The reason assigned by the First Appellate Court in the considered view of this Court is equally erroneous. Once existence of joint Hindu family is not disputed by the plaintiffs and rather it is their pleaded case, acknowledging a family settlement and distribution of the property through a family settlement is a well recognized mode of settling the disputes between the parties and for division of the property. The property purchased by a common ancestor is a self-acquired property, that would not itself debar the family members to divide amongst themselves. The Courts have always been leaned in favour of upholding a family settlement and refusing to re-open the disputes which have been settled between the family members by way of family settlement. It has been held that a memorandum of family settlement which acknowledges a settlement arrived at prior in point of time or a decree passed by the Court acknowledging a prior family settlement does not require registration. Reference in this regard can be made to the judgment passed by this Court in the case of ***Dhian Singh and others*** versus ***Mohinder Singh and others***[1]. For reasons recorded therein, it is held that a common ancestor is entitled to put the property in common stock and thereafter, suffer a decree acknowledging a family settlement and such decree would not be required to be registered unless the property is being transferred through a Civil Court decree. Once a decree is acknowledging a family settlement arrived at prior in point of time, such decree would not require registration. Accordingly, question No.1 is answered in favour of the appellants.

(12) Next reason assigned by the First Appellate Court that existence of family settlement is not proved, the findings of the First Appellate Court are erroneous as while making reference to the statement of DW-1, Nihali Bai, the Court has held that family settlement is proved between Munsha Singh and his sons but not grand-sons. The grand-sons who are defendants No.1 to 4-appellants are members of the same family. Hence, the Court erred in making a distinction with respect to sons and grandsons. Still further, once Munsha Singh appeared in the previous suit and admitted a family settlement not only in the pleadings but also in evidence, in a subsequent suit, the Court would not go behind the decree. Reference in this regard can be made to a Division Bench judgment of this Court in the case of ***Gurdev Kaur and another*** versus ***Mehar Singh and***

[1] 2017(4) PLR 729

others[2]**.** Still further, the Courts have erred that the present decree was got passed in order to frustrate the claim of the heirs. It will be noted that on the one hand, the Court has held that it is a self-acquired property and on the other hand, the First Appellate Court has held that the decree has been passed in order to frustrate the claim of the heirs. It has come in evidence that Munsha Singh had 14 acres of land in Tehsil, District Ferozepur which has not been subject matter of the judgment and decree dated 20.04.1992.

Question No.2

> (II)Whether a judgment and decree can be set aside on the ground that a previous suit instituted has not been disclosed in the subsequent suit (plaint)?

(13) The next reason assigned by the First Appellate Court is required to be answered by answering question No.2 extracted above. It will be noted that under Order 7 Rule 1 Clause-j added by the State of Punjab, it is provided that the plaint shall contain particulars of various facts including pendency of litigation between the same parties or between the parties under whom they or any of them claim litigating either pending or finally decided by the Court. The amendment in Order VII(1)(j) is extracted as under:-

> "**Paritculars to be contained in plaint.-** The plaint shall contain the following particulars:-
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> (a) ---------- (i)
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> (j)a statement to the effect that no suit between the same parties, or between parties under whom they or any of them claim, litigating on the same grounds has been previously instituted or finally decided by a Court of competent jurisdiction or limited jurisdiction, and if so,with what results."

(14) No doubt, the amendment incorporates that the plaint shall contain particulars. However, attention of this Court has not been drawn to any provision either in Code of Civil Procedure or any other law which mandates the Court to dismiss the suit or reject the plaint only on failure to disclose such facts. In absence of such provision, it would not be proper for the Courts to dismiss the suits on this ground alone.

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[2] 1990(1) PLR 334

(15) Still further, First Appellate Court has also held that the property is not proved to be ancestral co-parcenary property and since in the previous suit filed which resulted into decree dated 20.04.1992, the correct facts were suppressed, hence, the decree is liable to be set aside.

(16) In this regard, it will be noted that both the Courts have found that Munsha Singh, common ancestor of the parties had purchased the suit property. However, the plaintiffs themselves when filed the present suit had pleaded in para 5 that the property is joint Hindu family property. Still further, copy of the plaint of Civil Suit No.313-1 of 1992, which resulted into decree dated 20.04.1992, has not been proved on the record of this case. Hence, there is no material available for the Court to arrive at a finding that some facts were suppressed or not, disclosed or incorrectly stated, in the civil suit field on 07.04.1992. Accordingly, question No.2 is answered in favour of the appellants.

Question No.3

(i) Whether bar to the maintainability of the suit under Order Rule 1 (4) of the Code of Civil Procedure i.e. with respect to institution of a previous suit can be invoked by the Court without examining the pleadings of first and second suit?

(17) On careful reading of Order 23 Rule 1(4), it is apparent that institution of subsequent/fresh suit in respect of such subject matter or such part of the claim is barred. For proving that subsequent suit (fresh suit) is in respect of such subject matter or such part of the claim as is in the previous suit, it is mandatory for the party asserting to prove on file the plaint of first and second suit. In absence of pleadings of first and second suit, it will not be proper for the Court to record a finding that fresh suit is in respect of such subject matter or such part of the claim. Still further, it will be noted that the word such subject matter or such part of the claim obviously make a reference to cause of action on the basis whereof a suit is instituted. For proving that both the suits were on the same cause of action, it is mandatory that the pleadings of both the suits are produced. In the present case, the plaintiffs have failed to prove on record pleadings of both the suits. No doubt, a copy of the plaints instituted on 30.01.1992 and 25.01.1992 are part of the record, however, both the plaints have not been proved. The plaint which was instituted on 30.01.1992 is marked P-1, however, the plaintiffs did not take steps to prove the plaint and get it exhibited. A

document which has merely been marked cannot be read in evidence. Accordingly, this question is also answered in favour of the appellants.

Question No.4

(iv) Whether a registered Will executed by a common ancestor duly proved on record in accordance with Section 68 of the Evidence Act can be held to be surrounded by suspicious circumstances on the basis of conjectures and surmises?

(18) It has been held by both the Courts below that execution and registration of the Will has been proved on examination of DW-2 Hans Raj, an attesting witness, DW-3 Gian Chand, scribe of the registered Will and DW-4 Som Nath, another attesting witness of the Will. However, the Courts have held that the Will is surrounded by suspicious circumstances. The first reason given by the Courts is to the effect that in the plaint dated 07.04.1992, Will executed by Munsha Singh has not been disclosed. It will be noted that neither there was any occasion nor the Will was executed in favour of defendants No.1 to 4 who were the plaintiffs in he suit filed on 07.04.1992. Hence, there was no occasion for the plaintiffs in the aforesaid suit to disclose the execution of the Will as they were not executants. Still further, the Will operates after the death of the testator, therefore, the Will was not required to be disclosed in the plaint. As regards next reason that Munsha Singh was 85 years old and it is mentioned in the Will that he remains ill, it will be noted that once it is a registered Will, the Courts are not required to ignore the testament unless it is proved that the Will was not executed by the testator with his free will and volition. In the present case, no cogent evidence has been led nor finds by the Courts below that Munsha Singh-testator was not in his senses or the testament was executed under any undue influence. Munsha Singh remained alive thereafter and had appeared in the Court in the year 1992 which resulted into a decree dated 20.04.1992 whereas the Will is dated 31.12.1991. Hence, the Courts have erred in treating it to be a suspicious circumstances.

(19) Next reason assigned by the First Appellate Court is again erroneous as the Court has recorded that the testator had bequeathed 4 kanals land in favour of his wife and this fact was incorporated at the end where recitals in the Will was coming to an end. The Will is to be read as a whole. In the Will, the testator has made a reference to his children and the reasons as to why he wants to execute the Will in

favour of his four grand-sons. He still makes a reference to his wife and gives some part of the property to his wife. He also recites that Boor Singh has already been given property. The finding of the First Appellate Court that the Will was subsequently typed on already blank thumb marked paper is clearly erroneous as the Will is a registered Will and the paper on which the Will is executed, the testator has thumb marked the Will at two places on each side. The thumb impression of the testator exist on the front page at left hand margin as well as at the end where typed material comes to an end. It will not be proper to ignore a registered Will on these small reasons.

(20) Next reason assigned by the First Appellate Court to hold that the registered Will is suspicious is again result of total non-application of mind. The Court has held that since the scribe has admitted that he had entered the execution of the Will in his register but on the serial number at which the entry has been made in his register has not been mentioned on the Will and the register has not been produced are clearly erroneous. On careful reading of the statement of DW-3, Gyan Chand-scribe, it is apparent that he has stated that his register is lying in the Audit Department at Jalandhar and therefore, he is not at that time in possession of the register. Once the Will is registered and is duly entered in the office of the Sub-Registrar at page 108 in the appropriate book as per the Registration Act, unless there was some strong circumstance to hold that the Will suffered from a major suspicious circumstances, the Courts erred in ignoring the Will.

(21) The Courts no doubt are required to satisfy its conscious while examining the suspicious circumstances surrounding the Will, however, the suspicious circumstances have to have some solid foundation and basis. The suspicious circumstances cannot be on the whims and fencies of one party. There is a well settled rule of examining a Will and which is that the Presiding Judge should sit on the arm chair of the testator. Had the Courts applied that well settled rule, the result would have been different. It has been proved on file that the testator wanted to give the property to the families of his two sons namely Kala Singh Harnam Singh. He not only executed a Will in favour of two sons namely Kala Singh and Harnam Singh but also thereafter suffered a decree in favour of children of Kala Singh and Harnam Singh. Hence, the intention of the testator is clearly established.

(22) In view of the aforesaid, question No.4 is again answered in favour of the appellants.

(23) In view of the discussion made above, the judgments passed by the Courts below are set aside and the suit filed by the plaintiffs shall stand dismissed.

(24) The pending miscellaneous application, if any, shall stand disposed of in view of the above said judgment.

(25) Regular Second Appeal is allowed.

Ritambhra Rishi