

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

**RSA No.3371 of 1987 (O&M)
Date of decision: 23.09.2015**

Nahar Singh and others

... Appellants

Vs.

Krishna Devi and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

1. Whether reporters of local newspapers may be allowed to see judgment?
2. To be referred to reporters or not?
3. Whether the judgment should be reported in the Digest?

Present:- Mr. R.C.Setia, Senior Advocate with
Mr. Vishal Ranjan, Advocate
for the appellants.

Mr. O.P.Goyal, Senior Advocate with
Ms. Shamita Kaushik, Advocate and
Mr. Randeep Singh Smagh, Advocate
for the respondents.

AMIT RAWAL J.

Appellant-defendants have impugned the judgment and decree dated 26.10.1987 of the lower Appellate Court, whereby, the judgment and decree dated 12.08.1985 dismissing the suit of plaintiff/appellant-Krishna Devi, for declaration and permanent injunction, has been set aside, resultantly, the appeal has been allowed, in essence, suit of plaintiff for claiming ½ share in the estate of Jai Ram, has been decreed.

Before adverting to the arguments of learned counsel for the parties, it would be apt to give preface of the matter.

The land measuring 190 kanals 8 marlas was owned by Thakur Brahman, which was inherited by his sons. Chandu had two sons, namely, Jai Ram and Nikka and two daughters, namely, Rameshwari and Gangu. Jai Ram died unmarried on 19.01.1981, before death allegedly executed a Will dated 6.11.1980 (Ex.P1) in favour of plaintiff No.2, Krishna Devi wife of Malkiat Ram Brahmin. Similarly, Nikka also died issueless and his $\frac{1}{2}$ share also devolved in favour of Malkiat Ram. The other daughter had a son, namely, Ram Chand and the plaintiff No.1, is none else but son of Ram Chand Brahmin. The dispute in the present appeal revolves around the estate of Jai Ram. Ganga Devi being sister of Jai Ram got the mutation dated 02.03.1982 affected in her favour and therefore, sold the land qua her share, vide sale deeds dated 07.05.1982 and 11.05.1982, vide Ex.D2 and Ex.D3. It is the aforementioned sale deeds which were challenged by Malkiat Ram and Krishna Devi on the ground that Krishna Devi was grand-daughter of Jai Ram and served him along with her husband till his death. Jai Ram, on his own free will, had executed a Will dated 6.11.1980 of $\frac{1}{2}$ share in the suit land in favour of plaintiff No.2. On the basis of the said Will (dated 6.11.1980), plaintiff No.2, had become the owner in possession of $\frac{1}{2}$ share of the land in dispute on 2.3.1982. It was averred that Ganga was not the owner of the land in dispute as she did not have any title or interest in the land in dispute.

The said suit was contested on behalf of defendants, by filing separate written statements, on the ground that suit for

injunction was not maintainable, being bad for mis-joinder of the cause of action, as the sale deeds, were executed much before filing of the present suit. In essence, the suit was filed on 17.05.1982, whereas, sale deeds were executed prior to that. Defendants No.1, 2 and 3 had purchased the land on payment of valid consideration and Will set up by the plaintiffs was surrounded by suspicious circumstances.

The trial Court, on the basis of the aforementioned pleadings, much less, documentary evidence brought on record, while rendering the finding in paragraph No.9 of the judgment, dismissed the suit of plaintiff No.2. The relevant finding of the trial Court reads thus:-

“9. On the other hand the learned counsel for the defendants has seriously contended that the Will Ex.P1 was a forged document created after the death of Jai Ram. That the thumb impression of Jai Ram was already there when the contents of the Ex.P1 were written. To conclude this the counsel for the defendants has pointed out certain suspicious circumstances which are as under:-

- i) Firstly there appears to be difference of spacing in the writing of Ex.P1. In the earlier part of the writing, the spacing is more than in the later portion.*
- ii) Secondly words 'Khaba Gutha Jai Ram Ukat' have been written along with the concluding line of the Will and*

not below it. The thumb impression of Sadhu Singh Lambardar is somewhat over the writing containing his name and quite close to the line drawn under that thumb impression, which leads to the conclusion that the thumb impression was obtained, after that writing was made and the line drawn. That there was fold in the centre of paper of Ex.P1, and thumb-impression of Jai Ram was under the fold and that some of the ridges of the thumb-impression were broken and that was positive proof of the fact that the said thumb impression had already existed on the paper before it was folded and that the spreading of the ink in the writing on the fold further proves that the writing was made after the folding.”

The trial Court found that since Jai Ram was illiterate, but writing/contents of the Will showed that some matured brain, well conversant with the legal terminology incorporated the words and that the witnesses, who, had allegedly attested/scribed the Will in evidence stated that he was not a regular deed writer only knew Punjabi nor had attended any class or school.

Aggrieved against the aforesaid findings of the trial Court, plaintiff No.2, Krishna Devi filed an appeal before the lower Appellate Court. The lower Appellate Court found that Will was not surrounded by suspicious circumstances and reversed the finding of the trial Court. In essence, decreed the suit.

Mr. R.C.Setia, learned Senior counsel assisted by Mr.

Vishal Ranjan, Advocate submits that reasoning given by the trial Court, vis-a-vis, Will having been surrounded by suspicious circumstances is based upon appreciation of oral and documentary evidence, much less, examination of tenor and mode, much less, contents of the Will, whereas, on the other hand, the lower Appellate Court has committed illegality and perversity in accepting the Will. There are differences of spacing in the writing and the Will does not confirm to the provisions of Section 63(c) of the Indian Succession Act. Even attesting witnesses to the Will have not been examined, but one Surjit Singh, has been examined, who is not attesting witness, whereas, attesting witnesses were Kamal Krishan and Sadhu Singh, who have not been examined. Surjit Singh had not even appended his signatures on his statement, therefore, once the Will has not been proved, the lower Appellate Court ought to have dismissed the suit, thus, submits that following substantial questions of law arise for determination by this Court:-

- i) *Whether Will dated 6.11.1981 was surrounded by suspicious circumstances or not?*
- ii) *Whether there has been compliance of provisions of Section 63(c) of the Indian Succession Act or not?*
- iii) *Whether the lower Appellate Court has wrongly relied upon the statement of witnesses when the propounder failed to dispel the suspicious circumstances which surrounded the execution?*

Mr.O.P.Goyal, learned Senior counsel assisted by

Ms. Shamita Kaushik, Advocate submits that there is no illegality and perversity in the findings rendered by the lower Appellate Court. Will, was not surrounded by any suspicious circumstances as there is no difference of spacing. No suggestion has been put to witness Malkiat Ram with regard to writing of the Will, whereas, Malkiat Ram has proved that he scribed the Will on the asking of Jai Ram who was illiterate person. Mentioning of Urdu words, in the Will, would not belie the contents of the Will on the premise that the testator was illiterate as in common parlance, old person used to converse in Urdu.

It would be immaterial, if the Will is not registered. Registration is not necessary for giving effect to its genuinity. The lower Appellate Court had given cogent reasons that name of witness Surjit Singh instead of Daljit Singh, in evidence had wrongly been mentioned and even the record shows that plaintiff summoned Daljit Singh, Lambardar and it was Daljit Singh, who accepted the service of summons, thus, submits that no substantial questions of law arise for determination of this Court.

I have heard learned counsel for the parties and appraised the impugned judgments and decrees of the Courts below.

It would be apt to reproduce the provisions of Section 63(c) of the Indian Succession Act, which read thus:-

“The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the

presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

On perusal of the aforementioned provisions, it is evident that testator and witness are required to sign the Will in presence of each other. However, on perusal of the Will, it is manifest that only witnesses had stated that the testator had signed in their presence, but there is no reference that testator had appended his thumb impression in their presence. Thus, there is no compliance of Section 63(c) of the Indian Succession Act. Once essential requirement of law is not complied with, Will, *ex facie*, is to be discarded.

There is another aspect of the matter. On death of Jai Ram, the property was mutated in favour of Gango. The mutation was signed by the Assistant Collector in the presence of plaintiff No.2 - Krishna Devi and mutation has not been challenged. PW2- Document Expert, Dewan K.S. Puri stated, that he did not examine the body writing of the Will, or the ink or inks used in preparation of the Will expressed, inability about their similarity or otherwise of the ink used in the body writing and the writing of witnesses. Thus, an irresistible conclusion drawn is that witness DW1 document expert not categorically stated that Will, Ex.P1 was not genuine one..

I have gone through the Will and find that there is marginal difference in the spacing in the Will, which started from top with a regular spacing, but while reaching at the end of the page, the margin between lines had considerably been reduced.

Assuming for the sake of arguments, Daljit Singh had put in appearance and the Courts below recorded his name incorrectly, but the fact remains that statement is not signed by such witness to arrive at a finding as to whether he was Surjit Singh or Daljit Singh, whereas, all other statements of the witnesses have been signed. Thus, such statement of alleged Surjit Singh could not to have been into consideration, as has, vehemently been urged by Mr. Goyal.

Not only this, Malkiat Ram, in his cross examination, stated that he did not attend any school or class, yet he wrote Will in Punjabi and used difficult/legal Urdu words, thus, what surfaces is that Will was surrounded by suspicious circumstances. The relevant portion of cross examination of PW1 reads thus:-

"I am running a poultry form. I belong to Mistry cast. I am not a regular deed writer. I have not obtained any licence for writing documents. I know only Punjabi and have not read in any class or school. I can read Punjabi but I can read Gurugranth Sahib. I have not written any other Will except the Will in question. Jai Ram was also illiterate, again said if he was illiterate or not."

He feigned ignorance that Jai Ram had any sister, namely, Gango. In my view, the finding rendered by the lower

Appellate Court is not only erroneous but perverse, much less, fallacious. From perusal of record, it reveals that summons were not received by Daljit Singh, but by some one else by making remark that Daljit Singh had gone out of town. The plaintiffs have not led any evidence, except the bald statement of Krishna Devi and her husband, that Malkiat Ram was adopted by Jai Ram but no evidence, with regard to alleged adoption, has been brought on record, much less, proved. Had it been so, the plaintiffs could have, by taking aid of provisions of Section 50 of the Indian Evidence Act, made effort to lead evidence in this regard.

Keeping in view the aforementioned facts and circumstances of the present case, the substantial questions of law, as noticed above, are answered in favour of the appellant-defendants and against respondent/plaintiff No.2. The impugned judgment and decree of the lower Appellate Court is set aside, in essence, the suit is dismissed.

Accordingly, the appeal is allowed.

(AMIT RAWAL)
JUDGE

September 23, 2015
savita