

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

RSA-3571-1987

Date of reserve : 27.11.2014

Date of pronouncement:29.1.2015

Udmi (since deceased) through his legal representative and others

...Appellants

Versus

Birbal (since deceased) through his legal representatives and others

...Respondents

CORAM: HON'BLE MRS.JUSTICE SNEH PRASHAR

Argued by: Mr.Ajay Pal Singh, Advocate and
Mr.Harsh Manocha, Advocate for the appellants

Mr.C.B.Goel, Advocate and
Mr.RS Tacoria, Mr.Nitin Jain, Mr.Sumeet Sheokand,
Advocates for the respondents.

SNEH PRASHAR, J.

Assailing the judgment and decree dated 26.9.1987
passed by learned Additional District Judge, Narnaul vide which the
judgment and decree dated 24.1.1985 of learned Sub Judge 1st Class,
Narnaul, was reversed and the suit filed by Birbal and others,
respondents-plaintiffs was decreed, Udmi and others, defendants-
appellants preferred the instant appeal.

2. The facts garnered from the record are as under:-

Smt. Chandori @ Chando widow of Sanwal Ram son of Jai Karan, resident of village Sareli was owner in possession of the land measuring 194 Kanals 6 Marlas (details of which, as per the jamabandi for the year 1972-73, were given in para no.1 of the plaint) situated in Village Sareli, Tehsil Narnaul (hereinafter referred to as 'the suit land'). She executed a Will on 8.4.1978, registered on 17.5.1978 bequeathing the suit land in favour of Birbal and others, plaintiffs-respondents (hereinafter referred to as the plaintiffs). Smt. Chandori died on 11.4.1978. Plaintiffs Birbal and others claimed that they had become owners in possession of the suit land on the basis of the Will left by Smt. Chandori.

Praying for a permanent prohibitory injunction the plaintiffs sought to restrain Udmi and others defendants-appellants (hereinafter referred to as the defendants) from interfering in their possession over the suit land. They also added that in case Udmi and others succeed in taking possession during the pendency of the suit, their suit be treated as 'a suit for possession'.

3. The suit was contested by the defendants-appellants no.1, 2 and 4 to 9. Defendant No.3 Tara Chand being father of plaintiffs Birbal and others admitted their claim in entirety.

In the joint written statement filed by the contesting defendants, it was admitted that Smt. Chandori was owner in

possession of the suit land, but they denied that she executed any Will in favour of plaintiffs Birbal and others. According to them, Smt. Chandori was an old lady, aged 70 years and was suffering from various diseases, like Asthma and Cancer, because of which, she was mentally upset and was thus, not in sound and disposing state of mind. They alleged that in case plaintiffs Birbal and others or their father had prepared a Will in collusion with the witnesses or had brought Smt. Chandori to Narnaul or to some other place on the pretext of treatment or on some other ground and obtained her thumb impressions on some papers, such document was not binding on their rights.

Impugning the alleged Will dated 8.4.1978, the contesting defendants pleaded that Smt. Chandori died just after three days of the execution of the alleged Will due to illness; no respectable person of Village Sareli or anyone out of the defendants was joined as a witness to the Will; and the Will was got registered after her death. The said circumstances clearly indicate that the Will was based on collusion and misrepresentation. Submitting that no notice was given to them at the time of registration of the Will and they being in possession of the suit land as owners after the death of Smt. Chandori the plaintiffs had no locus standi to file the present suit and the suit for prohibitory injunction was not maintainable, the

defendants prayed for dismissal of the suit.

4. Plaintiffs Birbal and others filed replication denying the averment of defendants Udmi and others that Smt. Chandori was not in a sound mental state at the time of execution of the Will and reasserted their claim as put-forth in the plaint.

5. On the pleadings of the parties, the learned trial Court settled the following issues:-

- 1. Whether plaintiffs are the owners of the land in dispute by way of Will?OPP*
- 2. Whether they are in possession thereon?OPP*
- 3. If No.2 is proved, whether they are entitled for possession?OPP.*
- 4. Whether plaintiffs have no locus standi to file the suit?OPD.*
- 5. Whether suit is not maintainable in the present form?OPD.*
- 6. If No.1 is proved, whether the Will is based upon fraud, mis-representation etc., as alleged in written statement?OPD.*
- 7. Relief.”*

6. Both the parties led evidence to substantiate their respective contentions.

7. Considering the evidence available and submissions made on behalf of the parties, the learned trial Court/ Sub Judge 1st Class, Narnaul held under issue No.1 that plaintiffs Birbal and

others were not proved to be owners of the suit land by virtue of the impugned Will. Also finding that the plaintiffs were not in possession of the suit land, both issues No. 1 and 2 were decided against them. For the same reasons the plaintiffs were held not entitled to the relief of injunction and issue No.3 was also resolved against them. Issues No. 4 and 5 were returned against defendants for not having been pressed during the course of arguments and issue no.6 was said to have become redundant. Consequent to the decision on the issues, the suit of the plaintiffs was dismissed by the learned trial Court/ Sub Judge 1st Class, Narnaul, vide judgment and decree dated 24.1.1985.

8. Plaintiffs Birbal and others preferred an appeal and vide impugned judgment and decree dated 26.9.1987, the learned Additional District Judge, Narnaul set aside the judgment and decree dated 24.1.1985 passed by the learned trial Court/ Sub Judge 1st Class, Narnaul and decreed the suit of the plaintiffs. The plaintiffs were awarded relief of possession in respect of the suit land as prayed for.

9. Feeling aggrieved Udmi and others (contesting defendants-appellants) preferred this regular second appeal.

10. Mr.Ajay Pal Singh, learned counsel representing the defendants-appellants and Mr.C.B.Goel, learned counsel for the

plaintiffs-respondents have been heard at length and the record has been perused.

11. The foremost contentious issue raised by learned counsel for the defendants was regarding maintainability of the suit in the present form. It shall be apposite to notice that by way of the suit for prohibitory injunction filed by plaintiffs Birbal and others, they in between the lines intended to claim a declaration of their title over the suit land based on the impugned Will dated 8.4.1978 Ex.P1, allegedly executed in their favour by deceased Smt.Chandori. They prayed for a permanent injunctive order restraining defendants Udmi and others from interfering in their possession on the suit land claiming to be owners in possession of the same. But at the same time, in the relief clause, they added that in case the defendants are able to take possession of the suit land during the pendency of the suit, the suit may be treated as 'a suit for possession'.

12. The contesting defendants Udmi and others not only denied the execution of the impugned Will by deceased Smt.Chandori, but also specifically denied possession of the plaintiffs on the suit land. According to them, they were in possession of the suit land as owners after the death of Smt. Chandori.

13. Importantly, as indicated above, the learned trial court as

well as learned first appellate court concurrently held that the plaintiffs are not in possession of the suit land. In fact, no evidence, oral or documentary, was led by the plaintiffs to establish that prior to and on the date of institution of the suit, they were in possession of the suit land or that during the pendency of the suit, the defendants had forcibly taken possession of the suit land from them. It has remained unexplainable why the plaintiffs filed a simpliciter suit for prohibitory injunction when they were not in possession of the suit land. Merely by adding a line in the prayer clause that in case during the pendency of the suit, the possession is taken over from them by the defendants, the suit be treated as 'a suit for possession', was not enough to hold that the suit was maintainable in the form it was filed.

14. It was in the knowledge of the plaintiffs that they were not in possession of the suit land, yet they filed a simpliciter suit for prohibitory injunction. The mutation of inheritance of Smt. Chandori was sanctioned in favour of the defendants by the Assistant Collector, 1st Grade, Narnaul vide order dated 19.7.1978, copy of which is exhibited as Ex.P2. As a result thereof, the entries in the khasra girdawari i.e. Ex.D10 were also changed in favour of the defendants. The previous entries of possession were in the name of Smt. Chandori showing her in self occupation. PW1 Birbal in his deposition admitted that during her life time Smt. Chandori was in

self occupation of her entire property. The change of entry of possession in the khasra girdawari in favour of the defendants proves that they came in possession of the suit land after Smt. Chandori died. Hence, when the plaintiffs were proved to be not in possession of the suit land, their suit for prohibitory injunction was not maintainable.

15. In **Anathula Sudhakar vs. P.Buchi Reddy (Dead) by LRs and others 2008(4) SCC 594** the Hon'ble Supreme Court summarising the position with regard to the suit for prohibitory injunction relating to immovable property had laid down as under:-

“11. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

11.1) Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful

possession is not entitled to an injunction against the rightful owner.

11.2) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

11.3) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.”

16 As already held above, the plaintiffs had failed to prove that they were in possession of the suit land prior to the filing of the

present suit or on the date it was instituted. They had claimed possession in the event the defendants succeeded in taking possession from them during the pendency of the suit. When they were not in possession on the day the suit was filed, the question of taking possession by the defendants during the pendency of the suit did not arise and therefore, the prayer made by them was of no avail for them. They being not in possession and their title being under cloud/ in dispute, their simpliciter suit for prohibitory injunction was not maintainable.

17. The matter does not end here. As pointed out above, the plaintiffs claimed to be owners in possession of the suit land on the basis of the impugned Will Ex.P1, allegedly executed by Smt. Chandori. They were not in possession of the suit land, which means that they intended to establish their right, based on the Will, over the suit land by way of the present suit. It is a settled proposition of law that a suit for injunction cannot be converted into a suit for probate of the Will. Where a Will is set up and is required to be proved in accordance with the provisions of law, a petition for probate of the Will is required to be filed and not a suit for prohibitory injunction.

18. The authoritative pronouncement of the Hon'ble Supreme Court in **T.Venkata Narayana vs. Venkata Subbamma**

1996 AIR (SC) 1807, was as under:-

“The mere suit for injunction cannot be converted into a suit for probate of a Will whereat the Will is to be proved. If the Will is to be proved according to law, it has to be by way of a probate in the court having competency and jurisdiction according to the procedure provided under the Indian Succession Act, 1925. That procedure cannot be converted in a suit for mere injunction as a probate suit and direct the parties to adduce evidence, be it primary or secondary evidence as the circumstances may warrant.”

19. In the set of facts in hand, where the plaintiffs claimed to have acquired title over the suit land by virtue of the Will Ex.P1, it was incumbent upon them to have filed a petition for probate of the Will and not a simpliciter suit for prohibitory injunction. On this ground also, the suit is held to be not maintainable.

20. Coming to the merits of the case, plaintiffs Birbal and others had based their claim on the Will Ex.P1 dated 8.4.1978. To prove the said Will, Birbal (plaintiff No.1) appeared in the witness box as PW1 and deposed that Smt. Chandori was his grand mother and being owner of the suit land, had executed a Will Ex.P1 bequeathing her property in his and his brothers favour namely Banwari (plaintiff No.2), Arjan (plaintiff No.3) and Bhim (plaintiff

No.4). After her death on 11.4.1978, they became owners in possession of the suit land i.e. the property left by her. The Will was executed on 8.4.1978 and was got registered on 17.5.1978, which apparently shows that the Will was got registered after the death of Smt. Chandori.

21. In order to prove the Will Ex.P1, the plaintiffs examined PW3 Munshi Lal, Deed writer -scriber of the Will as well as PW4 Bhagirath and PW5 Hanuman, both the attesting witnesses of the Will. All the three witnesses unequivocally deposed that Smt. Chandori got scribed and thumb marked the Will in their presence. They also stated that they too had thumb marked/ attested the document in her presence. PW1 Birbal stated that he was present at the time of registration of the Will and that on inquiry by the Tehsildar, the witnesses had explained that Smt. Chandori was physically fit at the time of execution of the Will.

22. PW6 Chandgi, an ex-member of Gram Panchayat Sareli stated that during the period 1961 to 1965, Smt. Chandori was also a member Panchayat. He produced the Resolution book of the Panchayat and proved the resolution dated 25.5.1963, signed by him, Sarpanch Man Singh and thumb marked by Smt. Chandori. PW7, Ghisa Ram, Office Kanungo brought with him consolidation proceedings register and proved Ex.PW7/1, certified copy of the

resolution dated 13.11.1963, bearing thumb impressions of Smt. Chandori. He added that in his presence an expert had taken photograph of thumb impressions of Smt. Chandori on the Resolution under the orders of the Court. PW9, Vijay Kumar Rustogi, Handwriting and Finger Prints expert, who had examined the disputed and admitted specimen thumb impressions of Smt. Chandori, proved his report Ex.PW9/1, to which the original and photographic enlargements were attached. He had compared the disputed thumb impressions on the Will Ex.P1 with the specimen thumb impressions of Smt. Chandori, available on the Resolution of Gram Panchayat Sareli and he gave his opinion that the disputed and specimen thumb impressions were of one and the same person.

The defendants led no evidence to rebut the testimony of PW9 Vijay Kumar Rustogi, Handwriting and Finger Prints expert. In their pleadings also they only half heartedly disputed the thumb impressions of Smt. Chandori on the impugned Will Ex.P1. In the light of evidence of the plaintiffs it stands established that the Will Ex.P1 bears the thumb impressions of deceased Smt. Chandori, but the issue that requires determination is whether the Will was duly executed and was a valid Will.

23. To substantiate their plea that Smt. Chandori was an old lady, aged 70 years and was suffering from various diseases like

Asthma and Cancer and was not in sound and disposing state of mind when the Will was alleged to have been executed, the defendants examined DW1 Dr. Som Nath Majithia, Block Medical Officer, PHC Nangal Chaudhary, who produced the relevant outdoor patient register and deposed that OPD Slip No.5644 having entered in the Register on 30.3.1978 was in the name of Smt. Chando wife of Sanwal, aged 60 years and as mentioned on the slip, the patient was suffering from Asthmatic Bronchitis. Copy of the relevant entry was tendered in evidence by him as Ex.D1. DW2 Udmi Ram (defendant No.1) reiterating on oath the pleas raised in the written statement deposed that his aunt Smt. Chandori died at the age of 70-71 years due to illness. She was unwell for the last 2-3 years and was in a serious condition for about 1½ -2 months prior to her death. She was not in a position to move or speak or to think what was good or bad for her. She was suffering from Cancer and Asthma and was treated at Kotputli and Nangal Chaudhary. According to him, Parbhati and Giarshi, nieces of Smt. Chandori and the defendants, impleaded in the suit, used to serve her.

DW3 Gobind Ram Lambardar, DW5 Ganga Sahai, Lambardar, DW7 Siri Ram and DW8 Daya Nand, all residents of village Sareli, unequivocally deposed that Smt. Chandori was an old woman aged about 70 years and being seriously ill since long

was not in a sound and disposing state of mind when she died.

DW9 Dr. Devender Sain Kinra stating that he had remained posted as Incharge -cum- Medical Jurist, B.D.M. Hospital Kotputli from the year August 1977 to September 1979, testified that Smt. Chandori wife of Sanwal Ram was admitted in Surgical Ward under his charge on 16.12.1977. He produced the indoor patients register and stated that Smt Chandori was suffering from breast cancer and was mentally strained. She was operated upon and the cancer cyst was removed. Ex.DW9/A copy of the relevant entry of the indoor patients register was proved by him. He also proved the certified copy of certificate Ex.DW9/B, the original of which was attached with the summoned file of mutation No.502 of Village Sareli, by admitting his signatures and by stating that the said certificate was issued by him on 20.6.1978. It was explained by him that long term Cancer adversely affects the mental capacity of a patient and the patient is not able to co-relate the facts and his decisive power also becomes weak.

24. Learned counsel for the appellants-defendants argued with vehemence that even if it is held to be proved from the evidence adduced by the plaintiffs that the Will Ex.P1 bears thumb impressions of deceased Smt. Chandori, yet it was incumbent upon the plaintiffs to establish that the Will was thumb marked by the

Testator when she was in a sound and disposing state of mind and had put her thumb impressions out of her free will. Whenever there are certain suspicious circumstances surrounding the Will, the onus is on the propounder to explain those circumstances to the satisfaction of the conscious of the Court and unless the said onus is discharged, the Will cannot be accepted as a genuine document.

To fortify his arguments, learned counsel relied on **Karnail Singh and another vs. Sukhpal Kaur 2004(2) RCR (Civil) 836** and **Balbir Singh vs. Kashmir Singh and others 2004 (3) RCR (Civil) 45.**

25. Elaborating his arguments, learned counsel contended that admittedly the Will was alleged to have been executed on 8.4.1978 and Smt. Chandori died on 11.4.1978 i.e. just after three days of execution of the Will. In the Will, there was a recital that Smt. Chandori was healthy, whereas it is proved from the statement of DW1 Dr. Som Nath Majithia and DW9 Dr.Devender Sain Kinra that she was suffering from 'Asthmatic Bronchitis' as well as 'breast cancer' and for removal of the cancer cyst, she had undergone operation in December, 1977 i.e. less than four months prior to her death. None of the attesting witnesses of the Will were proved to be acquainted to deceased Smt. Chandori as one namely PW5 Hanuman hailed from Village Pavera and not from village Sareli of

Smt. Chandori and the other PW4 Bhagirath was not aware of the

physical condition and health of Smt. Chandori. The statements of PW4 Bhagirath and PW5 Hanuman were inconsistent on several material aspects. There had been intentional concealment of true facts by the plaintiffs relating to the health of Smt. Chandori.

Learned counsel asserted that all the said circumstances surrounding the Will Ex.P1 as well as the testator herself constituted suspicious circumstances which could not be explained / dispelled by the plaintiffs.

26. It was also pointed out by learned counsel for the defendants that Tara Chand (defendant no.3), father of the plaintiffs, had four brothers namely Udmi, Rup Chand, Hanuman and Giarsha, who all were impleaded as defendants No. 1, 2, 4 and 5. All five were sons of Bhuru. Said Bhuru and Sanwal were real brothers. Smt. Chandori was wife of Sanwal Ram. In that manner defendants No. 1 to 5 being sons of the brother-in-law (brother of the husband) of Smt. Chandori had exactly similar relation with her. Defendant Nos. 6 to 8 Smt. Keshari, Darkali and Sarti were daughters of Bhuru and defendant No.9 Tulsi was wife of Bhuru. Their relationship with Smt. Chandori was also at par.

The plaintiffs were sons of only one brother-in-law namely Tara Chand. There is nothing to indicate that as compared to other defendants the plaintiffs or their father had any special

affiliation with Smt. Chandori. No substantive and reliable evidence could be led by the plaintiffs to prove that Smt. Chandori was living with them or they had been serving her during her life time/ illness days. In fact, it was not even in the pleadings of the plaintiffs that they had ever served Smt. Chandori and it was out of love and affection that she executed the Will Ex.P1 in their favour. When the defendants were identically related to Smt. Chandori, there was no occasion for her to execute a Will in favour of sons of one of the brother of her husband and deprive the other brothers, sisters and their children of the suit land, especially when she was getting the suit land cultivated through all the brothers of her husband. Depriving the other legal heirs of the property without any cogent reason was another strong suspicious circumstance, which could not be explained by the plaintiffs and for that reason also the Will deserved to be rejected. To support his argument learned counsel relied upon **Karnail Singh's case (supra); Dyal Singh and another vs. Meeko and another 2009(2) RCR (Civil) 489; Amar Singh vs. Lajya Devi and others 2009(3) RCR (Civil) 761; Kartar Singh and another vs. Dilber Singh (dead) through legal representatives 2009(3) RCR (Civil) 253 and Baltej Singh vs. Hamir Kaur 2001(3) RCR (Civil) 134.**

27. Refuting the arguments of the learned counsel for the

defendants, learned counsel for the plaintiffs at the first instance argued that for proving the execution of Will, Section 63(c) of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872, require examination of only one attesting witness of the Will. In the instant case, the plaintiffs examined both the attesting witnesses namely PW4 Bhagirath and PW5 Hanuman. In addition to them, the plaintiffs also examined, PW3 Munshi Lal, Scriber of the Will and all the said witnesses consistently deposed that the Will Ex.P1 was scribed at the instance of Smt. Chandori. Its contents were read over and explained to her and admitting the same to be correct, she had appended her thumb impressions on the same in the presence of the witnesses. They further stated that the witnesses attested the document in her presence and entry regarding execution of the Will appeared at Serial No.31 in the Register of the Scriber PW3 Munshi Lal. PW9 Vijay Kumar Rustogi, Handwriting and Finger Print Expert, examined the disputed thumb impressions of Smt. Chandori on the Will Ex.P1 with her admitted specimen thumb impressions and vide his report Ex.PW9/1, he opined that all the disputed and specimen thumb impressions were affixed by one and the same person. The said evidence collectively established beyond doubt that Smt. Chandori without any undue influence or pressure from any quarter had executed the Will Ex.P1 during her life time bequeathing her property in favour of the plaintiffs.

28. Learned counsel pointed out that the learned trial Court in para 12 of his judgment, had rejected the assertion of the defendants that Smt. Chandori was not in sound and disposing state of mind on the day when the Will was executed. In other words, Smt. Chandori was held to be in senses and mentally capable for executing the Will. Yet in his own wisdom, learned trial Court held that the Will was surrounded by suspicious circumstances and for that reason, the plaintiffs could not be held to be owners of the suit land by virtue of the Will. Learned first appellate court after going through carefully all the evidence, oral and documentary available on record, arrived at the conclusion that the view taken by the learned trial Court was erroneous. The depositions of PW4 Bhagirath, PW5 Hanuman, Scriber PW3 Munshi Lal corroborated the testimony of PW1 plaintiff Birbal that Smt. Chandori had made the testamentary deposition in favour of the plaintiffs of her own free will and she was in sound and disposing state of mind at the time of execution of the Will. Once due execution of the Will was proved, the court was not required to go into the deep question relating to the reason for execution of the Will.

29. Learned counsel contended that the learned trial Court as well as learned first appellate court recorded a concurrent finding relating to the fact that testator Smt. Chandori was in sound and disposing state of mind at the time of execution of the Will and that

being a finding of fact, it could be interfered in second appeal only if a substantial question of law arose for consideration. In fact, all facts relating to the mental capacity of Smt. Chandori at the time of execution of the Will Ex.P1 were evaluated by the learned first appellate court. It was held by the Hon'ble Supreme Court in **Gurdev Kaur and others vs. Kaki and others 2006(1) PLJ 1** that the High Court has no jurisdiction to interfere in the finding of facts arrived at by the first appellate court. Even if the findings of facts by the court below were erroneous, still a second appeal was not maintainable upon the question as to the soundness of the findings of facts by the second court. Reliance was also placed on **Commissioner, Hindu Religious & Charitable Endowments vs. P.Shanmugama and others (2005)9 SCC 232** and **Union of India and another vs. Narendra Singh (2008) 2 SCC 741**.

30. It was further argued by learned counsel for the respondents that the mere fact that the plaintiffs were not permanently residing in Village Sareli where the deceased was residing was no ground to suspect the love and affection of Smt. Chandori towards them. It had come in the statement of DW7 Siri Ram, examined by the defendants, that wife of plaintiff Birbal was residing in the village. The services rendered by her and the love and affection of Smt. Chandori had for the plaintiffs could be a good ground for her to bequeath her estate in favour of the plaintiffs and

the other reversions could have no reason for grievance against her action.

In **Savithri and others vs. Karthyayani Amma and others 2007(4) RCR (Civil) 749**, it was found that the Will excluded the natural heirs from the ancestral property of the testator. The Hon'ble Supreme Court held that deprivation of a due share to the natural heirs itself is not a factor which would lead to the conclusion that there exists suspicious circumstances.

31. Learned counsel urged that Smt. Chandori had been a Member of village Panchayat as well as of the advisory committee constituted at the time of consolidation. She was, therefore, wise enough to take a decision regarding inheritance of her property and execute an appropriate disposition. Minor discrepancies in the statements of the witnesses had no bearing on the crucial issue of the execution of the Will when it stood established that the Will bears her thumb impressions and the attesting witnesses deposed that the execution of the Will was her voluntary act.

32. Having considered the arguments of learned counsel for the respondents-plaintiffs, I find no merit in the same. No doubt, the High Court while exercising its jurisdiction under Section 100 of Code of Civil Procedure, exercises a limited jurisdiction, but it is a settled proposition of law as laid down in **Rur Singh (dead) through LRs and others vs. Bachan Kaur (2009) 11 SCC 1** that

the High Court may interfere with a finding of fact arrived at by the learned trial court and /or the first appellate court in the event, a substantial question of law arises for its consideration. In **Easwari vs. Parvathi and others 2014 (3) RCR (Civil) 955**, the Hon'ble Apex Court had laid down that High Court cannot be precluded from reversing the order and judgment of the Lower Appellate Court if there is perversity in the decision due to mis-appreciation of evidence. Further held that there is no absolute ban on the High Court in second appeal to interfere with the facts.

33. In the instant case, the question, which requires determination from the very inception was a mixed question of law and fact. The issue required not just proof of 'execution of a valid Will' but also 'due execution of a valid Will'. Needless to say that the onus to prove a Will is on the propounder. The law requires him to prove not merely that the Will was signed/ thumb marked by the testator, but also that the testator was in a sound and disposing state of mind and understood the nature and effect of the disposition. It is only then that the onus from the propounder can be held to be discharged.

34. Reverting to the instant case, it is important to note that the Will was executed on 8.4.1978; testator Smt. Chandori died on 11.4.1978 i.e. just after three days of execution and the Will was got registered on 17.5.1978 i.e. after her death. The dates are not

only conspicuous for the short span in which the Will was executed, testator died and the Will was registered after her death, but also from the angle showing the condition of mind of the testator in the light of her state of health proved by DW1 Dr. Som Nath Majithia, Medical Block Officer of PHC Nangal Chaudhary and DW9 Dr. Devender Sain Kinra, who had remained posted as Incharge -cum- Medical Jurist, B.D.M. Hospital Kotputli from August 1977 to September 1979.

DW9 Dr. Devender Sain Kinra producing the relevant indoor patients register proved Ex.DW9/A, copy of the entry in the said register, according to which Smt. Chandori wife of Sanwal Ram was admitted in Surgical Ward under his charge on 16.12.1977. She was suffering from 'breast cancer and was mentally strained'. She was operated upon and the cancer cyst was removed before she was discharged. No doubt, he stated that Smt. Chandori was in senses at the time of discharge, but at the same time, he proved certificate Ex.DW9/B, issued by him on 20.6.1978 and explained that long term cancer adversely effects mental capacity of a patient. His decisive power becomes weak and he is not able to co-relate the facts.

35. It was in December 1977 that Smt. Chandori had undergone a '**cancer cyst removal operation**'. DW1 Dr. Som Nath Majithia appeared with outdoor patients register of PHC Nangal

Chaudhary and deposed that OPD Slip No.5644 related to Smt. Chando wife of Sanwal, aged 60 years. As per the entry, the disease from which she was suffering was '**asthmatic bronchitis**'. He proved the copy of the entry dated 30.3.1978 in the said register as Ex.D1. The entry Ex.D1 shows that having been operated upon for cancer cyst was not the end of ailment of Smt. Chandori, she was a chronic '**asthmatic bronchitis**' patient, for which she was taking treatment. On 30.3.1978, because of illness she had visited PHC Nangal Chaudhary. Just eight days thereafter i.e. on 8.4.1978, the Will Ex.P1 was purported to have been executed. In other words just three months after having been operated upon for cancer cyst, the Will was alleged to have been executed. The fact that she died on 11.4.1978 i.e. after just three days of the execution of the Will proves the aggravated decline in her health. Instead of recovering after operation of cancer cyst, it is apparent that within three months of operation and due to asthmatic bronchitis she was lying on death bed when the Will is alleged to have been executed.

36. Surprisingly, not a word was spelt out by the plaintiffs regarding the status of health or soundness of mind of Smt.Chandori in their plaint. Nothing such was stated by PW1 Birbal in his deposition when he appeared in the witness box. It was only during his cross-examination that facts relating to ailment of Smt. Chandori were extracted from him. He admitted that Smt. Chandori

was taken to BDM Hospital Kotputli because she was suffering from cancer disease. He also admitted that she was suffering from Asthma.

PW4 Bhagirath in his cross-examination admitted that Smt. Chandori died at the age of 74-75 years. The matter was not limited to the extent that Smt. Chandori was an old lady, rather in addition to the old age, she was diagnosed to be a patient of Cancer and in about 3½ months of having been operated for the cancer cyst, she died. Concealment of the said facts by the plaintiffs was a circumstance rendering execution of the Will into a shadow of strong suspicion.

37. Undisputably as observed above, the onus is on the propounder to prove that the testator was in a sound and disposing state of mind and was not suffering from any mental disease/weakness at the time of execution of the Will. What to say of producing evidence, the plaintiffs did not even plead so in their plaint. Rather, there was apparent concealment of relevant facts on their part.

38. Indeed, Smt. Chandori was not suffering from any mental disease and was suffering from Asthma and Cancer, which are not related to her mental state but certainly as explained by DW9 Dr. Devender Sain Kinra, long term cancer is such a dreaded disease that adversely effects the mental capacity of a patient. His mental

state becomes so weak that his power to take decision also becomes weak and he is unable to co-relate the facts. In the given facts, Smt. Chandori was almost on death bed because of the ailments as she died just after three days. In such state of health, it is certainly doubtful that Smt. Chandori was in a sound and disposing state of mind three days prior to her death i.e. the day on which, the Will was allegedly executed.

39. That is not the end of the matter. The attesting witnesses examined by the plaintiffs may have deposed in their favour in an attempt to prove the execution of the Will, but it is for the Court to look into the surrounding circumstances as well as the probabilities so as to form a correct idea of the trustworthiness of the witnesses.

A scrutiny of the testimony of attesting witnesses, shows that they do not deserve to be given credence. PW5 Hanuman belonged to village Pavera and not village Sareli of which Smt. Chandori was a resident. He admitted that he was not related to Smt. Chandori, but stated that his field was situated near her field. No document was produced to affirm his version. There is also nothing to indicate that he was on visiting terms with Smt. Chandori. He claimed to be a neighbour of Smt. Chandori in fields, but was not aware about her illness. So much so, he denied that Smt. Chandori was suffering from Cancer. According to him, he had gone to the house of Smt. Chandori to see her about 5-7 days prior to the

execution of the Will and at that time Smt. Chandori had asked him to accompany her on Saturday for execution of a Will. His statement was apparently false. Had he visited the house of Smt. Chandori on the day as stated by him, he would have known about her illness and the disease i.e. Cancer from which she was suffering and had undergone an operation.

PW5 Hanuman was not aware that Smt. Chandori had remained admitted in the hospital at Kotputli for fifteen days. As is proved from Ex.D1 i.e. the entry in the OPD Register Nangal Chaudhary Hospital, Smt. Chandori had visited the said hospital on 30.3.1978 i.e. eight days prior to the execution of the Will on 8.4.1978, which means when PW5 Hanuman alleged to have visited the house of Smt. Chandori she was so unwell that she had to be taken to the hospital. The statement of DW8 Daya Nand reveals that PW5 Hanuman was a relative of plaintiffs Birbal and Banwari. The factum of relationship between the plaintiffs and PW5 Hanuman was corroborated by DW7 Siri Ram also. The above facts indicate that PW5 was a procured witnesses.

40 Similar was the position regarding PW4 Bhagirath. He was a resident of the village of Smt. Chandori, but he was hardly aware of the facts relating to her. He expressed complete ignorance regarding her illness. He had no knowledge about her

hospitalization at hospitals in Kotputli or Nangal Chaudhary. He outrightly denied that Smt. Chandori was suffering from Cancer. His lack of information about the physical condition of Smt. Chandori would only show that he had no connection with her and had not ever seen her during her last days.

41. Needless to say that a person who voluntarily desires to execute a Will would naturally take his /her acquaintance or relative with him/ her with whom he /she can confide for attestation of a Will. When PW4 Bhagirath as well as PW5 Hanuman knew nothing about Smt. Chandori, it only shows that neither they were her acquaintance nor they were present with her when the Will was executed/ thumb marked by her. Their statements also create strong doubt about the fact that Smt. Chandori was in sound and disposing state of mind at the time of execution of the Will and that she had appended her thumb impressions on the same voluntarily and after knowing its contents.

42. In addition to the above infirmities it is noteworthy that PW4 Bhagirath and PW5 Hanuman, the attesting witnesses, had failed to give a consistent version with regard to the place, where the Will was executed. PW5 Hanuman in his cross-examination stated that he met Smt. Chandori at Nizampur Bus Stand on the relevant day. They both accompanied by PW4 Bhagirath, went to Narnaul by

bus and on reaching the court premises, they found that the courts were closed because it was a holiday. Thereafter, they went to the house of petition writer in a Tonga. It was on the suggestion of Tongawala that Smt. Chandori purchased a paper required for preparation of a Will from a shop in front of the Court building. Contrary to his deposition PW4 Bhagirath in his examination-in-chief stated the Will was executed at the house of Smt. Chandori, but in his cross-examination, he stated that the writing was prepared in the house of Munshi Ram, petition writer. His fluctuating statement was not only contrary to the statement of PW5 Hanuman, but also proved that he did not even know about the place where the Will was actually executed and thumb marked by the testator.

43. Further PW5 Hanuman stated that they went to the Court premises from bus stand on foot and from there, they went to the house of petition writer. The distance between bus stand and the court building was of 2-3 furlongs. Admittedly, Smt. Chandori was aged 70 years plus and was suffering from various diseases like Cancer and Asthma and had undergone operation for removal of cancer cyst about 3½ months back. Yet, surprisingly neither she nor the witnesses opted to hire some rickshaw / Tonga for reaching the court building and covered the distance of 2-3 furlongs on foot. That explicitly proves that the attesting witnesses PW4 Bhagirath and

PW5 Hanuman had not ever seen Smt. Chandori on the day the impugned Will Ex.P1 was alleged to have been executed. These inconsistencies leave no scope to believe that Smt. Chandori had visited either the court premises or the house of the scribe on the day of execution of the Will.

44. It has already been held above that the relationship of Smt. Chandori with the plaintiffs being sons of Tara Chand (defendant No.3) and defendants Udmi, Rup Chand, Hanuman and Giarsha (defendants No. 1, 2, 4 and 5) was at par. The other defendants namely Smt. Keshari, Darkali, Sarti (defendants No. 6, 7 and 8) being daughters and Tulsi (defendant No.9) being wife of Bhuru, were also in the same relationship.

The husband of Smt. Chandori had died and she had no issue of her own. Certainly she could have executed a Will relating to the moveable and immovable properties owned by her in favour of a person, who had served her sincerely during her bad times. However, the plaintiffs did not plead that they had ever served her or that the Will was executed in their favour by Smt. Chandori out of love and affection. Rather PW1 Birbal in his cross-examination admitted very clearly that his father Tara Chand had never served Smt. Chandori. He deposed that his father was working at Allahabad for the last about 25 years and that all his minor brothers use to

reside with his father. He gave his age as 25 years, but when his other brothers were residing with their father, it is obvious that he too during his childhood was residing with his father. He further deposed that he passed his BA examination from Nimkathana and MA examination from Sikkar, which means that he too was not residing in village Sareli, where Smt. Chandori was living. In the said set of facts, indeed, there was no reason for Smt. Chandori to execute a Will qua her immovable property exclusively in favour of the plaintiffs, who had never served her.

45. On the other hand admittedly the defendants were residing in village Sareli, in which Smt. Chandori was living. DW2 Udmi (defendant No.1) stated that Parbhati and Giarshi nieces of Smt. Chandori and the defendants used to serve her. DW3 Gobind Ram, DW5 Ganga Sahai, both Namberdars of village Sareli, DW7 Siri Ram and DW8 Daya Nand also residents of village Sareli supported the case of the defendants. They testified that Smt. Chandori was more than 70 years old and being seriously ill prior to her death was not in disposing state of mind. No person of the village could be examined by the plaintiffs to rebut their version.

46. Importantly, in the Will there is a recital that Smt. Chandori was healthy. When it was an admitted fact that Smt. Chandori was suffering from the diseases like Cancer and Asthma, it

appears strange how she described herself to be healthy in the Will. Rather, had she been in a sound and disposing mind she could have mentioned the factum of her ill health as a reason for executing the Will. DW9 Dr. Devender Sain Kinra with his expert opinion deposed that long term cancer adversely effects the mental capacity of a patient. The patient is unable to co-relate the facts and his decisive power becomes weak. In the case of Smt. Chandori, she was suffering from cancer and had undergone an operation for removal of cancer cyst. She was also a chronic patient of asthma. After a period of 3½ months of the operation she died. In view of her illness her mental and physical capacity during her last days can be very well assessed and the conclusion manifest is that she was not in a sound and disposing mind at the time the impugned Will is alleged to have been executed.

47. It is settled proposition of law that the onus is heavy upon the propounder to show that the testator at the time of execution of the Will was in sound, disposing and free mind and the Will was executed without any extraneous influence. All suspicious circumstances surrounding the Will have to be dispelled to the satisfaction of the Court failing which, the Will has to be discarded.

In the case in hand, there is not one, but numerous suspicious circumstances emerging from the evidence, which could

not be explained and dispelled by the plaintiffs. The evidence of the plaintiffs is riddled with contradictions, unexplained inaccuracies that are cumulatively sufficient to hold that the plaintiffs had failed to prove due execution of the Will.

48. Resultantly, it is held that the plaintiffs were not proved to be owners of the suit land by virtue of the Will. Their suit for prohibitory injunction was not maintainable in present form. Accordingly, the present appeal is allowed and the judgment and decree passed by the learned First Appellate Court are set aside and the suit of the plaintiffs shall stand dismissed.

29.1.2015
gsv

(SNEH PRASHAR)
JUDGE

Note: Whether to be referred to the Reporter? Yes/No