

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

Regular Second Appeal No.664 of 1987

Date of Order: 18th December, 2015

**Ram Sarup (since deceased) through his
LRs and others**

..Appellants

Versus

**Brij Lal (since deceased) through his
LRs and others**

..Respondents

CORAM: HON'BLE MR. JUSTICE RAJIVE BHALLA

**Present: Mr. V.K.Jain, Sr. Advocate with
Mr. Ravi Kadian, Advocate,
for the appellants.**

**Mr. Amit Jain, Advocate,
for the respondents**

RAJIVE BHALLA, J.

The appellants, challenge judgments and decrees, dated 12.01.1982 and 13.10.1986, passed by the Sub Judge Ist Class, Rewari and the Additional District Judge, Narnaul, dismissing their suit as well as the appeal, respectively.

Before recording the arguments and conclusions thereon, it would be appropriate to set out, in brief the facts leading to the filing of the present appeal.

Admittedly, one Jalim, was owner of the land, in dispute Jalim was survived by Meda, Gopal and Lalman, his three sons.

Lalman had three sons, namely, Ramsarup, Yadram, Harphool (the

appellants/plaintiffs) and two daughters Rajo and Pyari. His son Meda had two sons Bhola and Ram Mangal and two daughters Chandro and Hukam Kaur. Bhola had three sons Brij Lal, Sube Singh and Abhey Singh.

Chhaju son of Gopal son of Lalman, passed away in November, 1978, unmarried, without any children, leaving behind land measuring 108 kanals and 3 marlas, situated in village Kahnawas, Tehsil Rewari. The plaintiffs/appellants asserted their right to succeed to the estate of Chhaju, along with the proforma respondents but the contesting respondents propounded a registered Will, dated 23.05.1969, Ex.DW1/1, executed by Chhaju, bequeathing his entire property to them.

The appellants filed a suit for declaration and for a permanent injunction by pleading that as parties are Ahirs and agriculturists, their custom prohibits the transfer of ancestral property by sale, mortgage, gift or will. The appellants also pleaded that the land, admittedly, being ancestral, the appellants and the contesting respondents have inherited the land. The plaintiffs/appellants also challenged the validity of will, dated 23.05.1969, by pleading that Chhaju was an old man, who was not in sound disposing mind and the will was not executed of his free will. The appellants also pleaded that after the death of Chhaju, they are in possession of his share and, therefore, prayed for a declaration of their ownership and for a permanent injunction to restrain the contesting respondents from interfering in their possession.

The contesting respondents put in appearance and filed

their written statement, pleading that Chhaju was empowered by law to execute the will, denied that the land is ancestral, or that Chhaju was governed by custom in the matter of alienation, pleaded that will dated 23.05.1969, was executed and registered by Chajju, in accordance with law.

The plaintiffs/appellants filed a replication, controverting averments in the written statement and reiterating averments in the plaint. After perusal of the pleadings, the trial court framed the following issues:-

- “1 *Whether the plaintiff and defendant Nos. 4 and 5 are heirs of Chhaju Ram deceased as alleged?OPP*
2. *Whether the land in dispute is ancestral in the hands of Chhaju Ram qua the plaintiff?OPP*
3. *Whether Chhaju Ram deceased and parties are governed by agricultural custom. If so, what that custom is?OPP*
4. *Whether Chhaju Ram executed a valid will dated 23.5.1969 in favour of defendant nos.1 to 3?OPD*
5. *If issue No.4 is proved, whether the will is void and ineffective against the rights of the parties?OPP*
6. *Whether the plaintiffs are estopped by their own act and conduct from filing the present suit?OPD*
7. *Whether the plaint does not dispose any case of action?OPD*
8. *Whether the suit is not properly valued for the purposes of court fee and jurisdiction?OPD*

9. *Whether the other near heirs of Chhaju Ram are alive. If so, its of act?OPD.*

10. *Relief.”*

The trial court, thereafter, directed parties to lead evidence and after considering the pleadings and the evidence, held that as parties are Ahir, agriculturists, who are governed by custom a “sonless proprietor” can execute a will regarding his ancestral property in favour of a near relative.

As regards the will, the trial court held that execution of the will has been proved by the depositions, of two attesting witnesses, the scribe and the registration of the will. As regards the alleged suspicious circumstances, they were rejected by the trial court by holding that the suspicious circumstances pointed out by the appellants have been duly dispelled. The will executed by Chhaju was upheld and the suit was dismissed.

Aggrieved by the aforesaid judgment and decree, the appellants filed an appeal. The Additional District Judge, Narnaul, affirmed the judgment and decree passed by the trial court and dismissed the appeal, on 13.10.1986.

Counsel for the appellant submits that he does not challenge findings recorded by the courts below on the question of custom or the right of Chhaju to execute a will, but confines his arguments to the failure of the respondents to prove that the will was executed in accordance with the procedure prescribed by Section 63 of the Succession Act, 1925 (hereinafter referred to as 'the 1925 Act') or proved in accordance with Section 68 of the Evidence Act and

failure of the private respondents to dispell the numerous suspicious circumstances surrounding the execution of the will.

Counsel for the appellant submits, while amplifying his arguments, that a will has to be executed in accordance with the procedure prescribed by Section 63 of the 1925 Act, namely, to be executed by the testator in the presence of two attesting witnesses, who shall then attest the will by affixing their signatures or thumb impression, in the presence of the testator. A perusal of the will reveals that the thumb impression said to have been appended by DW1 Ram Singh, as an attesting witness, is smudged. A careful examination of the thumb impression reveals that it has been affixed by putting ink on the thumb, whereas the other thumb impressions have been appended by using a stamp pad. The expert has also opined that the thumb impression is not decipherable as its ridges are not visible, thereby clearly proving that the respondents have failed to prove that the will was attested by Ram Singh. The fact that Ram Singh stepped into the witness box as DW1 and owned the thumb impression, which is not decipherable, does not prove that the will was executed in the manner prescribed by Section 62 of the Act or proved in accordance with Section 68 of the Evidence Act.

Counsel for the appellants further submits that the thumb impression allegedly affixed by DW1 Ram Singh is clearly smudged, thereby proving that the alleged will is tampered and has to be ruled out of consideration.

Counsel for the appellant further submits that Ram Singh DW1, is Lambardar of another village and had merely come to

identify the testator. Ram Singh, therefore, cannot be said to be an attesting witness. The fact that he may have appended his thumb impression before the Sub-Registrar, at the time of registration of the will, is irrelevant, as registration does not legitimise the will. The will having not been attested in accordance with the procedure prescribed by Section 63 of the 1925 Act, and proved in accordance with Section 68 of the Act, must be rejected.

Counsel for the appellant further submits that a perusal of the original will reveals that it was scribed by a regular scribe but strangely enough has been scribed on a plain paper. The left hand corner of the first page of the will bears the LTI of Chhaju. A faint LTI also appears in the margin of the first page of the will. When considered along with the fact that the thumb impression attributed to Ram Singh is smudged, these facts prove that the will was executed on a paper which already bore the thumb impression of the testator. It is further submitted that the courts below have discarded these suspicious circumstance by referring to attestation before the sub-registrar, by treating the scribe as a witness and by holding that as the will was executed, long before Chajju Ram passed away, all facts are irrelevant for proving a will.

Counsel for the appellant further urges that a scribe cannot be considered as an attesting witness and registration of a will cannot prove the execution of the will, but the courts below have referred to the scribe and registration of the Will as sufficient to infer due execution of the will. Counsel for the appellant also submits that witnesses produced by the respondents have admitted the active

participation of Brij Lal and his father Bhola Ram, thereby rendering the execution of the will illegal for prevailing upon the free will of the testator.

Counsel for the appellant has framed the following substantial questions of law:-

- “i). Whether the Will is rendered void, if material alteration is proved to have been made relating to thumb impression of an attesting witness?*
- ii) Whether the presence of an attesting witness at the time of execution of Will is proved, even though his thumb mark or his signature is not proved on the record?*
- lii) Whether the Sub-Registrar can be treated as an attesting witness of the Will?*
- iv) Whether the findings recorded by the courts below are vitiated in the present case on account of non-consideration of material oral and documentary evidence?*
- v) Whether a son-less proprietor governed by custom, is competent to execute the Will regarding ancestral property?*
- vi) Whether active participation of beneficiary of Will constitutes suspicious circumstance and if so, to what effect?”*

Counsel for the appellants relies upon the following judgments in support of his arguments:- **Loonkaran Sethia etc. v.**

Mr. Ivan E. John and others etc., 1977 AIR (SC) 336, Chamela Ram v. Balwant Singh, 1999(2) RCR(Civil) 301 Dharam Singh v. Aso and another, AIR 1990 Supreme Court, 1888, and Mohinder Singh v. Nagina, 1993(3) PLR 153.

Counsel for the respondents submits that both courts have recorded concurrent findings of fact, affirming the will. The findings do not suffer from any error of jurisdiction or of law or any misreading of material evidence. The will does not suffer from any material alteration or tampering as alleged. DW1 Ram Singh has stepped into the witness box and acknowledged his thumb impression. The fact that the thumb impression appears to be smudged does not raise an inference of material alteration or tampering or that the will was not attested by this witness. The findings by the courts below that registration of the will, proves the execution of the will are observations recorded in the context of the plea that thumb impression affixed by DW1 Ram Singh is smudged. Counsel for the appellants is unable to refer to any fact that would prove the active participation of beneficiaries in the execution of the will or their prevailing upon the free will of the testator. The mere fact that witnesses have admitted the presence of a beneficiary, does not raise an inference of active participation particularly when there is no evidence to prove that they prevailed upon the free will of the testator. The appellants have not referred to any material evidence oral or documentary that has not been considered or referred to by the courts below. Counsel for the respondents further submits that the questions of law framed by counsel for the appellants are neither

substantial nor do they call for an answer in favour of the appellants.

I have heard counsel for the parties, perused the impugned judgments and decrees, appraised the entire pleadings and the evidence produced before the courts below as well as the substantial questions of law framed by counsel for the appellants.

Counsel for the appellants, as already recorded, has made a statement giving up challenge to the will on the ground that as the testator is governed by custom, he could not execute the will.

The questions of law framed by counsel for the appellants, other than question No.(v), which as recorded in the preceding paragraph has been given up by counsel for the appellants, briefly put are (question no.1) material alteration in the will rendering it void, based upon the fact that thumb impression affixed by DW1 Ram Singh is smudged, question No.(ii) whether the smudged thumb impression can be used to infer the presence of this attesting witness even though the thumb impression has not been proved, question no.(iii), whether the Sub-Registrar can be treated as an attesting witness, question no.(iv) whether presence of Brij Lal, a beneficiary and his father Bhola Ram raises an inference of active participation in the execution of the will and constitutes a suspicious circumstance, question no.(vii) a general question whether findings recorded by courts below are vitiated for failure to consider material or documentary evidence?

The questions arising from the thumb impression affixed by DW1 Ram Singh, i.e., questions no.(i) and (ii), shall be answered

first.

The will, Ex.DW1/1, was scribed by DW3 Chatur Bhuj, a trained scribe, who has deposed that the will was scribed, at the instructions of the testator. DW3 has also deposed that the Will was thumb marked by Chhaju (the testator), in the presence of attesting witnesses DW1 Ram Singh and DW2 Kishan Lal and he recorded an entry in his register relating, to execution of the Will, Ex.DW3/1. The scribe has also deposed that Chhaju was in sound disposing mind at the time of scribing of the will. The statement by the scribe has essentially gone unchallenged. The first attesting witness is Ram Singh son of Dharam Singh, who stepped into the witness box and deposed as DW1 that he accompanied Chhaju to Rewari Tehsil for execution of the will. The will was scribed by the deed writer in the Tehsil complex in favour of Abhey Singh, Brij Lal and Sube Singh. The will was, thereafter, read over to Chhaju, deceased, who thumb marked the will after understanding its contents. DW1 has also deposed that he and the other attesting witness Krishan Lal thumb marked the will in the presence of Chhaju, deceased and at the time of execution of the will, Chhaju was in sound disposing mind. DW1 has also deposed that the attesting witnesses and Chhaju also appeared before the Sub-Registrar who read over the will to Chhaju, whereafter Chhaju and the attesting witnesses thumb marked the will, which was then registered by the Sub-Registrar, by making an endorsement.

The second attesting witness is DW2 Krishan Lal, who has deposed in consonance with the deposition by DW1. Chhaju's thumb impression, was compared with his admitted thumb

impression by examining an expert, who submitted a report, Ex.DW5/12 and opined that the thumb impression appearing on the will tallies with the admitted thumb impression of Chhaju. At this stage, it would be appropriate to point out that appellants examined another hand writing expert, who opined that the thumb impression attributed to Chhaju does not tally with his admitted thumb impression. Apart from this evidence, parties have produced oral evidence in support of their respective pleadings.

The appellants' primary contentions are that as the thumb impression allegedly appended by DW1 Ram Singh, an alleged witness of the will, Ex.DW1/1, is smudged, the document must be ruled out of consideration for failure to prove that the will was attested by a second attesting witness, as required by Section 62 of the Act. Counsel for the appellants also alleges that the smudged mark is a material alternation of the document and, therefore, has to be discarded.

The first question, as framed, is general in nature, namely, a document that is materially altered, is void. As a general proposition, the first question must be answered in favour of the appellants. A document that is proved to have been materially altered cannot be received in evidence. The judgments cited by counsel for the appellants, namely, **Loonkaran Sethia etc. v. Mr. Ivan E.John and others etc., 1977 AIR (SC) 336, Chamela Ram v. Balwant Singh, 1999(2) RCR(Civil) 301**, support his argument. The first question must, therefore, as a general proposition of law be answered in favour of the appellant but the question that remains and

arise from a part of the question no.(i) and question no.(ii) is whether there is any material alteration in the will and whether the disputed thumb impression has not been proved?

Both the trial court as well as the first appellate court have upon appraisal of the disputed thumb impression, the depositions by, DW1 Ram Singh and DW2 Kishan Lal, (the other attesting witnesses) , the scribe and registration of the document, rejected this argument by recording concurrent findings of fact. The courts below apart from relying upon the fact that DW1 Ram Singh stepped into the witness box, and admitted that he had affixed the disputed thumb impression, have also relied upon the fact that the name of DW1 Ram Singh appears beneath the thumb impression, the will is devoid of any cutting or over writing, the attendance of DW1 is recorded by and he affixed a thumb impression, before the Sub-Registrar on the same day, while holding that there is no material alteration in the will and attestation by Ram Singh, is proved. The courts below have also relied upon the fact that while endorsing the will, the Sub-Registrar has recorded that Ram Singh Nambardar (DW1), is present and that he is personally known to him.

A perusal of the will, however, reveals that the thumb impression attributed to Ram Singh is blurred but this alone, does not warrant the recording of an opinion contrary to the opinion recorded by the courts below on the basis of arguments advanced by counsel for the appellants or the record. The courts below have after appraising the thumb impression and other relevant evidence on record accepted the attestation by DW1 Ram Singh.

The findings so recorded are clear, cogent and plausible. The deposition by DW1 admitting that he had affixed the disputed thumb impression, in the presence of the testator, after the testator affixed his thumb impression and in the presence of the second attesting witness, read with the fact that his presence is recorded by the Sub-Registrar, on the same date goes a long way in proving, his presence, his attestation of the will and that he affixed the disputed thumb impression. The judgments cited by counsel for the appellants pertain to cases where there were admitted cuttings and over writings, a situation that does not obtain in the present case.

The fact that the will was executed on an ordinary paper or that the thumb impression on the first page is in the upper right hand corner or that a faint thumb impression appears in the left margin, are facts that have been duly considered and rejected by the courts below and do not persuade me to hold that the will is a manipulated document.

Another fact that persuades me to hold against the appellants is that the will was executed in 1969, whereas Chhaju passed away in an accident, in 1978. The time gap between the execution of the will and the passing away of Chhaju lends credence to the legality of the will executed nine years before his death. The registration of the will adds further credibility to the will.

The first question of law is, therefore, answered in favour of the appellant as a general proposition that if a document is materially altered, it has to be ruled out of consideration but the second question is answered against the appellants by holding that

as the thumb impression has been proved there is no question of the attesting witness's presence not being proved. The first and the second questions are, thus, answered accordingly.

The third question, whether the Sub-Registrar can be treated as an attesting witness of a will must be answered in favour of the appellants. A Sub-Registrar exercises power, under the Registration Act, to register a document after it has been executed and, therefore, cannot be treated as an attesting witness. All that registration of a document proves is that a document was registered under the Registration Act. The third question is, therefore, answered in favour of the appellants.

The next question (vi) relates to the active participation of the beneficiary or his father, in my considered opinion, must be answered against the appellants. A perusal of the evidence on record reveals that one of the witnesses admitted the presence of the beneficiary and his father, but in the absence of any evidence to prove their active participation in the execution of the will or any evidence that they prevailed upon the free will of Chhaju, their mere presence does not cast any doubt on the legality of will. A perusal of the record reveals that Chhaju was perfectly healthy and was not suffering from any debilitating disease or illness so as to enable the respondents to prevail upon his free will. The will in fact contains a recital that the beneficiaries are looking after Chhaju. Thus, in the absence of any evidence of active participation or prevailing upon the free will of the testator, the mere presence of the beneficiaries cannot by itself be a circumstance, as to interfere with findings of fact

recorded by the courts below.

The sixth question, namely, whether findings recorded by the courts below are vitiated on account of non-consideration of material oral and documentary evidence, must also be answered against the appellants. A perusal of the findings recorded by the courts below, affirming the legality of a will, reveal that they do not suffer from any error in consideration of material evidence whether oral or documentary.

Consequently, as the substantial questions of law framed by counsel for the appellants, have been duly considered and answered and the impugned judgments and decrees do not suffer from any error of law or of jurisdiction or of misreading of material oral or documentary evidence, the appeal is dismissed, with no order as to costs.

18th December, 2015
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(RAJIVE BHALLA)
JUDGE