

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

RSA No.1350 of 2002.
Decided on:-May 19th, 2015.

Zora Singh.

.....Appellant.

Versus

Smt. Mango and others

.....Respondents.

CORAM: *HON'BLE MR. JUSTICE DR. BHARAT BHUSHAN PARSOON.*

Present:- Mr. Vinod Khunger, Advocate
 for the appellant.

 Mr. R.S. Bains, Advocate
 For the respondents.

Dr. Bharat Bhushan Parsoon, J.

This Regular Second Appeal is directed against judgment and decree dated 15.1.2002 of the court of Additional District Judge, Ferozepur, whereby reversing the judgment and decree dated 28.9.2000 passed by Civil Judge (Senior Division), Ferozepur declaring the plaintiff as owner of the suit land on cancellation of mutation sanctioned on the basis of Will dated 12.4.1991 of his predecessor-in-interest Natha Singh, suit of the plaintiff was dismissed in toto.

2. Natha Singh father of plaintiff Zora Singh as also of defendants Smts. Mango, Bachno, Jeeto and Meeto and husband of defendant Smt. Bant Kaur, was owner in possession of suit land measuring 36 Kanal 16 Marlas detailed and described in the plaint. He had willed away, inter alia, the said land on 12.4.1991 in favour of the plaintiff alone. Natha Singh died on 24.4.1992. The Will was posthumously registered on 1.6.1995. The defendants viz. widow and

daughters allegedly appeared before the Joint Registrar, Guruharsahai. Later on, the defendants got the mutation of inheritance of Natha Singh sanctioned in favour of all the legal heirs on 28.2.1997 whereby the Will of the deceased in favour of the plaintiff was ignored. Request of the plaintiff to admit his claim of ownership as per Will dated 12.4.1991 did not find favour with the defendants.

3. On notice having been issued, the defendants appeared and contested the suit tooth and nail. Claiming the Will of 12.4.1991 to be false and fabricated document, it was also denied that any notice of registration of the Will had been sent to anyone. Rather, it was proclaimed that the Will was registered at the back of the plaintiff. Any statement made by sisters in favour of the plaintiff at the time of registration of the Will, was denied. Furnishing of evidence by them concealing claim of the plaintiff was also denied. Denying the ownership of all the legal heirs of the deceased, to be co-owners in equal share, the plaintiff had asserted testamentary succession in his favour declaring him complete and absolute owner of the property. Claiming the suit to be false and frivolous, dismissal of the same was sought.

4. Separate written statement was furnished by defendant No.5, Smt. Bant Kaur, mother of the parties. She, however, had admitted the claim of the plaintiff.

5. No replication was preferred on behalf of the plaintiff. To adjudicate the rival claims of the parties, the lower court had framed the following issues:

1. Whether deceased Natha Singh executed valid Will dated 12.4.1991 in favour of the plaintiff? OPP
2. Whether the plaintiff is the owner in possession of the suit land? OPP
3. Whether the plaintiff is entitled to the relief of permanent injunction prayed for? OPP
4. Relief.

6. After receiving oral as well as documentary evidence from both the parties and providing a hearing to their respective counsel, the lower court decided all the issues in favour of the plaintiff and had decreed his suit declaring him to be owner in possession of the suit land. The defendants were also restrained from causing interference in any manner with his peaceful possession over the suit land and from further alienating the suit land in any manner whatsoever to any person other than the plaintiff.

7. Contesting defendants challenged the judgment and decree. Smt. Bant Kaur defendant No.5 was arrayed as respondent No.2.

8. In appeal, reversing the findings of the lower court on all the issues, the first appellate court vide judgment and decree dated 15.1.2002 dismissed the suit of the plaintiff.

9. Now, it is the judgment and decree dated 15.1.2002 which is under challenge. Claiming that the lower appellate court had wrongly held that the Will was not proved and further averring that approach of the lower court was wrong and misfounded where neither the facts nor the evidence was properly appreciated, reversal of the impugned judgment and decree was sought.

10. In this Regular Second Appeal, substantial questions of law needing determination by this Court are as under:

1. Whether the Will in dispute which was duly registered could have been discarded/disbelieved on the grounds mentioned by the learned lower appellate court?
2. Whether in the face of admission of execution of the Will by the defendants, the plaintiff/appellant could be asked to lead any other evidence to prove the same?
3. Whether the learned lower appellate court erred in law in joining the statements Ex.P2 made by Smts. Mango, Bachno and Bant Kaur before the Sub-Registrar?

11. Hearing has been provided to the counsel for the parties while going through the paper book.

12. Before rival claims of the parties are adjudicated in terms of substantial questions of law, it would be appropriate to take stock of the facts about which there is no dispute.

13. Natha Singh husband of defendant No.5 Smt. Bant Kaur and father of the appellant-plaintiff as also of defendants No.1 to 4, respondents herein, before his death on 24.4.1992 had allegedly executed a Will on 12.4.1991 which has been propounded by the plaintiff, claiming that he alone is entitled to testamentary succession of his deceased father.

14. Though widow Smt. Bant Kaur had conceded claim of the appellant-plaintiff but his sisters had contested the claim averring that neither any Will was executed by Natha Singh nor the same was valid or legal and hence, could not have been acted upon. Since the mutation of estate of Natha Singh had been sanctioned in favour of all the first class legal heirs, denouncing the Will, validity and legality of the mutation has been asserted by the contesting respondents.

15. Without going into the aspect as to whether the deceased, in fact, had executed the Will (Ex.P1) or not, taking cognizance of the physical existence of the Will, its validity is being tested on the legal pedestal. As per Section 63 of the Indian Succession Act, 1925, a Will is required to be attested by two attesting witnesses. It cannot be used as evidence unless and until in terms of Section 68 of the Indian Evidence Act, 1872 (for short, the Evidence Act) at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.

16. Will is on a plain paper. It is scribed by one of the two sons of appellant-plaintiff Zora Singh. Name of scribe is Salwinder Singh. The Will has been attested by three attesting witnesses i.e. Palwinder Singh

son of the appellant-plaintiff, Dial Singh Lamberdar and Virsa Singh. Neither the scribe of the Will nor attesting witness thereof except Virsa Singh, who had entered the witness box as PW3, have come to depose about the Will. Thus, Virsa Singh (PW3) is an important witness. However, he categorically deposed that Will (Ex.P1) had not been executed in his presence. In short, Virsa Singh does not sub-scribe to the execution of the Will. Having faced absence of scribe as also other attesting witnesses playing truant to the witness box and sole attesting witness Virsa Singh, who entered the witness box as PW3, having gone hostile to the cause of the plaintiff and having not supported his case, the plaintiff has taken recourse to supplemental method to prove execution of the Will by Natha Singh, his father.

17. After execution of the Will, the same was produced before the Sub-Registrar for its registration when the testator was no more. Zora Singh appearing as PW1 claimed that at the time of registration of the Will, Smt. Jeeto, one of the contesting defendants, had appeared before the Sub-Registrar and had vouched for correctness of the Will. Said defendant, Smt. Jeeto entered the witness box as DW1 but had denied the execution of the Will by her father Natha Singh. There is absolutely no explanation coming forth from the side of the appellant-plaintiff as to why purported statement of all the sisters including of Smt. Jeeto (Ex.P2) was not put to her in her cross-examination to confront her in terms of Section 145 of the Indian Evidence Act, 1872. Smt. Jeeto (DW1) has rather clarified that wife of appellant-plaintiff Zora Singh used to quarrel with Natha Singh deceased and he was not even residing with his son Zora Singh and it is in evidence that she even did not attend the cremation of testator Natha Singh. It is thus claimed that there was no question of execution of Will in favour of the plaintiff. Her version has been unabatingly corroborated by Bagicha Singh (DW2) who has deposed that Natha Singh used to consult him on important matters and had never executed any Will in favour of Zora Singh.

18. When questioned, counsel for the appellant has not been able to give any reply as to why neither of the sons of the appellant-plaintiff had entered the witness box in support of his claim. Scribe Salwinder Singh who is none else but son of the appellant-plaintiff was a very important witness and his non-examination by the plaintiff is to be construed adverse to him.

19. There are number of other suspicious circumstances about which no explanation emerges from the plaintiff. These are as under:

- (i) Will (Ex.P1) is on a plain paper;
- (ii) It is not scribed by a professional deed-writer but is in the hands of Salwinder Singh son of plaintiff Zora Singh notwithstanding the fact that distance between the village of the testator and Gurharsahai where office of Sub-Registrar is located and professional deed-writers are available, is hardly 2-3 Kms.;
- (iii) This Will was unregistered;
- (iv) After the death of testator Natha Singh on 24.4.1992, the appellant-plaintiff had taken the Will for registration only on 1.6.1995;
- (v) The testator was 90 years of age. Though he had explained the factum of reason for disinheritance of his daughters, there is absolutely no reason for disinheritance of his wife Smt. Bant Kaur;
- (vi) There is absolutely no reason for the plaintiff not to have examined attesting witnesses Palwinder Singh and Dial Singh Lamberdar; and,
- (vii) Between different lines, spacing is also uneven in body of the Will and writing of the Will does not appear to be genuine.

20. Much reliance has been placed on affidavits dated 29.11.1994 purported to be of Smt. Bachno and Smt. Mango (Mark B and Mark-C) but these have not been legally proved so as to be legally read in evidence. These affidavits, thus, cannot be read as documents of relinquishment of share of the makers of these affidavits in favour of the appellant-plaintiff. Though lower court had verdicted validity and legality of the Will (Ex.P1) in favour of the appellant-plaintiff on 28.9.2000 but

the first appellate court by a well-reasoned judgment had rightly reversed the said findings being against facts as also being against law.

21. The plaintiff being propounder of the Will was required to prove not only execution of the Will but also was to explain away the suspicious circumstances to add to genuineness of the Will. Reliance was placed by the lower court on certified copies of statements Ex.P2 of Smt. Mango, Smt. Bacchno, Smt. Jeeto and Smt. Meeto, Ex.P3 of Salwinder Singh, Ex.P4 of Virsa Singh and Ex.P5 of Dial Singh and Ex.P6 of Palwinder Singh. These statements without examination of the witnesses in the witness box before the court, could not have been acted upon by the lower court as makers of these statements had not been subjected to cross-examination by opposite counsel. At best, these statements could be used as previous statements of their makers for confronting them individually when they were to appear in the witness box.

22. It is also worth notice that these statements are purported to have been recorded by Joint Sub-Registrar Phool Singh at the time of posthumous registration of the Will on 12.4.1991. These statements were never put to Joint Sub-Registrar Harphool Singh when he entered the witness box as PW5. These statements thus have no evidentiary value. These statements having not been recorded by any court of law and having also not been legally proved are not of any legal significance. Though Will (Ex.P1) has been put in evidence of Joint Sub-Registrar Harphool Singh (PW5) but he having merely registered the Will is neither scribe nor an attesting witness nor is otherwise a witness of the Will.

23. When questioned, counsel for the appellant-plaintiff has not been able to give any satisfactory reply as to why the alleged Will was not taken for registration till death of Natha Singh and only after his death was taken for registration. It is also noteworthy that Will (Ex.P1) was never produced before the revenue officials for getting the mutation sanctioned on the basis of the said Will.

24. Counsel for the appellant-plaintiff has cited ***Lila Dhar Versus Smt. Badho and another 1993 PLJ 801 (P&H)*** wherein it was held that in a situation of attestation by Sub-Registrar, contents of endorsement are admissible in evidence and shall have to be taken as true. In the cited authority, the Will was registered and testator of the Will had put his thumb impression in the presence of Sub-Registrar who had also signed the same. Sub-Registrar was taken to an attesting witness and thus contents of the endorsement were held to be admissible in evidence.

25. However, facts of the case in hand are entirely different. In the present case, Will (Ex.P1) is of 12.4.1991. Testator had died on 24.4.1992. The Will was taken by the plaintiff for registration on 1.6.1995. There is no explanation emerging from the plaintiff as to why it was not produced by him before the authorities for entering of mutation exclusively in his name. There is absolutely no reason why the suspicious circumstances have not been tried to be explained. As such, the cited authority with due deference does not advance the cause of the appellant-plaintiff.

26. In view of the totality of facts and circumstances as mentioned earlier, neither valid execution of the Will nor its legality and genuineness is established. Mere registration of the Will after death of the testator, does not add to the veracity or genuineness of the proof of due execution of the Will. The first appellate court in a very lucid and transparent manner has rightly reversed findings of the lower court on issues No.1 to 3 clearly holding that the plaintiff had not been able to prove execution as also genuineness of the Will (Ex.P1) and had also failed to clear suspicious circumstances thereof.

27. It is, thus, established that the appellant-plaintiff has failed to prove due execution of the Will dated 12.4.1991 (Ex.P1) and has further failed to clear the doubts and surrounding circumstances creating suspicion in validity and genuineness of the Will. Hence, all the aforementioned three substantial questions of law are answered against the appellant-plaintiff.

28. Sequelly, no ground to interfere with the findings recorded by the first appellate court, is made out. As such, affirming the impugned judgment and decree dated 15.1.2002 of the first appellate court, this Regular Second Appeal, being devoid of any merit, is dismissed with costs. Decree sheet be prepared.

May 19th, 2015
'Yag Dutt'

(Dr. Bharat Bhushan Parsoon)
Judge

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. Whether to be referred to the Reporters or not? Yes
3. Whether the judgment should be reported in the Digest? Yes