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

**RSA No.2379 of 1989 (O&M)
Date of Decision: 11.03.2015**

Basta Singh

.....Appellant

Vs

Joginder Kaur and others

.....Respondents

CORAM:HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. G.S. Bhatia, Advocate
for the appellant.

Mr. Amit Jain, Advocate
for respondents.

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

RAJ MOHAN SINGH, J.

[1]. Defendant No.1 is in second appeal against the concurrent judgments and decrees passed by the Courts below.

[2]. Plaintiff-Joginder Kaur filed suit for possession in respect of 17 *Kanal* 19 *Marlas* of land as fully detailed in headnote of the plaint. She also put forward her claim to one house situated in the village as aslo described in the headnote of the plaint.

[3]. The plaintiff alleged that one Nand Singh s/o Mukand Singh was the original owner of the land. He had three sons and two daughters. Nand Singh was married to Attar Kaur. One of the son

Harmej Singh was owner in possession of 17 *Kanal* 19 *Marlas* of land and he died intestate, unmarried and issueless on 19.04.1976. The mother Attar Kaur being the first class heir of Harmej Singh, inherited the property in accordance with Section 8(a) of Hindu Succession Act 1956. The said inheritance was duly given effect in the revenue record as mutation No.1267-D dated 11.01.1977 was sanctioned in the name of Attar Kaur and the aforesaid fact was duly reflected in the revenue record.

[4]. Basta Singh and Jaswant Singh other sons of Nand Singh (defendants No.1 and 2) filed a civil suit with regard to the property in question. Declaration was sought that Basta Singh, Jaswant Singh-defendants No.1 & 2 were owners in possession of the land of Harmej Singh by virtue of unregistered Will dated 01.10.1975, alleged to have been executed by Harmej Singh. Suit was filed against the mother Attar Kaur. During pendency of the suit, Attar Kaur died on 06.06.1978. Attar Kaur had executed a Will dated 01.06.1977 in favour of Jaswant Kaur and Joginder Kaur (daughters) which was later on registered on 20.06.1977. Joginder Kaur-plaintiff was impleaded as a party in place of Attar Kaur in the suit filed by Basta Singh and Jaswant Singh (defendants No.1 and 2). The said suit was decreed vide judgment and decree dated 29.02.1980. The Will set up by Basta Singh and Jaswant Singh was accepted and the Will set up by Joginder Kaur dated 25.11.1975 was rejected.

[15]. Jaswant Kaur and Joginder Kaur filed an appeal and the

same was accepted. Judgment and decree of the trial Court was set aside and the alleged Will in favour of Basta Singh and Jaswant Singh was rejected and the issue regarding Will dated 25.11.1975 in favour of Joginder Kaur was not pressed by the appellant therein. Basta Singh filed **RSA No.1226 of 1981**. This Court while dismissing the appeal, modified the findings of the First Appellate Court to exclude the findings of Will dated 01.06.1977 executed by Attar Kaur in favour of Jaswant Kaur and Joginder Kaur. Operative part of decision dated 21.07.1982 Ex.D-2 passed by this Court in **RSA No.1226 of 1981** is reproduced as under:-

“Smt. Attar Kaur died during the pendency of the suit itself and Joginder Kaur and her other sister Jaswant Kaur were impleaded as legal representatives of Smt. Attar Kaur during the pendency of the said suit.

While the trial Court decreed the suit believing the unregistered Will, the appellate Court had illegible that finding that held that the Will propounded by the deceased was not a genuine will, that Smt. Attar Kaur was entitled to succeed to the property of her issueless son, and that since Smt. Attar Kaur had willed away her property, vide will Exhibit D.3, to her daughters Joginder Kaur and Jaswant Kaur, respondents herein, so Joginder Kaur and Jaswant Kaur were entitled to succeed to the property left behind by their issueless brother, to which their mother was held to have earlier succeeded.

Learned counsel appearing for the appellant has canvassed that the trial Court having not framed any issue

regarding the will Exhibit D.3, the lower appellate Court could not give a finding that the said will, executed by Smt. Attar Kaur in favour of her daughter Joginder Kaur, was a genuine will and that on its basis she was entitled to succeed to the property which Smt. Attar Kaur had inherited from her issueless son.

There appears to be merit in the contention advanced in this regard. Mr. Ujagar Singh appearing for the respondents agrees that the judgment and decree of the lower appellate Court deserves to be modified by excluding therefrom the finding regarding the genuineness of will Exhibit D.3 and the declaration that on the strength of will Exhibit D.3 Smt. Joginder Kaur and Jaswant Kaur were entitled to succeed to the suit property.

In view of the above, the appeal is allowed to the extent indicated and the judgment and decree of the lower appellate Court stand modified accordingly.

July 21, 1982

*Sd/-D.S. Tewatia
Judge”*

[16]. The aforesaid suit was only in respect of inheritance of the estate of deceased Harmej Singh and was not in respect of estate of Attar Kaur. When Attar Kaur died on 06.06.1978, Basta Singh and Jaswant Singh never agitated against the veracity and genuineness of registered Will dated 01.06.1977 executed by Attar Kaur in favour of Jaswant Kaur and Joginder Kaur in any proceedings.

[17]. Joginder Kaur-plaintiff filed suit for possession of land measuring 17 *Kanal* 19 *Marla* along with one house on the basis of

registered Will dated 01.06.1977 executed by Attar Kaur in her favour. The Will in question was sought to be proved by examining PW-1 Sikander Singh (scribe of the Will) and Didar Singh as PW-2 who was one of the attesting witness to the Will in question. The Will was sought to be proved on the touchstone of Section 68 of the Evidence Act and Section 63 of the Succession Act as the same was never disputed by anyone since the date of its execution on 01.06.1977 and, therefore, it was claimed that the Will in question was duly proved.

[18]. Suit was contested by Basta Singh defendant No.1. Other defendants No.2 to 5 were proceeded against *ex parte* on 26.09.1983. He contested the suit primarily on the ground that the suit was barred by principle of *res judicata* in view of judgment dated 21.07.1982 delivered by this Court in **RSA No.1226 of 1981.**

[19]. After completion of pleadings, trial Court framed the following issues:-

- “1. Whether the plaintiff is entitled to the suit property on the basis of will dated 1.6.1977?OPP
2. Whether the suit is barred by the principle of *res judicata*? OPD
3. Whether the plaintiff is entitled in one fourth share of in suit the property? OPD
4. Whether deceased Harmej Singh, was not in owner of house in dispute? OPD

5. *Relief.”*

[20]. Trial Court discussed issues No.1 and 2 jointly and treated the Will dated 01.06.1977 to be duly proved on the strength of statements of PW1- Sikander Singh and PW2-Didar Singh. Plaintiff herself appeared as PW-3. As against this defendant No.1 got his statement recorded as DW-1 and one Mohinder Singh was examined as DW-2. By tendering documentary evidence, the evidence was closed.

[21]. Trial Court decided issues No.1 and 2 holding that plaintiff Joginder Kaur was entitled to succeed the estate left by Attar Kaur to the exclusion of others on the basis of Will dated 01.06.1977. On the basis of findings recorded under issue No.1, issue No.2 was also decided in favour of plaintiff and against the defendants on the ground that finding of the Appellate Court about the genuineness of the Will was expressly deleted by this Court in judgment dated 21.07.1982 in **RSA No.1226 of 1981** (Ex.D-2) and the trial Court held that the earlier litigation between the parties did not operate *res judicata* in the suit in question. Other issues were also accordingly decided and the suit was decreed vide judgment and decree dated 13.12.1984. However, the findings regarding house under issue No.4 were diluted to the extent that the house was not proved to be in exclusive ownership of Harmej Singh for want of evidence to that effect and, therefore, it was stated to be ancestral between the

parties to the extent of share of Harmej Singh as 1/6th and to the extent of share of the plaintiff, it was decided that the plaintiff was entitled to the house to the extent of one half share. Resultantly, suit was decreed in *toto* to the extent of land measuring 17 *Kanal* 19 *Marla* and to the extent of half share in respect of house in question.

[22]. Basta Singh feeling aggrieved, filed first appeal before the Appellate Court. Lower Appellate Court vide judgment and decree dated 01.09.1989 dismissed the appeal and affirmed the judgment and decree dated 13.12.1984 passed by trial Court. This is how defendant No.1-Basta Singh came in second appeal before this Court.

[23]. Learned counsel for the appellant has formulated following substantial questions of law during the course of arguments:-

- “i) Whether the Will dated 20.06.1977 alleged to have been executed by Late Smt. Attar Kaur is not surrounded by suspicious circumstances?*
- ii) Whether respondent no.1/appellant was supposed to prove the will as per the provisions of Section 68 and 69 of the Evidence Act and as per the provision of Section 63 of the Succession Act and as per settled law?*
- iii) Whether without framing an issue with regard to the validity and genuineness of the will, a finding can be given even if counsel of the appellant before the courts below have made a statement*

that he does not dispute the fact that plaintiff has been able to prove the execution of Will dated 01.06.1977 which is Ex.P-1(certified copy). In view of the Hon'ble Supreme Court judgment reported in 2012 Vol-I, Civil Court Cases 350, a copy attached?

- iv) Whether the courts below were supposed to give finding with regard to the validity and genuineness of the will after evaluating the evidence produced by the respondent/plaintiff, failing which the judgments and decree is not sustainable?*
- v) Whether the will Ex.P-1 is surrounded by suspicious circumstances as the natural legal heirs of Late Smt. Attar Kaur has been left out but nothing has been mentioned about them in the will, why they have been ignored?*
- vi) Whether the Will Ex.P-1 is said to be proved even if the attesting witness has not stated that the testator has affixed his signature on the will in the presence of the witnesses and even the witnesses has signed the will in the presence of the testator and in the presence of each other.”*

[24]. Learned counsel for the defendant No.1-appellant made a statement before the lower Court that execution of Will dated 01.06.1977 Ex.D3 need not be proved now. He has strenuously contended that the execution of Will is not proved in consonance with the requirement under Sections 68 of the Evidence Act and 63 of the Succession Act. According to him, the Will should have been

proved by framing probable issues and by giving findings therein.

[25]. Learned counsel further submitted that even if the statement was made by the counsel in respect of Will, the execution has to be proved by giving proper findings in respect of legal requirement. He has cited **M/s Divya Exports v. M/s Shalimar Video Company and others 2012(1) CivCC 350.**

[26]. In order to supplement his arguments learned counsel relied upon the statement of PW-2 Didar Singh to contend that the attesting witness did not state that the testator had affixed his signature on the Will in the presence of witnesses and also the witnesses had signed the Will in the presence of testator and in the presence of each other. He has also cited **Joginder Singh v. Sukhbir Kaur and others 2013(4) RCR (Civil) 435,** on the ground that the Will has to be proved as per requirement of Sections 68 of Evidence Act and 68 of the Succession Act. Also on these very lines, 2009(4) SCC 780 titled as **Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and others** has been cited to argue that the attesting witness should speak about testator's signature and also about signature of each of the witnesses. Lastly it was argued that the Will executed by Attar Kaur in favour of plaintiff did not give reasons of disinheritance of the defendant No.1 being son and, therefore, it should be viewed with suspicion.

[27]. Learned counsel for the respondents has argued that the

Will in question was duly proved by the testimony of Sikandar Singh-PW1 who scribed the Will and one of the attesting witness Didar Singh was examined as PW-2. The Will in question was duly proved in terms of Sections 68 of Evidence Act and 63 of the Succession Act. The plea of *res judicata* is not at all attracted because while modifying the findings of First Appellate Court, this Court excluded the finding on Will dated 01.06.1977 executed by Attar Kaur in favour of Jaswant Kaur and Joginder Kaur. The ground of disinheritance of the appellant in the Will is no ground to presume the Will having surrounded with suspicious circumstances in view of case law on the subject 2012 (2) RCR (Civil) 493 titled as **Mohinder Kumar (dead) by LRs v. Vinod Kumar and others** in which it was held that exclusion of natural heirs by itself does not create any suspicious ground for rejecting the Will. Therefore, on all the material pleas the claim of the appellant was refuted by the respondent/plaintiff and it was prayed that appeal be dismissed.

[28]. It was also argued that Will in question dated 01.06.1977 was never challenged from the date of death of Attar Kaur in 1978 till date. At this juncture, defendant No.1 is not justified in raising any suspicion on the validity of the Will in question particularly when it was never assailed by the him in any proceedings. Learned counsel supplemented his arguments by citing 1981 Punjab (130) Full Bench **Mohinder Kaur and another vs. Piara Singh and others.**

[29]. This Court has considered the arguments raised by the

parties in detail.

[30]. The parties were not at issue so far as Will dated 01.06.1977 was concerned as the learned counsel for the appellant admitted before the Court that execution of Will need not be proved. Even then from the statements of PW-1 Sikander singh and PW-2 Didar Singh execution of Will stood proved to the hilt. In the statement of PW-2 Didar Singh the following fact is relevant to quote:-

*“In my presence about 8/9 years back Attar Kaur has got written one will in favour of her daughter Joginder Kaur. Sikender Singh read over this will after writing. Attar Kaur after hearing and admitted to be correct put her thumb impression. I Teja Singh and Numberdar Shingar Singh were the marginal witnesses.
Attar Kaur after hearing the same at that time and put her thumb impression, we put out witnesses.....
 xxxxxxxx cross-examination
On that day also she said so Attar Kaur dictated the will, I was also sitting there.....The deed writer enter this will in his register.”*

[31]. The statements of aforesaid witnesses in totality left no manner of doubt that the Will in question was duly executed. Even otherwise when the counsel raised no objection with regard to Will and parties knew each others case from the very beginning. Even if no issues were framed, the execution of Will stood proved to the hilt. The findings so recorded were *germane* to the real controversy and

Basta Singh defendant No.1 never assailed the Will in question even after the death of Attar Kaur in the year 1978. Therefore, this plea was not available to the defendant No.1 now to take somersault from the alleged omission.

[32]. The precedents cited by the appellant have their application in the facts and circumstances of those cases and there cannot be any dispute with regard to proposition narrated therein. So far as facts of the present case are concerned though judgment have no application inasmuch as the requirement of law in terms of Sections 68 of the Evidence Act and 63 of the Succession Act have been duly proved in the present case. Statements of PW Nos.1 and 2 are categorical in nature. This evidence coupled with statement of learned counsel for the appellant himself in the context of no objection with regard to Will served as overwhelming situation in proving the due execution of the Will.

[33]. The questions of law as formulated by the appellant need to be answered against him collectively particularly when the Will dated 01.06.1977 (wrongly shown as 20.06.1977 in questions of law framed by the appellant) is not proved to have surrounded with any suspicion as the same duly satisfies the legal requirements in terms of Sections 68 of the Evidence Act and 63 of the Succession Act.

[34]. Since the parties knew the case of each other from the very beginning and the Will dated 01.06.1977 was never assailed by the

appellant. In view of statement of attesting witnesses as PW-1 and PW-2, no other requirement remained to be fulfilled in the context of proving the due execution of the Will dated 01.06.1977. Therefore, the precedents cited by the appellant has no application.

[35]. The Courts below have considered due execution of the Will in favour of the respondents while endorsing the findings in the impugned judgments and decrees and Will in question has not been found to have surrounded with any suspicion and the execution in question has been duly proved by way of scribe and one of the attesting witness fully in consonance with the requirement of law i.e. Sections 68 of the Evidence Act and 63 of the Succession Act. Resultantly, all the questions as formulated by the appellant need to be answered accordingly against him.

[36]. Since the estate of Attar Kaur was not in issue in the earlier litigation and it was the estate of Harmej Singh which was being attacked, therefore, Will in favour of Joginder Kaur and Jaswant Kaur was rightly excluded by this Court. Attar Kaur died in the year 1978 and the factum of Will in question was never assailed by the defendant No.1 in any appropriate proceedings, therefore, there was no such declaration which was required to be obtained by the plaintiff and civil suit for possession was duly maintainable. No *res judicata* was involved as no issue was directly and substantially involved and, therefore, concept of *res judicata* was not at all attracted.

[37]. Resultantly, the appeal is found to be totally devoid of merits and is dismissed as such. Parties to bear their own costs.

March 11, 2015
Atik

(RAJ MOHAN SINGH)
JUDGE