

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

RSA No.1754 of 1995.
Decided on:-February 05, 2015.

Dalip Kaur.Appellant.

Versus

Sukhbir Singh and othersRespondents.

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

Present:- Mr. Harnam Singh Bhullar, Advocate
for the appellant.

Mr. Arvind Setia, Advocate for
Mr. Deepak Agnihotri, Advocate
for the respondents.

Dr. Bharat Bhushan Parsoon, J.

Dispute in this Regular Second Appeal pertains to succession to the estate of Hardev Singh (since deceased). Defendant Smt. Dalip Kaur, appellant herein, is sister of Hardev Singh deceased, whereas plaintiffs Sukhbir Singh, Bhupinder Singh and Raghbir Singh sons of Darshan Singh who are respondents herein, are the sons of the uncle of Hardev Singh. Hardev Singh died on 3.7.1986 at Naushera Pannua. He was a bachelor and was having land in village Nangal Kalan as well as in Naushera Pannua.

2. There are two competing Wills, one dated 1.7.1986 propounded

by the plaintiffs, respondents herein, and the other of dated 12.6.1986 set up by the defendant, appellant herein. On the basis of Will dated 1.7.1986, the plaintiffs had claimed themselves to be owners in possession of the land left by Hardev Singh deceased whereas the defendant, appellant herein, claimed exclusive ownership and possession pursuant to Will dated 12.6.1986 in her favour.

3. To adjudicate the rival claims of the parties, the lower court had framed the following issues:

1. Whether Hardev Singh deceased had executed a valid Will on 1.7.1986 in favour of the plaintiffs? OPP
2. Whether the plaintiffs are entitled to the injunction as prayed for? OPP
3. Whether the plaintiffs have not served notice under Section 79 of the Punjab Coop. Societies Act, if so its effect? OPD
4. Whether suit is not maintainable in the present form?
- 4-A. Whether the plaintiffs have no locus standi and cause of action to file the suit? OPD
- 4-B. Whether the suit in the present form is not maintainable? OPD
5. Relief.

4. An additional issue reading as 4-C was also framed by the lower court later on, which reads as under:

- 4-C. Whether Hardev Singh deceased executed a valid Will dated 12.6.1986 in favour of defendant No.1 Smt. Dalip Kaur? OPD

5. After receipt of oral as well as documentary evidence, the lower court decided issues No.1 and 2 in favour of the plaintiffs and decreed their suit vide judgment and decree dated 23.12.1991. Issues No.3, 4-A and 4-B had not been pressed for arguments, hence, no findings were given on the said issues. Issue No.4-C which had been framed additionally, was not considered by the lower court and no findings were returned thereon.

6. The first appellate court deciding the appeal of Smt. Dalip Kaur took up each and every matter raised by the appellant and vide a detailed judgment and decree dated 19.4.1995 affirming findings of the lower court as also deciding issue No.4-C against the appellant, dismissed her appeal.

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

1. Whether a Will can be treated to have been proved without producing any of the attesting witnesses and on the evidence of the scribe alone?
2. Whether a finding by the lower appellate court can be taken as a substitute for the trial court in absence of any issue and finding returned by the trial court at all?

8. Arguments were advanced by the counsel for the parties referring to their rival claims.

9. Counsel for the appellant has urged that the Will in favour of the appellant-defendant which stood proved as per law, was discarded whereas unproved Will in favour of the plaintiffs was relied upon causing a great prejudice to the appellant-defendant. It is claimed that the scribe cannot be taken to be as an attesting witness and in absence of examination of attesting witnesses, Will dated 1.7.1986 (Ex.P1) in favour of the plaintiffs

remains unproved. It is contended that the Will dated 12.6.1986 (Ex.D1) in favour of the defendant, appellant herein, was to be considered by the courts below which was ignored without any plausible and legally valid reasons. It is further urged that issue No.4-C which was framed by the lower court additionally but did not engage the attention of the said court and sequently remained unanswered causing prejudice to the appellant. It is urged that though the same was answered by the first appellate court but that course is not permissible in law.

10. Counsel for the contesting respondents has urged that Will dated 1.7.1986 (Ex.P1) propounded by the respondents-plaintiffs was fully proved in accordance with law and thus, was to be acted upon. It is claimed that Will dated 12.6.1986 (Ex.D1) set up by the appellant-defendant has concurrently been held by the courts below to be shrouded with suspicious circumstances and is not a valid Will of the deceased and thus, was rightly ignored by the courts below. Prayer for dismissal of this second appeal has been made by the respondents.

11. Before embarking upon the rival claims of the parties qua the substantial questions of law needing determination by this Court, it is worthwhile to take into account the facts about which there is no dispute. Hardev Singh died as a bachelor on 3.7.1986. His father had three brothers, namely, Pritam Singh, Gopal Singh and Darshan Singh. Pritam Singh, father of the deceased as also of the appellant-defendant was hanged to death whereas Gopal Singh, uncle of the deceased was sentenced to life imprisonment. It so happened in a murder case adjudicated against them.

12. Deceased Hardev Singh had his brother, namely, Balwinder Singh and sister Smt. Dalip Kaur. She is the appellant-defendant. On the charge of murder, when father of the deceased admittedly was hanged to

death in 1965 and his uncle Gopal Singh was sent to jail to undergo life imprisonment in 1961, there was none to look after the deceased as also his brother Balwinder Singh and sister Smt. Dalip Kaur. They were brought up by Darshan Singh, third brother of father of the deceased. Smt. Dalip Kaur was also married by Darshan Singh, uncle of the deceased. Not only maternal uncle Kundan Singh of the deceased appearing as PW5 but even his only brother Balwinder Singh appearing as PW8 have fully supported the case of the plaintiffs, respondents herein.

13. If we go by intestate succession of deceased Hardev Singh, Balwinder Singh (PW8), being his real brother was to get $\frac{1}{2}$ share of his estate as his natural heir. Deposition of Balwinder Singh (PW8) clinches the entire matter and leaves no manner of doubt that Hardev Singh deceased and his sister Smt. Dalip Kaur were not only looked after by Darshan Singh, his uncle but he was also sustained and supported in his illness as he was suffering from bronchitis.

14. Land of the deceased is proved to be continuing in possession of the respondents-plaintiffs who are sons of Darshan Singh. In short, there was great emotional investment made by uncle Darshan Singh and his sons in Hardev Singh deceased, who was naturally having attachment with all of them and thus, there was nothing unnatural in Hardev Singh deceased willing away his entire estate to his affectionate cousins i.e. sons of Darshan Singh who are respondents-plaintiffs.

15. Plea of the appellant-defendant that the Will dated 1.7.1986 (Ex.P1) has not been proved in terms of law when scrutinised on the legal pedestal, also fails. No doubt, to prove a Will in addition to other evidence, testimony of an attesting witness is required in terms of Section 68 of the Indian Evidence Act, 1872 (for short, the Act) which provision for ready

reference is appended as below:

“68. Proof of execution of document required by law to be attested. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least 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:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]”

Both the Wills, one propounded by the plaintiffs and the other set up by the defendant are unregistered.

16. In addition to the scribe, there are two attesting witnesses of the Will dated 1.7.1986 (Ex.P1). Concedingly, one of these two attesting witness viz. Lamberdar Piara Singh had died whereas other attesting witness Ajaib Singh was missing and was unheard of. His whereabouts were also unknown. It has sufficiently come in evidence that there were threats from the terrorists which had made Ajaib Singh to flee from the village leaving behind his no whereabouts.

17. Scribe Rajinder Singh appearing as PW1 has given detailed testimony not only of scribing of the Will but also of its execution by the testator Hardev Singh and also of attestation by the attesting witnesses Piara Singh and Ajaib Singh. Normally, testimony of a scribe is not taken to be at par with an attesting witness but in this case, testimony of the scribe is so detailed and descriptive that it is no less valid and legally significant than that of testimony of an attesting witness. It is, thus, such a case where

testimony of scribe Rajinder Singh (PW1) is on equal footings of an attesting witness.

18. So far as testimony of Balwinder Singh (PW4) son of attesting witness Lamberdar Piara Singh (since deceased) is concerned, he has also given complete, descriptive and pointed account stating that his father Piara Singh, attesting witness of Will Ex.P1 had died on 22.11.1989. He has categorically mentioned that he used to see his father signing and writing and thus, could identify his signatures as also writing and had identified his signatures on Will Ex.P1. At this stage, reproduction of Section 69 of the Act is necessary, which is appended as below:

“69. Proof where no attesting witness found. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

19. Evidence of Balwinder Singh (PW4) being in tune with requirements of the provisions of Section 69 of the Act also proves the Will (Ex.P1). In addition to testimony of plaintiff Sukhbir Singh (PW2) and of his father Darshan Singh (PW3), there is unassailed testimony of Balwinder Singh (PW4) son of attesting witness Lamberdar Piara Singh as also of , Kundan Singh, maternal uncle of deceased as PW5 and of Balwinder Singh (PW8), brother of the deceased, which is even against his own interest.

20. So far as Will dated 12.6.1986 (Ex.D1) propounded by defendant Smt. Dalip Kaur is concerned, it suffers from many suspicious circumstances. Issue No.4-C had specifically been framed on pleadings of the defendant on this count. Merely because the trial court has not answered this issue No.4-C, which was additionally framed, does not vitiate the

proceedings either before the lower court or before the first appellate court as it was agreed upon between the parties at the time of framing of additional issue No.4-C that no evidence was required to be led additionally by any of the parties, and thus only findings were to be given on issue No.4-C which the trial court had omitted to give.

21. At this stage, it is appropriate to refer to Rule 24 of Order XLI CPC which fully authorizes the appellate court to fill the void without referring the matter to the lower court. Said Rule 24 of Order XLI CPC for ready reference is reproduced as below:

“24. Where evidence on record sufficient, Appellate Court may determine case finally— Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which Appellate Court proceeds.”

22. The first appellate court has fully discussed the evidence and the attending circumstances in answering issue No.4-C. It is interesting to note that though Smt. Dalip Kaur (DW1) has mentioned that the Will dated 12.6.1986 (Ex.D1) was executed in her favour by Hardev Singh deceased, her brother, as she used to serve him but this plea of her's is not tenable. Sewa Singh (DW2) and Gurdeep Singh (DW3) are the attesting witnesses of this Will dated 12.6.1986 (Ex.D1).

23. A bare look of the Will dated 12.6.1986 (Ex.D1) reveals that the contents therein have been adjusted by manipulation and narrowing down the space by writing closely at the end of the writing of the Will. The circumstances of scribing the Will in this way are clearly revealing that the paper had already been signed blank by its signatory and contents therein

were incorporated later on.

24. Plea of rendering of service to the deceased by defendant Smt. Dalip Kaur (DW1) is as hollow as her stand that she was in possession of the land. She is married in village Nangal Kalan. There is nothing on record or in her evidence that deceased Hardev Singh was living with his sister. Even his death certificate Ex.PX shows that he died in village Naushera Pannua. This fact itself shatters entire case of defendant Smt. Dalip Kaur.

25. There is also no truth in assertion of Smt. Dalip Kaur that she was in possession of the land as she being married in village Nangal Kalan and land being located in village Naushera Pannua and Nangal Kalan, she could not have managed the same except by leaving her matrimonial home. When confronted with such circumstances, Smt. Dalip Kaur twisted the entire story and tried to explain that the deceased used to visit his village in order to collect Ration on the Ration Card every month which is not only unbelievable but is unacceptable as well. Death certificate Ex.PX shows that he died in village Naushera Pannua. There is no evidence worth the name that Smt. Dalip Kaur ever left her matrimonial home to manage the estate of her deceased brother Hardev Singh.

26. When cross-examination of Smt. Dalip Kaur became closer and more scrutinizing, the cat was completely out of the bag. The truth had clearly emerged. Matters had been cleared. Smt. Dalip Kaur conceded that the entire litigation from her side had been propelled and sponsored by Gopal Singh her uncle. This aspect is sustained and supported from the written statement filed on behalf of Smt. Dalip Kaur which is signed by Amrik Singh son of Gopal Singh who had no power of attorney even from Smt. Dalip Kaur. By now, it is thus, evident that Gopal Singh, uncle of the plaintiffs was contesting the proxy litigation through Smt. Dalip Kaur. Plea

of Smt. Dalip Kaur that Hardev Singh was living with her and used to be served by her do not find any place in the recitals of the Will dated 12.6.1986 (Ex.D1).

27. Rather, when comparative analysis of the respective cases of the respondents-plaintiffs and that of the contesting defendant, appellant herein, is made, it becomes quite clear that there was no chance of the deceased to be in the house of the appellant-defendant and there was no occasion for her to serve her brother Hardev Singh. The first appellate court was right in returning findings on issue No.4C against the appellant and in favour of the respondents-plaintiffs.

28. Having been sufficiently cornered, the appellant-defendant hitting hard, the validity and legality of the Will dated 1.7.1986 (Ex.P1) in favour of the respondents-plaintiffs has urged that there was no occasion with the deceased to disinherit his real sister and his real brother Balwinder Singh in his Will in preference to his cousins i.e. the respondents-plaintiffs.

29. Every act is to be taken and is to be appreciated in the milieu in which it takes place. Without complete details being available, no findings on any issue are possible. Smt. Dalip Kaur was happily married in village Nangal Kalan and had hardly left with any connection with the suit land or Hardev Singh deceased who was suffering from bronchitis and being bachelor needed continuous support and strength which was being provided by the plaintiffs and their father who were readily available to the deceased. The defendant-appellant was well-settled in her life. Sequel, her disinheritance by the deceased should not raise any eye-brows. Similarly, disinheritance of Balwinder Singh, brother of the deceased by him also does not spring any surprise because not only that he was well-settled but was also in the knowledge that the plaintiffs and their father were serving the

deceased with full devotion and responsibility. In short, merely because Will dated 1.7.1986 (Ex.P1) ignores Smt. Dalip Kaur and brother Balwinder Singh by the deceased, there is nothing wrong in it. Rather, Balwinder Singh (PW8) has supported the cause of the plaintiffs and not of the defendant-appellant.

30. From the totality of facts and circumstances as discussed earlier, it has become sufficiently evident that Will dated 1.7.1986 (Ex.P1) in favour of the plaintiffs, respondents herein, is fully proved and in absence of finding of trial court in issue No.4-C, substitution of finding by the first appellate court, is fully valid and legal. Both these substantial questions of law are thus decided in favour of the respondents-plaintiffs.

31. Sequel, no ground to interfere with the concurrent findings by the courts below is made out. As such, affirming the impugned judgments and decrees of the trial as also of the first Appellate Court, this appeal, being devoid of any merit, is dismissed. Decree sheet be drawn.

February 05, 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