

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

RSA No. 2815 of 2001 (O&M)

Reserved on: 10.07.2015

Date of decision: 24.07.2015

Surjit Singh

....Appellant

Versus

Sukhbir Kaur & another

...Respondents

CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA

Present: Mr.M.S.Khaira, Sr.Advocate
with Mr.D.S.Randhawa, Advocate, for the appellant.

Mr. K.S.Dadwal, Advocate
and Mr.Manish Dadwal, Advocate, for the respondents.

G.S.SANDHAWALIA, J.

1. The present regular second appeal, filed by the defendant-appellant, is directed against the concurrent findings recorded by the Courts below, which have rejected the registered will dated 10.11.2004 (Exhibit D1), which was set up by him, being executed by his father-Husan Singh. Accordingly, the suit for declaration of the plaintiffs/respondents that they were co-owners in possession of the land measuring 35 kanals 8 marlas, details of which were mentioned in the headnote of the plaint and which was situated in the Village Gondpur Tehsil Garhshankar, District Hoshiarpur, was granted. The reasoning of the Trial Court was held to be justified by the Lower Appellate Court on 07.06.2001.

2. A perusal of the record would go on to show that the suit was filed by taking the plea that the plaintiff-respondents, the mother and the daughter and the son were residing together with the testator as a joint family and he had never executed the will in favour of the defendant and therefore, he had no right to get the land mutated in his favour. It was pleaded that Husan Singh had never

executed the will and had got the mutation sanctioned and on having refused to admit their claim, the suit had been filed on 03.02.1997. In the written statement, specific plea was taken that there was no joint residence and the testator had been residing with the defendant who was serving him in all respect and in such circumstances, the registered will had been executed which had been scribed by a regular deed writer and witnessed by marginal witnesses. The said will had been executed voluntarily, without any pressure and had been acted upon since mutation had been sanctioned in favour of the defendant. In the replication, the plaintiffs further replied that the will was a result of fraudulent act of the defendant and stated that the said will could not be executed. The plaintiffs examined Joginder Singh as PW1 and the daughter appeared herself as PW2.

3. The following issues were framed by the Trial Court:

- “1. Whether the parties are owners in possession in equal share of the share of the deceased Husan Singh as detailed in the headnote? OP Parties
2. Whether the plaintiff is entitled to the injunction prayed for? OPP
3. Whether the property in dispute is ancestral property? OPP
4. Relief.
5. The following additional issue was framed on 18-8-1999:-

Issue No.3-A) Whether Husan Singh executed a registered will in favour of the defendant on 10.11.1994? OPD.”

4. The evidence of the plaintiff was closed vide order dated 10.12.1998 and thereafter, an application for secondary evidence was filed under Section 65 of the Evidence Act, 1872 by the defendant-appellant that he had produced the original will before the Halka Patwari for mutation and tried his level best to trace the original will on the file which was not traceable. Accordingly, permission was sought to lead the secondary evidence by producing the certified copy of the

original will by examining the Clerk of the office of the Sub-Registrar, Garhshankar. The said application was contested by filing reply that if there was a will, it was invalid and surrounded by suspicious circumstances and was a forged document. However, the counsel for the plaintiffs suffered a statement that he would have no objection if the application was allowed subject to proof of the loss of the execution of the will.

5. The defendant, accordingly, examined Vijay Kumar, Assistant from the Tehsil Complex as DW1 who brought the concerned register where the will had been entered in the said register and copy of the same had been affixed. Accordingly, the certified copy of the will was exhibited as Exhibit D1. One of the attesting witness, Sodhi Singh appeared as DW2 to state that he personally knew Husan Singh who had executed the will 4 ½ years back in favour of the defendant-Surjit Singh who was rendering services to him. The said defendant examined himself as DW3 to state that he was rendering services to his father and staying with him. The mother was residing separately in the same house whereas Surjit Kaur the daughter was living in her in-laws house. He further stated that at the time of mutation, he had handed over the original will to the Patwari which was lost and was not traceable. The deed writer, Bhebushan Dutt was examined as DW4, who stated that he had scribed the will which contains the thumb impression of Husan Singh and Satnam Singh whereas Sodhi Singh had attested the same and an entry had been made in the register at Sr.No.398. It was further stated that the testator was fully conscious and hale and hearty.

6. Keeping in view the statement of the scribe and the attesting witness, read with the statement of the Assistant Vijay Kumar, DW2, the Trial Court held that the execution of the will was proved. However, after referring to the evidence and while recording a finding on the loss of the original will reference was made to the cross-examination of the defendant-appellant. It was held that the original will

had not been lost as the same was lying with the Jamabandi since the witness had stated that he did not know the name of the Patwari to whom he had given the will and the Patwari had told him that the will had been attached with the Jamabandi and that he had not taken the Jamabandi. Accordingly, failure of the defendant to summon the record of the mutation alongwith the Jamabandi, led the Trial Court to hold that the loss could not be proved. The second ground which prevailed was that though the will was registered, it was under suspicious circumstances as there was no mention about the daughter and the wife in the will and even if it was admitted that there were strained relationship between the testator and his wife and the daughter being already married, the will was held not to be free from suspicious circumstances and was disbelieved. Reliance placed upon the judgment of the Apex Court in **Rabindra Nath Mukherjee & another Vs. Panchanan Banerjee (dead) by L.R.s & others AIR 1995 SC 1684** and **Bija Ram (dead) through LRs Vs. Raja Ram & others 1999 PLR 746** was distinguished, to reject the defence of the defendant.

7. As noticed above, the argument that there were strained relationship between the husband and the wife were rejected by the Lower Appellate Court and reliance was placed upon the judgment of the Apex Court in **Ram Piari Vs. Bhagwant & others 1990 AIR (SC) 1742** and **Shankarsan Parida (dead) and his legal heirs Rambhamani Dei & others Vs. Laxmidhar Nayak 1991 AIR (Orissa) 23** The questions of law that thus, arise for consideration before this Court are mainly three, which are framed as under:

“(i) Whether the loss of the original will had been proved by the defendant-appellant and whether there was suspicious circumstances as to the genuineness of the will?

(ii) Whether the non-mentioning of the natural heirs in the will by the testator and depriving them from his estate would create a suspicious circumstance which would propound that the will

was fake?

8. The facts, as noticed above, would show that a specific application was filed under Section 65 of the Evidence Act, 1872 to prove the loss of the original will on the basis of which, mutation No.3297 had been carried out in favour of the appellant in 1995, after the death of the testator on 02.07.1995. Under Section 65, secondary evidence is to be given of the existence, condition or contents of the documents when is lost under Sub-clause (c). On the application filed by the defendant/appellant, the counsel for the plaintiffs had given statement that subject to proof of loss, he had no objection in allowing of the application. The said order dated 27.03.1999 reads as under:-

“Present: Sh. Labh Singh, counsel for plaintiff.

Sh. Kuldip Walia, counsel for defendant.

Sh. Labh Singh, Adv. has made a statement that he is not having any objection in case the application U/s 65 of the Indian Evidence Act is allowed subject to proof of loss of execution of the alleged Will dated 10.11.94. In view of the statement made by the counsel for the plaintiff, the application filed by defendant u/s 65 of the Indian Evidence Act is allowed subject to proof of loss and execution of the documents. Now to come up for entire evidence of the defendant on 28.4.99.”

9. In his evidence, the appellant has very categorically stated that after the death of his father, he had given the same to the Patwari for entering in the mutation and the same had been misplaced. It is a matter of record that mutation had already been entered on the basis of the will which is the subject matter of the suit itself. Once the same had been done, it is apparent that the defendant did not make any effort to get the original document since his purpose had been resolved

and the mutation had been entered in his favour. The suit was filed much later on 03.02.1997 and accordingly, the application was filed that he had tried his level best to find out the original will from the mutation filed but the same was not traceable and accordingly, permission was sought to lead the secondary evidence of the will. In such circumstances, the Trial Court only presumed that the will was lying with the revenue authorities and the defendant had made no effort to get the same. The certified copy of the same was duly got proved by examining DW1, who had brought the relevant record containing the entry and accordingly, the same was got exhibited as Exhibit D1. The loss, thus, had to be proved by deposing and recording the will being misplaced and the circumstances were rightly explained by the appellant-defendant and in what circumstances, the same had been lost. It is to be noticed that the Trial Court itself held that the will stood duly proved by examining the certified copy and by examining one of the attesting witness namely, Sodhi Singh DW1 and the scribe, Bhubneshwar Dutt, DW4. Thus, in such circumstances, the Courts below were not justified in holding that the defendant had failed to prove the loss of the will. Accordingly, question no. 1 is answered in favour of the defendant-appellant, by holding that the loss had been proved and the explanation given is liable to be accepted and it had wrongly been not accepted by the Trial Court.

10. Regarding question No.2, sufficient evidence had been brought on record that there was a dispute *inter se* the testator and his wife whereas the daughter was already married and staying separately in her matrimonial home. The will in the present case is a registered document and it has been found that it was duly executed and that its contents did not show that that the wife and daughter had been excluded and it had been written in a mechanical manner. Merely because there is no mention in the will regarding the reasons that the wife and the daughter were being deprived of the estate would not be a ground to set aside the

registered will which carries a presumption of truth in view of the provisions of Section 62(2) of the Registration Act, 1908. The purpose of the will was only to debar the other legal heirs from the right of the land in question which is 35 kanals 8 marlas, which was executed by the father in favour of his son. It is well known and accepted practice that the efforts are always made to keep the agricultural land in the hands of the male members excluding the daughters in laws who are not living with the parents. Reliance can be placed upon the decision of this Court in **Surjit Kaur Vs. Nirvair Singh (dead) through LRs 2005 (1) PLR 696** wherein the widow of the pre-deceased son had contested the benefits of the unregistered will and her exclusion was upheld by this Court, keeping in mind the above said principle while upholding the will. In the present case, the beneficiary is the son and therefore, only on account of the fact that there was no mention of the reasons given in the Will, the Courts below were not right in rejecting the will. The appellant has led sufficient evidence on record that the sister had already got married and was living separately and had a child also from the said marriage. The propounder, thus, was not a stranger and he was a beneficiary being the son and the will was duly acted upon. The said principle was also noticed by the Apex Court in **Rur Singh (D) through L.Rs. and others vs. Bachan Kaur, 2009 (11) SCC 1** that daughters are excluded when it comes to agricultural land. The relevant portion reads as under:-

“11. The High Court framed only one substantial question of law, viz., whether the Will had been duly proved and/ or was otherwise genuine.

It is essentially a question of fact. The learned Trial Judge as also the first Appellate Court in opining that the Will was genuine and free from suspicious circumstances inter alia took into consideration the existing materials on record, viz., the parties ordinarily do not want their agricultural land to go out from the family and in that view of the matter if Kehar Singh had bequeathed his agricultural land only in favour of his sons and excluding the daughters from inheritance, no

exception thereto could be taken.

12. The learned Trial Judge as also the first Appellate Court also took into consideration the fact that the villagers in great numbers were present at the time of execution of the Will and in fact Sarpanch himself scribed the same. Furthermore, the fact that at least in respect of the properties situate in village Lohgarh the order of mutation was passed in favour of the sons in the year 1970 and the same was not challenged, also was taken into consideration that the Will must be held to be genuine.

13. As regards proof of Will, as statutorily required in terms of [Section 63](#) (c) of the [Indian Succession Act](#), it was categorically held by the learned first Appellate Court:

"...The execution of the Will Ex. D-1, dated 14.5.1969, was proved by Rur Singh, DW-1, Kapoor Singh, DW-2, and Hema Ram, DW-3, attesting witnesses thereof. Their evidence goes to prove that the Will was scribed by Gurbachan Singh, Sarpanch, at the instance of Kehar Singh. After scribing the Will, the contents thereof were read over and explained to Kehar Singh, who admitted the same to be correct, and thumb marked the same, in the presence of Rur Singh, DW-1 & Kapoor Singh DW-2, Hem Raj DW-3, Prem Chand, Gurbachan Singh and Piara Singh, attesting witnesses. It is further proved from the evidence of Rur Singh, DW-1, Kapoor Singh, DW-2 and Hema Ram (DW-3) that Kehar Singh thumb marked the Will, in token of its correctness, in their presence and in the presence of other witnesses, whereas they signed and thumb marked the same, in the presence of the testator. It is also proved from the evidence of these witnesses, that Kehar Singh, was in sound disposing mind, at the time of execution of the Will dated 14.5.1969 Ex. D-1. In fact, the perusal of the Will, Ex. D-1, reveals that it was executed by Kehar Singh, in the presence of the entire Panchayat of the village. No doubt, Rur Singh, DW-1, is the son of Kehar Singh, and is one of the beneficiaries, residing with him, in the same house and serving him throughout his lifetime. That, however, does not make his evidence unbelievable. Since, he was residing, in the same house, with Kehar Singh, and was serving him, his presence at the time of the execution of the Will was natural and probable, and that was why he signed the same, as an attesting witness..."

As Bachan Kaur, respondent herein was comfortably married, if the testator thought it proper to exclude her from his agricultural property bequeathing the same in favour of his sons, as has been stated in the Will, no exception thereto could be taken."

11. The judgment of the Apex Court in the case of **Rabindra Nath Mukherjee** (supra) was wrongly distinguished wherein it has been held that deprivation of the natural heirs by the testator is the whole idea. The submission, as such, cannot be laid down as absolute proposition that merely because the will did not mention the said facts and reasoning was not given to exclude, it has to be necessarily rejected. The will has been duly proved by examining the attesting witness and the scribe which was the requirement under the Succession Act, 1925 and the Evidence Act, 1872. There is nothing to show that the appellant had been disinherited and the will was forged or some other person had been put up to execute the will. It is to be seen that though a prudent testator might put the same in black and white and give reasons but in the present case, the testator was thumb marking the will after going to the regular deed writer and thereafter, took the precaution of getting the will also registered. Nothing as such could be pointed out that there were any other suspicious circumstances which would shift the burden on the propounder apart from the sole reason that specific reasons had not been given to exclude the other legal heirs. The conscious of the Court has, thus, to be satisfied that the will in question was not executed and attested in the manner provided and in the absence of any such circumstances and the son being the beneficiary, the Courts below were not justified in rejecting the registered will.

12. The judgment in *Shankarsan Parida's case (supra)* was a case where no official had been examined from the Sub-Registrar to prove that the will was registered and the will in question was drafted by a Lawyer and it was only in such circumstances, it was held that the genuineness was doubtful as the entire property had been given to the step-son without making any provision for the second wife.

13. Similarly, in **Ram Piari** (supra), the will was executed one day before the death of the testator and it was found that the testator was covered with cloth in the afternoon of August. The testator could sign but he had put his thumb mark

and in such circumstances, the will had been set aside and it was held that the same was invalid. In the present case, the facts are in total variance. It is also to be noticed that the will was acted upon at the earliest by the testator, as noticed and the will was never held back to gain any benefits.

14. Similarly, the judgment relied upon by counsel for the respondents in **Amar Singh Vs. Layja Devi & others 2009 (2) PLR 768** pertained to a case where the will in question have been set up by one of the daughters to the exclusion of the 4 others and the will had been registered after the death of the testator. The said testator had been a Patwari and who had not got the will scribed from a regular scribe. It was in such suspicious circumstances the Lower Appellate Court's judgment was upheld and the same would, thus, not to be applicable to the circumstances of the present case.

15. Resultantly, question no. 2 is answered in favour of the appellant.

16. Resultantly, the present appeal is allowed and the suit filed by the respondents is dismissed, by upholding the validity of the will and the mutation which had been entered into in favour of the appellant.

24.07.2015
sailesh

(G.S. SANDHAWALIA)
JUDGE