

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

1. RSA No.3908 of 2009 (O&M)
Date of decision : 14.12.2015

Balwant Singh

...Appellant

Versus

Nisabar Singh and ors.

...Respondents

2. RSA No.1338 of 2010 (O&M)
Date of decision : 14.12.2015

Nishabar Singh and ors.

...Appellants

Versus

Balwant Singh

...Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL.

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

Present: Mr. Kulwant Singh, Advocate for the appellant
(In RSA No.3908 of 2009)

Mr. Arvind Singh, Advocate for respondent Nos.1 to 4 and 6
(In RSA No.3908 of 2009)
for appellants
(In RSA No.1338 of 2010)

Mr. Govind Chauhan, Advocate
for LR's of respondent No.11.

AMIT RAWAL, J. (Oral)

This order of mine shall dispose of two Regular Second Appeals bearing No.3908 of 2009 titled as Balwant Singh Vs. Nisabar Singh and ors. filed at the instance of plaintiff and RSA No.1338 of 2010 titled as Nishabar Singh and ors. Vs. Balwant Singh, also at the instance of plaintiff.

Before adverting to the submission of learned counsel for the parties, it would be apt to give brief preface of the matter. Sohan Singh had two wives namely Devo and Lachhmo. From the loins of Sohan and Devo, Sajjan Singh & Nazar Singh were born and Sajjan Singh is the father of Balwant Singh-appellant in RSA No.3908 of 2009 and respondent-defendant in RSA No.1338 of 2010. From the loins of Sohan and Lachhmo, two sons were born, namely Phulla and Tehal Singh. The entire controversy revolves around share of Tehal Singh who died issueless. Tehal Singh filed Civil Suit No.137 of 1993 seeking declaration, possession and permanent injunction challenging the judgment and decree dated 24.11.1990, obtained on the basis of fraud. Aforementioned suit was with regard to land measuring 26 kanals. Tehal Singh suffered judgment and decree in favour of defendant Nos.1 to 4 who are sons of Phulla.

Similarly, Phulla filed civil suit bearing No.3 of 1998 against Balwant Singh seeking declaration by challenging the judgment and decree dated 19.11.1991 passed in civil suit No.890 of 1991 suffered by Tehal Singh in favour of Balwant Singh in suit titled as Balwant Singh Vs. Tehal Singh. The short question which arises for adjudication of the

aforementioned appeal is that whether Tehal Singh on the date of execution of the judgment and decree had his left thumb existing or not. Though trial Court in RSA No.3908 of 2009 dismissed the suit, on the ground that plaintiff did not lead evidence as to whether Tehal Singh left thumb impression or was it amputated for the reason the written statement and power of attorney filed in the judgment and decree dated 24.11.1990 bore left thumb impression of Tehal Singh. However, before lower Appellate attempt was made to produce on record the statement suffered by Tehal Singh under Section 313 in criminal case which proves that he had appended right thumb impression and thus, the presumption which could be drawn was that his left thumb impression was amputated long time back, therefore, judgment and decree dated 24.11.1990 as well as judgment and decree dated 19.11.1991 passed in civil suit No.890 of 1991 bearing again left thumb impression on the written statement and power of attorney could not be validly passed as it was a outcome of fraud and misrepresentation played on Tehal Singh. Both the parties are aggrieved vis-a-vis the inheritance of the share of Tehal Singh.

Mr. Kulwant Singh, learned counsel appearing on behalf of appellant in RSA No.3908 of 2009 submits that additional evidence clinches the issue that Tehal Singh did not have left thumb impression existing at the time of suffering of statement. He submits that besides the judgment and decree dated 19.11.1991, Tehal Singh had also executed a Will in favour of Balwant Singh and, therefore, judgment and decree would not have any effect on his rights and the said Will has not been challenged by Phulla Singh or his sons.

Mr. Arvind Singh, learned counsel appearing on behalf of Successor-in-Interest of Phulla Singh submits that even the Will also bear the right thumb impression, therefore, statement under Section 313 Cr.P.C. in criminal proceedings cannot be looked into as the Will is subsequent to the judgment and decree, therefore, it would be inconsequential.

After hearing the arguments of learned counsel for parties, I am of the view that both the appeals involves following substantial questions of law arises for determination:-

- i) Whether the impugned decree has been passed by playing fraud and impersonation and which fact is apparent from Exs.P-1, P-2, PW-2/A, PW-2/B, Mark-A and Mark-B which show that Tehal Singh-plaintiff was not having any left thumb and which had been amputated and he was affixing his right thumb impression, whereas, on the record of the case in which the impugned decree has been passed, the left thumb impression of Tehal Singh-plaintiff has been shown to have been affixed?
- ii) Whether the learned lower appellate court has grossly erred in disallowing the application for additional evidence i.e. certified copy of statement under Section 313, Cr.P.C. of Tehal Singh recorded in the year 1949 by Sessions Judge, Karnal and the judgment dated 4.6.1949 passed by Sessions Judge, Karnal in FIR No.124, dated 22.9.1948, under Sections 302, 326, 324, 148 IPC, P.S. Assandh, in case titled as Crown Vs. Tehal Singh etc. wherein it has been specifically recorded that the right thumb impression of Tehal Singh is being affixed as his left thumb is amputated?

Section 33 of the Indian Evidence Act, deals with the relevancy of certain evidence of proving in a subsequent proceedings the truth of facts. Since Tehal Singh had died and, therefore, he could not have entered into witness-box and proved that he did not have left thumb nor the Court had any occasion to see such fact, the only evidence which should have been brought on record is some criminal proceedings initiated against him. Since, Tehal Singh faced criminal trial, he suffered statement under Section 313 Cr.P.C. which bore his right thumb impression. Irresistible conclusion drawn is that he did not have left thumb. Had it been so, as per the practice and procedure, all the illiterate male members put their left thumb impression whereas female members put their right thumb impression. Thus both the judgment and decree suffered in the year 1991 and the Will pales insignificant as all the documents bear the left thumb impression of Tehal Singh.

I am of the view that lower Appellate Court in RSA No.3908 of 2009 ought to have been taken into consideration the additional evidence brought on record that statement suffered under Section 313 Cr.P.C. which is proceedings of the Court can be looked into for the adjudication of the lis. De hors of the fact that whether statement was in the knowledge of the plaintiff or not, in essence, the plaintiff could not non-suited by not leading the evidence before the trial Court. The same analogy would apply vis-a-vis the other suit filed by the Successor-in-interest of Phulla who also challenged the judgment and decree suffered by Tehal Singh. The written statement and power of attorney also bears the left thumb impression.

There is another aspect of the matter. The Will of Tehal Singh

set up by Balwant Singh as per the findings given by the lower appellate Court has been proved on the ground that it bore right thumb impression. Be that as it may, but the fact remains that witnesses of the Will has not deposed as per the provision of Section 63-C of Indian Succession Act and the trial Court had an occasion to discuss the said evidence in extenso. The relevant portion of the findings reads thus:-

“The answer is that the same is not in conformity with the said provisions.

Firstly, Didar Singh who appeared as a witness has deposed that Mohar Singh had appended his thumb impression first and after that Tehal Singh had appended his thumb impression. Didar Singh has failed to depose in the cross examination that Nazar Singh the third attesting witness was also present at the time of execution of the Will and rather he stated that but for Tehal Singh, Didar Singh and Mohar Singh, no other person was present at the time of execution of the Will and also at the time of attestation of Will. Further Didar Singh did not know the year and the month in which the said will was executed. Further he also stated that left thumb of Tehal Singh was chopped off. This story never found mentioned in the written statement nor in the Will itself. Interestingly, in written statement in civil suit No.890/91, thumb impression of left hand of Tehal Singh were affixed and it was never disclosed by the defendant that when and in what circumstances the left hand thumb of Tehal Singh as chopped off before execution of Will. Balwant Singh has been shown to be the nephew of Tehal Singh and no explanation has been given in the will as to why the other legal heirs were being ignored.

Thus the will does not quality the test of Section 63 of the India Succession Act and also Section 68 of the

Indian Evidence Act and further more the suspicious circumstances which have been elaborated above have not been dispelled by the defendant and as such the factum of execution of Will by Tehal Singh has also not proved.”

However, the lower Appellate Court has not assigned any reasons vis-a-vis the application of the provision of Section 63-C and 68 of Indian Evidence Act. In my view, the lower Appellate Court was completely oblivious of the aforementioned provision in upholding the Will in favour of Balwant Singh.

Keeping in view the aforementioned facts, questions of law as noticed above is answered in favour of appellant and against respondent. Judgment and decree of both the Courts below in Civil Suit No.137 of 1993 in RSA No.3908 of 2009 and judgment and decree of the lower Appellate Court in Civil Appeal No.37 of 2008 in RSA No.1338 of 2010 are set aside. Judgment and decree in Civil Suit No.3 of 1998 titled as Phulla Singh (deceased) Vs. Balwant Singh, is restored.

Both appeals are accordingly allowed.

14.12.2015

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**(AMIT RAWAL)
JUDGE**