

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

Regular Second Appeal No.4387 of 2011 (O&M)

Date of decision: 30.7.2015

Ranjeet Singh and another

... Appellants

Versus

Baljit Kaur and others

... Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr.Raman Mohinder Sharma, Advocate,
for the appellants.

1. To be referred to the Reporters or not? Yes.
2. Whether the judgment should be reported in the Digest? Yes.

RAJIV NARAIN RAINA, J.(Oral)

This is defendants' second appeal in a suit filed by their mother late Tej Kaur for declaration that she is joint owner to the extent of 7/30th share in the property described in the head note to the plaint. Tej Kaur's husband late Didar Singh, father of the appellants, left behind a registered testamentary Will dated 15th September, 1995 in favour of his grandsons bequeathing his suit property to them by excluding his sons, of which two have approached this Court in the present appeal. The suit has been partly decreed by learned trial court and a declaration has been issued to the effect that the plaintiff is owner in joint possession to the extent of 1/6th share of the land measuring 17 Bighas-16 Biswas being 356/1297 share out of the

land measuring 64 Bighas 17 Biswas comprised in the land described in the decree and of electric motor connection bearing A/c No.AP-89/C.1. However, the remaining reliefs with respect to other land has been declined.

2. The defendants contested the case and set up a counter Will allegedly executed by their father in their favour as against the Will dated 15th September, 1995 propounded by the plaintiff. The Will set up by the appellants was disbelieved and the lower courts have held this latter Will was not proved and consequently did not overwrite the previous Will which was declared to be a genuine document. The testamentary will propounded by the defendants, though was a registered document, but its propounders failed to produce its attesting witnesses at the trial even though they were summoned to appear. They did not come forward. If they did not appear when summoned then an adverse inference can safely be drawn that had they appeared they may not have supported the case of the propounders. The defendants having failed to satisfy the methodology statutorily engraved in section 63 of the Indian Succession Act, 1925 of proving testamentary wills and the conditions precedent laid down therein, then the defence was destined to fail and in this misadventure no court can come to their rescue.

3. Nevertheless, an application was moved by the defendants at the appellate stage to rescue their case from doom praying for another attempt in summoning the attesting witnesses but that application has been dismissed for good and sufficient reasons within the appellate judgment from where this appeal arises.

4. Learned counsel relies on a single Bench decision of this Court in **Kirpal Singh v. Smt.Tarowati and others**; 2010 (1) RCR (Civil) 307 to

contend that the attesting witnesses to the Will ought to have been allowed to be examined by summoning and the court of first appeal improperly exercised its jurisdiction in rejecting the application. In the case cited, the lower appellate court exercised such discretionary jurisdiction and allowed the witnesses to be summoned to prove the Will. The Court fell back on the principle that the justice should be imparted between the parties and not to penalize them on technicalities of rules of procedure. However, there is no violation of rules of procedure in this case and the case is, therefore, distinguishable on facts. It is inherent that such a plea is to be examined from a case to case basis and no universal or absolute principle can be or has been laid down in past precedents except to decide the issue within the contours of Order 47 Rule 27 of the Code of Civil Procedure.

5. The propounders of a will must make the most of their case to prove issues the onus of which lies on them by leading before the trial or with leave of the appellate court, the best evidence available at their command. In the case of a testamentary disposition of property, parties know beforehand what their fate would be if the attesting witnesses do not appear to prove they were present when the testator signed or affixed his mark to the Will in their presence and by the direction of the testator, and each of the witnesses signed the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time. In absence of all which the Will produced by the defendants is not proved in law as evidence. Moreover, the appellate court was not wrong in its reasoning when it found that due diligence was not exercised by the defendants and presently I think it would be a futile exercise to give such an

extraordinary opening to the losing party to be allowed to play a second innings on the turf of second appeal jurisdiction by showing misplaced sympathy with the cause of the defendants, especially in the backdrop where the mother was pitted against her three sons locked in a forensic battle over property left behind by late Didar Singh by a testamentary disposition of property which has been found to be self acquired by the testator. He was always free to dispose it off by last will and testament in favour of whom he wished. In any case, the property in dispute has not gone out of the family fold and no substantial injustice has resulted to the defendants except heartburn which their past conduct may have warranted.

6. I would not consider any interference in the second appeal side of this court on any of the fronts urged by the learned counsel and have no earthly reason to differ with the dispensation handed down by the court of first appeal in dismissing the application for additional evidence and the main civil appeal itself when the defendants miserably failed to prove the Will in accordance with law and on which they depended to non-suit their mother Tej Kaur and would dismiss the appeal as not involving a question of law much less a substantial one for consideration. There is no merit in the appeal which is turned down in limine and the findings of the court of first appeal are affirmed and the decree is made absolute. File be consigned to the record room.

(RAJIV NARAIN RAINA)
JUDGE

July 30, 2015
Paritosh Kumar