

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

RSA No.1875 of 2013 (O&M)

Date of decision : 04.12.2015

Surender Kumar

...Appellant

Versus

Subhash Chander and ors.

...Respondents

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. Anil Ksheterpal, Sr. Advocate with
Mr. Saurabh Garg, Advocate for the appellant.

Mr. Ashish Yadav, Advocate for the respondent No.1.

AMIT RAWAL, J. (Oral)

The appellant-plaintiff is in Regular Second Appeal against the concurrent findings of fact, whereby the suit for declaration and permanent injunction claiming the right of succession by way of natural succession, has been declined by believing the Will dated 09.01.1990 set up by the respondent-defendant.

Mr. Anil Kshetarpal, learned Senior Counsel assisted by Mr. Saurabh Garg, Advocate for the appellant submits, that though essential requirement of proving the Will as per Section 68 of Indian Evidence Act is

that it is to be attested by two witnesses. However, in the instance case one of the attesting witness Shadi Ram has appeared as DW8 but his entire examination-in-chief did not conform to the provision of Section 63-C of the Indian Succession Act inasmuch as that his statement does not say that the testator Mangal Ram had appended his thumb impression in his presence and on his dictation he had appended the thumb impression and, therefore, there is no compliance of aforementioned provision. In support of his contention, he has relied upon judgment rendered by Hon'ble Supreme Court in *Janki Narayan Bhoir Vs. Narayan Namdeo Kadam, 2003(2) SCC 91*, thus there is illegality and perversity, therefore following substantial question of law arise for determination:-

- 1) Whether statement of DW8 Shadi Ram (attesting witness to the Will dated 09.01.1990 registered on 08.02.1990) is in conformity with the provision of Section 63-C of the Indian Succession Act or not?

Mr. Yadav, learned counsel appearing on behalf of respondent No.1-defendant has very assiduously argued that the concurrent findings cannot be interfered by exercising the power under Section 100 of the Code of Civil Procedure. He further submits that in order to prove the Will, he has also examined DW2 who had attested the Will who stated that Mangal Ram and the witnesses after having been read over the contents of the Will appended their thumb impression in his presence. Even the scribe to the Will DW3 Prabhu Dayal Gupta who is none else but an Advocate, has also stated that testator and other witnesses had appended their signatures in his presence. Even Statement of DW2 scribe is in conformity with Section 63-C of the Ibid Act. He further submits that plaintiff by playing fraud upon

Mangal Ram had obtained the collusive decree in respect of land measuring 76 kanals which was later on challenged and the same was set aside. In those proceedings, Mangal Ram had stated that plaintiff-Surender Kumar had played fraud upon him. The said statement was suffered in the year 1989, whereas Will was of 09.01.1990. He further submits that registered documents carrying presumption of truth and, therefore, Will cannot be said to have been suffering from suspicious circumstances, in essence, since onus to prove the Will was on the defendants which has been discharged by examining one attesting witness, scribe & Registrar from the office of Sub-Registrar and thus prays that there is no illegality and perversity and prays for dismissal of the appeal.

I have heard learned counsel for the parties and appraised the paper book as well as the record of the trial Court and judgments cited at bar.

Before advertng to the aforementioned arguments, it would be apt to reproduce Section 63-C of the Indian Succession Act:-

“Section 63(c) in The Indian Succession Act, 1925

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign 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, and no particular form of attestation shall be necessary.”

On going through the provision of Section 63-C of the Indian Succession Act, it is essential requirement of law for the witnesses to state in their evidence that they had put their signatures or thumb impression in the presence of the testator and they have also seen the testator signing or affixing his mark. Shadi Ram in examination-in-Chief stated as under:-

“I know Mangal Ram s/o Budha, r/o Village Khaleta. Mangal Ram had died. During his lifetime, he had executed the Will, have seen the summoned original Will. It bears my signatures. Copy of which is Ex.PW3/1. After objected to volunteered said that I never want to say about this Will and I do not wish to give any statement with regard to this Will. In the summoned record pertaining to the mutation proceedings, my statement bears the signatures which is dated 02.04.2006 and the copy of the statement is Ex.DW8/1 Objected to. I had appended my signatures in the presence of the Sub-Registrar. The Will was read over to me and Mangal Ram by the scribe. I do not know whether Mangal Ram had appended thumb impression in my presence or not.

Q:- Did you appended signatures on the Will in the presence of Mangal Ram or not?

A:- Will bears my signatures.

It is incorrect to submits that with one Surrender Singh I am making incorrect statement”.

From the perusal of the examination-in-chief of the Shadi Ram, it reveals that Shadi Ram had not deposed as per the provision of Section 63-C of the Act, therefore, ratio decidendi culled out by Hon'ble Supreme Court in Janki Narain Bhoir's case is squarely applicable to the facts of the case. Hon'ble Supreme Court in Janki Narain Bhoir's case in paragraph 10

has held that if one attesting witness examined, in his evidence has to satisfy the attestation of a Will by him and other attesting witnesses in order to prove that there was due execution of the Will, otherwise, it would be following short of the attestation of the Will. In the instant case, perusal of record of Courts below shows that Shadi Ram had not stated that the other witness namely Hira Lal, Numberdar had also appended his signature/thumb impression in his presence and on the instructions of the testator.

Mr. Yadav, Advocate has vehemently relied the statement of DW8 Shadi Ram who in a proceedings before the revenue record confirmed to the provision of Section 63-C and relies upon the provision of Section 33 of the Indian Evidence Act.

Mr. Ksheterpal, rebutted the aforementioned submission on the premise that provision of Section 33 of the Indian evidence did not apply for the reasons the witness Shadi Ram had appeared and such provision would apply where the witness had died or kept away or is not aware or incapable of suffering the statement. Even otherwise the statement suffered before the revenue Court was without oath and, therefore, cannot be read into evidence and, in support relied ratio decidendi culled out by this Court in *Bhajan Singh Vs. Smt. Jaswant Kaur 1996(1) RRR 738*.

I am in agreement with the submission of Mr. Kshetarpal, that the statement suffered by Shadi Ram in proceedings before revenue Court was without oath and, therefore, cannot be relied upon by the defendants to contend that it is confirming to the provision of Section 63-C of the Indian

Succession Act. There is another aspect of the matter, the parties to the lis are real brothers claiming 1/4th share in the estate of Mangal Ram but according to plaintiff Mangal Ram had intestate that the respondent-defendant had bequeathed the entire property by virtue of the Will. Since I have already deliberated upon the Will having not been attested in accordance with the provision of Section 63-C of the Indian Evidence Act, in essence, Will cannot be looked into. Even if it is registered as per Indian Registration Act, in essence, all the legal heirs of the Mangal Ram would be entitled to equal shares.

In view of the aforementioned fact, the substantial question of law as noticed above is answered in favour of the appellant-plaintiff and against the respondents-defendants.

Accordingly, judgment and decree of both the Courts below is set aside, in essence, suit filed by the appellant-plaintiff is decreed. He shall entitled to as per his respective shares in the estate of Mangal Ram.

Decree sheet be prepared accordingly.

Appeal is allowed.

04.12.2015

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**(AMIT RAWAL)
JUDGE**