

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

**Regular Second Appeal No.241 of 1988 (O&M)
Date of Decision: July 13, 2016.**

Kartar Singh (Died) through LRs

.....APPELLANT(s).

VERSUS

Ujjagar Singh (Died) through LRs and others

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Argued by: Mr. Amit Jain, Advocate
for the appellant (s).

Mr. Sherry K. Singla, Advocate
for the respondents.

SURINDER GUPTA, J.

Appellant-plaintiff Kartar Singh (since deceased) now represented through his legal representatives, filed suit seeking the relief of possession of land measuring 101 kanals 13 marlas as fully defined in head note of the plaint situated in village Galib Kalan, Tehsil Jagraon and for joint possession of land measuring 5 kanals 2 marlas bearing khata No.1145/1315 rectangle No.104 kila No.5/2, 5/4, 5/5 as shown in jamabandi for the year 1979-80 situated in village Galib Kalan after setting aside mutation No.12391 vide which the inheritance of Mohinder Singh son of Bhagwan Singh has been wrongly recorded in the name of defendant No.1 Ujjagar Singh on the basis of fictitious Will dated 05.08.1980. The suit of the plaintiff was partly decreed as follows:-

“39. Therefore, the suit of the plaintiff for

possession of the land measuring 1 kanal being 10/61 share out of land measuring 6K-2M khata No.1116/1243 Rect. No.104 Killa Nos. 5/2, 5/4, 6/5 bounded as East : 10 karams wide passage, West: 10 Karams; North: 18 Karam remaining land of vendor; South 18 Karam Hari Singh and the land measuring 12 marlas being 12/55 share out of land measuring 2 K 15 M Khara No.1116/1243, Rect. No.104, Killa No.3/1, 4/1, 8, 7/2 bounded as East: Passage, West: Pond, North: Remaining land of vendor, South: land of Tara Singh etc., situated at Galib Kalan, as per jamabandi for the year 1979-80, is dismissed against defendants No.3 and 2 respectively. The suit of the plaintiff for possession of the remaining land as detailed in the head note of the plaint is decreed against defendant No.1.”

2. Not satisfied, defendant No.1 Ujjagar Singh filed appeal against the judgment and decree passed by Sub Judge 1st Class, Jagraon, which was accepted by the first Appellate Court vide judgment dated 05.02.1986 and judgment and decree passed by learned Sub Judge, Jagraon was set aside.

3. Plaintiff Kartar Singh (since deceased), now represented by his legal heirs, has preferred this second appeal against the judgment of the first Appellate Court.

Brief Facts:-

4. The dispute pertains to the inheritance of Mohinder Singh son of Bhagwan Singh. The plaintiff claims himself to be sole heir of Mohinder Singh as he died issueless and without leaving behind his wife. The plaintiff pleaded that Mohinder Singh used to live with him during his life time and never executed any Will. Defendant No.1 had propounded Will dated 05.08.1980 executed by Mohinder Singh, which is forged and

fictitious document. On the basis of this Will, he got mutation No.12391 sanctioned in his favour on 29.09.1980. Deceased Mohinder Singh was not in his sound state of mind at the time of execution of alleged Will. After getting the mutation sanctioned, defendant No.1 sold land measuring 12 marlas i.e. 12/55 share out of land measuring 2 kanals 15 marlas bearing rectangle No.104 killa No.8, 3/1, 4/1, 7/2 situated in village Galib Kalan to defendant No.2 and mutation No.12450 was sanctioned in favour of defendant No.2. The sale made by defendant No.1 in favour of defendant No.2 was termed as illegal and void. On coming to know of the sale by defendant No.1, plaintiff requested him to accept his claim to declare the alleged Will dated 05.08.1980 as illegal, null and void and not binding on rights of plaintiff, which he discarded, hence, this suit.

5. Defendant No.1 contested the claim of plaintiff in the written statement and challenged his locus standi to file this suit. It was alleged that Mohinder Singh died on 15.09.1980 and the plaintiff is not his legal and natural heir. Mohinder Singh had bequeathed his entire property through a registered and valid Will executed in favour of defendant No.1, who is his maternal uncle's son. Defendant No.1 is in physical cultivating possession of the suit land since the death of Mohinder Singh. It is denied that Mohinder Singh was ever living with the plaintiff, rather he was living with defendant No.1, who performed his last rites. All other averments of plaintiff were contested, controverted and denied.

6. Defendant No.2 in his separate written statement defended the Will executed by Mohinder Singh in favour of defendant No.1 and his purchase of land measuring 12 marlas. He alleged that the land was

purchased by him for a valuable consideration, as such, he is a bona fide purchaser.

7. Defendant No.3, in his separate written statement, contested the claim of plaintiff, inter-alia pleading that he has been unnecessarily impleaded by the plaintiff just to harass him. Mohinder Singh had validly sold land measuring 1 kanal for a sale consideration of ₹5,000/- vide sale deed dated 01.07.1980 and delivered the possession to defendant No.3. The plaintiff has not assigned any reason as to why he has impleaded him as party in this case.

8. In replication to the written statement of defendant No.1, plaintiff re-asserted his case. Pleadings of the parties led to the framing of issues as follows:-

- (1) Whether the plaintiff is the heir of Mohinder Singh deceased? OPP
- (2) Whether defendant No.2 is bonafide purchaser for consideration. If so, its effect? OPD
- (3) Whether the sale deed dated 01.03.1980 executed by Mohinder Singh deceased in favour of defendant No.3 is illegal and void? OPP
- (3-A) Whether Mohinder Singh deceased executed a valid will dated 5.8.80 in favour of defendant No.1? OPD
- (3-B) Whether the suit is not maintainable in the present form? OPD
- (3-C) Whether the suit is barred by time? OPD
- (3-D) Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD
- (3-E) Whether the suit is bad for misjoinder of parties? OPD
- (3-F) Whether the plaintiff has locus standi to file this suit? OPD

4. Relief.

9. Before proceeding further, it is appropriate to have a look on locus-standi of appellant-plaintiff to file the suit, relationship of defendant No.1 with Mohinder Singh and number of Will(s) executed by Mohinder Singh.

Locus standi of the appellant-plaintiff to file the suit:-

10. Both the Courts on appraisal of evidence found that plaintiff Kartar Singh was a collateral of Mohinder Singh. Observations made by learned first Appellate Court in para 12 of its judgment clearly depict the relationship of Kartar Singh and Mohinder Singh as follows:-

“12. I may here also recapitulate the relations of the plaintiff with that of Mohinder Singh deceased. Plaintiff Kartar Singh is the son of Ram Singh, who is the son of Punjab Singh. Punjab Singh was the son of Didar Singh. Didar Singh had two more brothers, namely, Waryam Singh and Jito and all these were the sons of Surta Singh. Mohinder Singh deceased was the son of Jito and in this manner, Mohinder Singh becomes the cousin from a remote collateral.....”

11. In view of the above, plaintiff was rightly held to be having locus standi to claim the estate of Mohinder Singh.

Relationship of defendant No.1 Ujjagar Singh with Mohinder Singh

12. Admittedly, defendant No.1 Ujjagar Singh is the son of maternal uncle of Mohinder Singh. He was residing at village Panj Garain. The case of the defendant No.1 is that after the death of his brother Sunder Singh, Mohinder Singh was living with him and was being served in his old age by defendant No.1.

Will(s) executed by Mohinder Singh:-

13. From the evidence on record, it is evident that Mohinder Singh executed two Wills. First Will was executed by him on 30.05.1978 in favour of Gurudwara Sahib Gurmat Parchar. The execution of Will in favour of Gurudwara Sahib is evident from the sale deed dated 03.08.1978 executed by Mohinder Singh in favour of Budh Singh son of Pakhar Singh, whereby he sold his 12 marlas of land with the consent of Gurudwara Committee. Vide registered Will dated 05.08.1980, which is under challenge in this suit, he cancelled Will dated 30.05.1978 executed by him in favour of Gurudwara Sahib.

14. I have heard learned counsel for the parties and have gone through the judgments and records of the Courts below with their assistance.

15. Learned counsel for the appellant has argued that in order to prove Will dated 05.08.1980, it was imperative on defendant No.1 to prove that testator had signed or affixed thumb marked on the Will in presence of marginal witnesses and the witnesses have signed the Will in presence of testator. In this case, neither of marginal witness has stated that the Will was signed by the testator in their presence or they had signed in presence of testator. Even the Sub Registrar, who can be taken as attesting witness of Will, has stated that the signatures and thumb impressions of marginal witnesses and testator were taken by the registration clerk and not in his presence, as such, the Will is not duly proved, as per provisions of Section 63 of Succession Act. He has supported his contention with the observations in case of ***Jagdish Chand Sharma Vs. Narain Singh Saini***

(Dead) through his Lrs and Ors., 2015 AIR (SC) 2149; B. Venkatamuni Vs. C.J. Ayodhya Ram Singh and others, 2007 AIR (SC) 311; Pentakota Satyanarayana & Ors. Vs. Pentakota Seetharatnam & Ors., 2005 AIR (SC) 4362 and Janki Narayan Bhoir Vs. Narayan Namdeo Kadam 2003 (2) SCC 91.

16. Learned counsel for the appellant has further argued that the facts and circumstances on file show that there was no reason for Mohinder Singh, who was living in Gurudwara to execute Will in favour of defendant No.1. The fact that Will dated 05.08.1980 was executed only a few days before the death of Mohinder Singh shows that it was not a legal and valid document. The entries in the death certificate and of immersion of his last remains at Gurudwara Kiratpur Sahib are fabricated and this contention of defendant No.1 that Mohinder Singh was living with him and as such, executed will in his favour is not proved. Learned Sub Judge has rightly rejected the Will and the first Appellate Court set aside the finding of learned Sub Judge on the grounds which are not tenable and has blatantly ignored the fact that neither of the marginal witness of the Will had proved the execution of the Will by Mohinder Singh.

17. Learned counsel for respondents-defendants while refuting all the submissions of learned counsel for the appellant, supported the detailed reasons given by first Appellate Court while setting aside the observations of Sub Judge that the Will is not proved to be a valid and genuine document.

18. Substantial questions of law requiring determination which arise in this appeal are as follows:-

Will dated 05.08.1980 executed by Mohinder Singh is proved to be his legal and valid Will, are based on proper appreciation of facts of case, evidence on record and law on the point?

(ii) Where both the marginal witnesses of a Will turn hostile, whether the Court can look into other facts and circumstances to record finding about genuineness and validity of a registered Will?

19. Learned Sub Judge discarded Will dated 05.08.1980 with the observation that it is not proved to have been executed by Mohinder Singh. Learned first Appellate Court upheld Will dated 05.08.1980 and held the same as genuine Will executed by Mohinder Singh in favour of defendant No.1 Ujjagar Singh.

20. Before proceeding further, it will be relevant to have a look on the evidence produced by defendant No.1 Ujjagar Singh to prove the Will. Both the marginal witnesses of the Will though admitted their signatures on the Will yet did not state that Mohinder Singh had executed the Will in their presence and were declared hostile. Scribe of the Will fully supported the contention of defendant No.1 that Will dated 05.08.1980 was executed by Mohinder Singh, however, he was not knowing him personally. Sub Registrar, who had registered the Will has supported the contention of defendant No.1-Ujjagar Singh by stating that the Will was read over and explained to Mohinder Singh, who accepted it as correct and appended his signatures on it. He also stated about appending of signatures by marginal witnesses at the time of registration of the Will but gave a twist to his statement in cross-examination by stating that signatures of the executant and marginal witnesses were taken by the registration clerk and not before

21. Learned Sub Judge, Jagraon while discarding the Will, took note of the following factors:-

(i) Mohinder Singh was living with his brother Sunder Singh, who died in 1977. Age of Mohinder Singh at the time of death of his brother was 69 years. Learned trial Judge posed a question that when Mohinder Singh did not execute Will in favour of real brother how he could think to execute the Will in favour of defendant No.1, particularly when the villagers in Punjab favour agnatic succession.

(ii) Mohinder Singh executed Will in 1978 in favour of Gurudwara Sahib. After execution of the Will, he sold land vide Ex.D5 to Budh Singh with the consent of Gurudwara Committee. The reason given in Will dated 05.08.1980 (Ex.D1) that the same was executed to prevent dispute regarding inheritance was not tenable as dispute regarding inheritance had already been settled vide Will executed in favour of Gurudwara Sahib.

(iii) Death certificate of Mohinder Singh was procured under a plan to grab property of Mohinder Singh. A suggestion was given to DW2 marginal witness Balbir Singh that he gave ₹35,000/- as loan to defendant Ujjagar Singh so that he may sell the land in suit to him. It appears that defendant No.1 induced Mohinder Singh to live with him with mischievous mind but Mohinder Singh was mainly living in his village Galab Kalan.

(iv) Address of Mohinder Singh of Panj Garain was mentioned in his death certificate with ulterior motive.

(v) If Mohinder Singh had lived with defendant No.1 for few years. There was no occasion for him to execute a Will only 40 days before his death.

(vi) In the record of Gurudwara Keshgarh Sahib, date of death of Mohinder Singh was mentioned as 01.10.1980 which show that this entry was got hurriedly recorded to create evidence.

(vii) Mohinder Singh could not declare defendant No.1 to be likely heir of his estate one year before his death as he had already executed a Will in favour of Gurudwara Sahib. Moreover, that could be occasion for Mohinder Singh to execute a Will in favour of Gurudwara Sahib as he had allegedly given possession of land to defendant no.1.

(viii) Will (Ex.D1) does not express the real intention of the testator and his last testamentary deposition.

22. Learned first Appellate Court termed the reasons advanced by learned Sub Judge while discarding the Will as illogical, based on conjectures and observed in para 33 of the judgement as follows:-

“The first reason advanced was that Mohinder Singh should have made a will in favour of his brother Sunder Singh who died in the year 1977. When Mohinder Singh did not want to execute a will in favour of his brother he should (sic could) select Ujagar Singh for the execution of the will. The present will is dated 5.8.1980 and by that time Sunder Singh was no more and in these circumstances, Mohinder Singh could not execute any will in favour of Sunder Singh. In para no.26 of the judgment, the trial court was of the view that the recital of the will Ex.D.1 shows that Mohinder Singh wanted to execute the will so that any dispute may not arise after his death and there was no dispute regarding his succession because Mohinder Singh had already executed a will in favour of Gurdwara Committee. The learned counsel has forgotten best thing that the wills are scribed by the

petition writers and generally there is a recital on the part of the testator that he is executing the will so that after his death there may not be any dispute with regard to his property and this is a matter of common knowledge that the will is executed ordinarily in order to deprive a natural heir to some extent. The learned trial court stated that the death entry Ex.D.3 is a device which has been coined out by defendant No.1.

I do not agree with this reason. Death entry is a public record and the document per se is admissible u/s 35 of the Evidence Act. The trial court then held that defendant no.1 induced Mohinder Singh to live with him occasionally with a mischievous mind but in fact Mohinder Singh was residing in village Ghalib Kalan. This is not the case of the plaintiff himself who states that the deceased used to reside in Committee Gurdawara and when the deceased found fit that will not be looked after in village Ghalib Kalan, he took the assistance of the son of his maternal uncle. It has been admitted impliedly by the learned trial court that Mohinder Singh started residing with Ujagar Singh defendant no.1. The trial court also held that the entry Ex.D.1 of Gurdwara Kesgarh Sahib had been hurriedly made and the date of death has been given as 1.10.1980. I have already held that this is a clerical mistake. The reasons of the learned trial Sub Judge that if Mohinder Singh was living with defendant no.1 for the last several years, but was the special occasion for the deceased to execute the will only 40 days before his death. The execution of the will is the sole prerogative of the deceased and it is generally seen that ordinarily testators make the will few days before their deaths. Even otherwise the deceased could not comprehend that he will die after 40 days and that he will execute the will on 05.10.1980. The date of death was

never known to a person and the life of a person can abruptly come to an end at any moment. In para 30, the trial court held that Mohinder Singh handed over the will to Ujagar Singh defendant as per statement, few days before his death, but in the cross-examination this defendant, Ujagar Singh states that Mohinder Singh did not disclose to him about the will during his life time. The trial court has rejected the will on minor discrepancies here and there which always happen in the statement of the rustic witnesses.”

23. Learned first Appellate Court, on appraisal of evidence of scribe, marginal witnesses and Sub Registrar coupled with other facts and circumstances on record, observed that Will dated 05.08.1980 (Ex.D1) is duly proved as per requirements of Section 68 of Evidence Act and dismissed the suit of the plaintiff.

24. Before proceeding further, it will be relevant to take a note of certain facts which are not disputed:-

(i) Will dated 05.08.1980 (Ex.D1) bears the signatures of Mohinder Singh.

(ii) This Will also bears the signatures of marginal witnesses.

(iii) The Will was scribed by DW1 Balwant Singh, Deed-writer, who had stated that he scribed the Will at the instance of Mohinder Singh. It was read over and explained to Mohinder Singh, who signed the same in token of its correctness in the presence of marginal witnesses Balbir Singh Sarpanch and Haqiqat Singh, who also signed the Will in presence of Mohinder Singh. Balbir Singh was personally known to him and he had made entry of the execution of the Will in his register at serial No.660 dated

against the entry. He had further stated that Mohinder Singh was in sound disposing mind at the time of execution of the Will but he was not personally known to him.

(iv) Kartar Singh appellant-plaintiff was not aware even about the date of death of Mohinder Singh. This demolishes his plea that Mohinder Singh was residing with him. He had stated that he came to know about the death of Mohinder Singh about two years before his statement was recorded (his statement was recorded on 28.11.1984).

(v) Kartar Singh plaintiff was not aware as to where Mohinder Singh died. The fact of death of Mohinder Singh came to his notice when he obtained the copies of jamabandi. He had not attended immersion/last rites of Mohinder Singh.

(vi) Mohinder Singh was member of Agricultural society of village Galib Kalan, where he has appointed Ujjagar Singh, defendant No.1 as his nominee.

25. The proposition of law as discussed in the citations referred by learned counsel for the appellant are not disputed. It is a settled proposition of law that in order to prove the Will, requirements of Section 63 of Indian Succession Act are to be complied with. In case of ***Janki Narayan Bhoir Vs. Narayan Namdeo Kadam (supra)***, Hon'ble Apex Court has observed in this regard in para 8 of the judgment as follows:-

“8. To say will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e., (a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or

mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.”

26. It is not a disputed proposition of law that due execution of the Will requires attestation by two or more witnesses. Section 68 Evidence Act require that in order to prove the execution of the Will examination of at least one of marginal witnesses, if alive, is required.

27. In this case, respondent No.1 has examined the scribe of the Will, whose testimony is unshattered, both the marginal witnesses, though, they have not fully supported the case of defendant No.1 and also the Sub Registrar, who registered the Will. Learned first Appellate Court has looked into the statement of marginal witnesses, scribe and sub Registrar before reaching the conclusion in para 22 of the judgment as follows:-

“22. I have already reproduced the endorsement appearing on the back of the will Ex.D.1, which is contradictory to the stand of the Sub Registrar. The registration of a document is a solemn act and the registration adds to the authenticity of the will, although it is a settled law that the registration is not necessary for

holding a will as a valid. The sub and substance of the three witnesses is that Mohinder Singh presented the will personally, he was in sound and disposing mind, the contents of the will was read over to him, both the attesting witnesses signed on 5.8.80 and they appeared before the Sub Registrar, who read out the contents to Mohinder Singh but for some reasons best known to the witness and the Sub Registrar, they want to dispel the will but they had not been able to exert themselves in a state forward manner and they have left behind sufficient traces of their falsehood and sufficient evidence for this Court to hold that Shri Mohinder Singh did execute the will while in sound and disposing mind in favour of Ujagar Singh defendant no.1.”

28. The plaintiff has impliedly admitted execution of Will dated 05.08.1980 by Mohinder Singh in favour of defendant No.1 and has challenged the same with the plea that it is the result of fraud played upon deceased Mohinder Singh. He has taken a plea that Mohinder Singh was not in a sound disposing mind at the time of execution of alleged Will. This fact is no more in dispute that Mohinder Singh died on 15.09.1980 at village Panj Garain and the Will in question was executed and registered on 05.08.1980. He (Mohinder Singh) had executed a sale deed dated 01.07.1980 in favour of defendant No.3 which depicts his sound disposing mind on the date of execution of the Will. The plea of fraud and unsound mind of testator was not proved by appellant-plaintiff.

29. Learned first Appellate Court has taken note of the ratio of judgment in case of *Jarnail Singh Vs. Narain Singh and another AIR 1984 P&H 181; Ittoop Varghese vs Poullose And Ors. AIR 1975 Kerala*

Ors. AIR 1930 Madras 770; AIR 1976 Andhra Pradesh 370, while reaching conclusion that when the attesting witnesses are denying the attestation of the Will, the Court can look into whole circumstances of the case and come to the conclusion that requirements of Section 68 of Evidence Act were duly complied with.

30. In support of his contention that where the attesting witnesses have turned hostile, it should not stand in the way of holding that the Will was duly executed, learned counsel for the respondent has relied on following citations:-

(i) **Gurdev Singh and another Vs. Smt. Shanti an others 1989 CivCC 40 (RSA No.1471 of 1978, decided on 11.07.1988)**, where in para 9 of the judgment, it was held as follows:-

“In order to establish the validity of a will, it has no doubt to be proved that it was attested by at least two witnesses, but it must, at the same time also be observed that it is not the intention of the law that an attesting witness be permitted to hold the propounder of a will to ransom, as it were, by treating his mere denial of attestation of the will, by itself, as negation of due execution of the will. As held by the High Court of Calcutta in **Mahindra Nath Ganouli v. Durga Charan Ganouli, 1959 ILR (1) Calcutta 471**, (sic **Manindra Nath Ganguli v. Durga Charan Ganguli, ILR (1949) 1 Calcutta 471**) where the attesting witnesses or some of them prove hostile or unreliable, the Probate Court is not powerless to declare in favour of the will and if from the other evidence on record and the circumstances taken as a whole, it is in a position to hold that the will was duly executed and attested, it will pronounce in favour of its validity.”

(ii) ***Chacko Vs. Elizabeth John 1997 (1) HLR 721 (1997(1) KLT***

739); wherein it has been held in para 15 to 17 as follows:-

“15. It is now an accepted proposition that merely because an attesting witness chooses to deny attestation of the document, the propounder of the Will should be without remedy. In ***Ittoopa Varghese v. Paulose & Others 1974 KLT 873***, a Bench of this Court had occasion to consider the situation where the attesting witnesses deposed that they did not see the Testator signing that did not get a personal acknowledgement from the Testator of his signature in the Will and further that they did not sign in the presence of the Testator. This Court took the view that when the court is satisfied that witnesses deliberately and falsely denied that they attested the Will, court is entitled to look into the other circumstances and the regularity of the Will on the face of it and to come to the conclusion on the question of attestation. In ***Manindra Nath Ganguli v. Durga Charan Ganguli, ILR (1949) 1 Calcutta 471*** it was held that the probate court is not powerless to declare the favour of the Will where attesting witnesses or some of them prove hostile and unreliable, if from other evidence on record and the circumstances taken as a whole the Court is in a position to hold that the Will was duly executed and attested. In the above case, application for probate was supported by verification by one of the attesting witnesses to the Will. The signature of the Testator was proved and the attesting witness who signed the verification, admitted his signature in the Will. There were no other circumstances to show that the terms of the Will were not natural. Under these circumstances, the Court took the view that inadequacy of the evidence of the attesting witness should not stand in the way of granting probate. In coming to the above conclusion,

Calcutta High Court relied on a decision of the Court of Appeal in England and an earlier decision of its own.

16. In ***Wright v. Sanderson (1884) 9 P.D. 149***, the attesting witnesses to the codicil on the Will when examined, could not say that the Testator signed the Will and that his signature was there when they signed as witnesses. The decision of the probate Court upholding the Will was approved by the Court of Appeal. Fry L.J. observed that presumption in favour of true attestation of the Will was not rebutted by the evidence of two attesting witnesses who deposed to say that Testator did not sign the Will in their presence, but they were confused and forgetful in the witness box. In the present case also, if we closely read the evidence of PW.1, it can be seen that he was confused with regard to the signing of the Will in the Office of the scribe and signing in necessary registers and on the cover contained the Will in the Office of the Registrar. It is a case of his not properly recollecting the sequence. He had admitted that the Testator had signed the Will in the Office of the scribe. Then, he refers to the Testator signing in the registry office which, according to him, he could not see as he was standing 10 feet away from her. Under these circumstances, we are of the view that the court would be justified in looking into the entire circumstances and other evidence to consider whether the Will has to be upheld. It is also to be noted that ex-facie, the Will is properly executed. The attesting witnesses have signed after the signature of the Testator.

17. In ***Brahmadat Tewari v. Chaudan Bibi, AIR 1916 Calcutta 374***, both attesting witnesses called for giving evidence in support of execution of a Will, turned hostile. There was an elaborate discussion of the principle and various decisions on the point in this judgment. Upholding the Will, Sir Asutosh Mookerjee J. has observed as

follows :

"The principle is well settled that when the evidence of the attesting witness is vague, doubtful or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the Statute were complied with, in other words, the Court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are wilfully misleading the court and accordingly disregard their testimony and pronounce in favour of the Will".

The above dictum is seen followed in ***Mohammed Zia Ullah Khan v. Rafiq Mohammed Khan and Ors. AIR 1939 Oudh 213***. In this case, both attesting witnesses deposed that neither the Testator signed the Will in their presence, nor did they sign in the presence of the Testator. The court took the view that the attesting witnesses were not speaking the truth. Taking into consideration other circumstances and evidence in the case, the Will was upheld."

(iii) In ***Lila Dhar Vs. Smt. Badho 1993 PLJ 801***, it was held in para 17 of the judgment as follows:-

"17. In order to establish the validity of a Will, it has no doubt to be proved that it was attested by at least two witnesses, but it must, at the same time also be observed that it is not the intention of the law that an attesting witness be permitted to hold the propounder of a Will to ransom, as it were, by treating his mere denial of attestation of the Will, by itself, as negation of due execution of the Will. Where the attesting witness or some

of them prove hostile or unreliable, the Court is not powerless to declare in favour of the Will and if from the other evidence on record and the circumstances taken as a whole, it is in a position to hold the Will was duly executed and attested, it will pronounce in favour of its validity. If any judgment is required on the point, a reference can be had to ***Gurdev Singh and another v. Smt. Shanti and others, 1988, S.L.J. 885.***”

(iv) In ***Saroja and others Vs. Chennimalai and others 2003(4) CTC 330***, a Division Bench of Hon'ble Madras High Court, observed in somewhat similar facts and circumstances observed in para 15 of the judgment as follows:-

“15. As far as the attesting witnesses are concerned, one Kumarappa Gounder (D.W.2) has not supported the case of the defendants. Though he admitted his signature in the will, his evidence was that the first defendant Chennimalai asked for his signature as witness on behalf of the first defendant. He also stated, 'it is incorrect to state that Muthusami Pillai executed the will and affixed his signature before us and we have affixed our signatures in that'. He also stated that he did not know that Muthusami Pillai affixed his left thumb impression in each and every page of the will. In other words, his evidence is that he has not attested the will. The other witness, Thulasimani (D.W.3) has turned hostile and he has stated that he has not attested the will. As against the evidence of two attesting witnesses, the defendants rely upon the evidence of the scribe, Nagaraj (D.W.5). He has stated that Muthusami Pillai affixed his thumb impression in the will in the presence of attesting witnesses and then, the attesting witnesses signed the will which was seen by Muthusami Pillai also. The other witness in support of the

attestation of the will is the first defendant, Chennimalai (D.W.6). He has stated in his evidence that his grandfather affixed his thumb impression in the will which was seen by both the attesting witnesses and the will was also signed by the attesting witnesses in the presence of his grandfather who saw them attesting the document and after that, the scribe put his signature. In other words, there is conflicting evidence on this point between the attesting witnesses on one hand and the scribe and D.W.6 on the other hand. But, there is one neutral evidence, namely, the evidence of D.W.4. He is the Joint Sub-Registrar of Assurance, Erode and he has, in his evidence, deposed that both the attesting witnesses have identified Muthusami Pillai and signed on the backside of the first page of the will as identifying witnesses when the will was presented for registration. In his evidence in two places he has stated that Muthusami Pillai has admitted that the will was executed by him and then, he has affixed his thumb impression when the will was presented to him for registration of the will. He has also stated that he has put a specific question to him (Muthusami Pillai) whether it was the will of Muthusami Pillai for which Muthusami Pillai gave an affirmative answer. He has also stated that the will was read over to him and only after he gave the affirmative answer that it was his will, his thumb impression was obtained for the purpose of registration of the will. It is also relevant to mention here that Kumarappa Gounder and Thulasimani have admitted their signatures found in the will both as attesting witnesses and identifying witnesses in the will.”

31. From the above observations by various High Courts, it is apparent that the courts are not powerless to hold the Will as duly proved in

spite of the fact that attesting witnesses, for the certain reasons, have turned

hostile against the propounder. In this case, the reasons for the marginal witnesses turning hostile are quite apparent. Both the marginal witnesses belong to village Galib Kalan i.e. village of plaintiff and not to the village of defendant No.1. Learned first Appellate Court has rightly observed that in case defendant No.1 had to fabricate the will, he would not have taken assistance of co-villagers of plaintiff, rather may have chosen witnesses of his confidence. It was also proved on record that defendant No.1 has refused to sell the property in dispute to Balbir Singh in spite of the fact that he had advanced him a loan of ₹35,000/-. While appearing as DW2, Balbir Singh admitted his signature on the Will Ex.D1 but he stated that he signed the same on the asking of Deed-writer Balwant Singh. He stated that Mohinder Singh was of his village and personally known to him. He also admitted his signatures on the endorsement made at the time of registration of the Will but denied that he appeared before the Sub-Registrar. He stated that Mohinder Singh used to live with Kartar Singh plaintiff and Kartar Singh was in possession of the suit land. Haqiqat Rai another marginal witness also made statement on the similar lines. Both are educated persons and appeared to be over-enthusiastic to endorse and advance the claim of plaintiff. Their eagerness to advance the claim of plaintiff is evident from the fact that plaintiff has denied that Mohinder Singh was living with him or died at his residence but these witnesses have tried to make out that Mohinder Singh lived with plaintiff and was being served by him. This shows that they have got reasons to depose in favour of plaintiff. However, their signatures on the Will are duly proved. Balwant Singh scribe of the Will has categorically stated that both the marginal witnesses have signed

the Will in presence of Mohinder Singh, who had signed it in presence of marginal witnesses after accepting its contents as correct. No suggestion was given to Balwant Singh that marginal witnesses have signed the Will at his instance or that he had any reason to fabricate the Will or to depose falsely. Though he was not knowing Mohinder Singh personally but he was knowing Balbir Singh, the marginal witness, who is resident of village of Mohinder Singh, as such, there could not be any dispute regarding identity of Mohinder Singh, who executed the Will. Bachan Singh, Naib Tehsildar has stated that Will Ex.D1 was produced before him by Mohinder Singh, for registration. He read over the same to Mohinder Singh, who on hearing and admitting the same as correct, put his thumb impression. Marginal witness Balbir Singh was known to him. He had signed endorsement Ex.D1/H. He has stated that the Registration Clerk has his office at about 100/125 yards away from his office, who filled up the endorsement and obtained the signatures of executant of a document and the witnesses. At the time of signatures of marginal witnesses and Mohinder Singh, he was not present in the office of Registration Clerk. This witness has, however, admitted that during his service tenure and prior to this case, he had not made any such statement. This also reflect that plaintiff appellant had prevailed on this witness and after winning over marginal witnesses, made this witness to depose in his favour. Bachan Singh also took the liberty to make such maiden statement, as by the time, he appeared to depose, he had retired from service and could take liberty to depose in favour of plaintiff in order to shatter the claim of propounder of Will by twisting his (Bachan Singh's) statement.

32. Here I recollect a well-known Latin maxim '*omnia proesumuntur legitime esse facta*' (all things are presumed to have been done according to law) and '*omnia proesumuntur rite esse acta*' (all things are presumed to have been done rightly). The Will of Mohinder Singh was presented before Sub Registrar Bachan Singh and while appearing as DW4, Bachan Singh had stated:-

- (i) Will Ex.D1 was produced before me for registration by Mohinder Singh;
- (ii) I read over the Will to Mohinder Singh, who after hearing and understanding the same, admitted it as correct and then signed the same;
- (iii) Balbir Singh, marginal witness was personally known to me;
- (iv) Mohinder Singh was in sound disposing mind at that time;
- (v) Endorsement (Ex.D1/H) bears my signatures.

33. He categorically stated that during that period, he remained in service, he never stated while appearing as witness in any case that the endorsement for registration of the document was not made in his presence.

34. In view of my above discussion, it is evident that plaintiff has not only prevailed upon the marginal witnesses of the Will but also the Sub Registrar. In case ***Mohammad Ziaullah Khan V. Rafiq Mohamad Khan***, ***AIR 1939 Oudh 213 at page 222***, a Division Bench in somewhat similar circumstances held as follows:-

“We are of opinion however that the attesting witnesses are not speaking the truth when they deny that they and the Raja signed the will in each other's presence. In ***Brahmandar Tewari V. Chanan Bibi (1916) 3 AIR Cal 374*** (20 C.W.N. 192), their Lordships of the Judicial Committee said:-

The principle is well settled that when the evidence of the attesting witnesses is vague, doubtful, or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with, in other words, the Court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are wilfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the will; and further;

Every presumption will be made in favour of due execution and attestation in the case of a will, regular on the face of it and apparently on the face of it duly executed.”

35. Will Ex.D1 is a registered Will, which contain no unnatural deposition. Plaintiff is a remote collateral of Mohinder Singh, who died unmarried and issueless. Vide Will Ex.D1, he had not only bequeathed his entire estate to defendant No.1 but has also cancelled earlier Will executed by him in favour of Gurudwara Sahib. It is specifically mentioned in the Will Ex.D1 that defendant No.1 is the son of his maternal uncle and is serving him in his old age. For the love and affection and having a sense of gratitude towards defendant No.1, Mohinder Singh executed the Will of his entire estate in his favour. This Will was acted upon by defendant No.1 when he contested the suit filed by one Gurbachan Singh, who laid claim over the estate of Sunder Singh, brother of Mohinder Singh. In that suit, Ujjagar Singh was impleaded as legal heir of Mohinder Singh and plaintiff never put forth his claim to defend that suit as legal heir of Mohinder Singh.

Mutation of the estate of Mohinder Singh was also sanctioned in favour of defendant No.1 in due course. The plea taken by the appellant-plaintiff that Will Ex.D1 is the result of fraud, is not proved on file.

36. Another aspect, which goes against the appellant-plaintiff in this case is that even if Will dated 05.08.1980 (Ex.D1) is proved to be not a valid and genuine Will of Mohinder Singh, still the appellant-plaintiff cannot assert his claim over the suit property, as admittedly Mohinder Singh had earlier executed a Will in favour of Gurudwara Sahib on 30.05.1978. That Will in favour of Gurudwara Sahib has not been challenged by the plaintiff and in the event of Will dated 05.08.1980 being declared as not legal and valid, that Will remains a genuine and valid Will executed by Mohinder Singh and his estate will revert to Gurudwara Sahib and not to plaintiff. However, in view of the proof of registered Will dated 05.08.1980 in favour of respondent-defendant No.1, Will dated 30.05.1978 stood revoked.

37. Learned first Appellate Court has dealt with all the pleas raised by the appellant-plaintiff before reaching the conclusion that Will Ex.D1 is a valid and genuine Will executed by Mohinder Singh and its execution is duly proved on file.

38. Learned counsel for the appellant-plaintiff could not make out from any evidence on record to show that any of the observations made by learned first Appellate Court are based on misreading of facts or any evidence on record has been missed or over-looked. The first Appellate Court has rightly set aside the reasons recorded by learned Sub Judge First Class while discarding Will Ex.D1 of Mohinder Singh, as the same were

misconceived, superfluous and presumptive.

39. On perusal of the record and judgment of the first Appellate Court, I find no legal or factual infirmity therein calling for any interference.

40. Both substantial question of law as mentioned in para 18 above, are answered against the appellant and in favour of respondent No.1. This appeal has no merits.

Dismissed.

July 13, 2016.
Sachin M.

(SURINDER GUPTA)
JUDGE

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Whether to be referred to Reporters: Yes/No