

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

RSA No.1151 of 1998

Date of Decision: 02.06.2016

Japan and another

.....Appellants

Vs

B.K. Sharma and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Sanjiv Gupta, Advocate
for the appellants.

Mr. Vikram Singh, Advocate
for respondents No.1 to 10.

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

RAJ MOHAN SINGH, J.

[1]. Defendants are in regular second appeal against the judgment and decree dated 18.04.1998 passed by Additional District Judge-I, Jind vide which judgment and decree dated 19.05.1993 passed by Addl. Senior Sub Judge, Safidon was set aside and suit of the plaintiffs was decreed in appeal and a decree of declaration was ordered to the effect that after the death of Kura Ram, his legal representatives namely Hardei, Gangadei (daughters) and Phemo Devi (widow) became owners

in possession in equal shares of the land in dispute. Plaintiffs were held entitled to get the land mutated in their names and defendants were restrained from interfering in their ownership and possession over the land in question.

[2]. Plaintiffs filed suit for declaration to the effect that they were owners in possession of their respective share in the suit land as depicted in the plaint. They alleged that Kura Ram was the father of plaintiffs No.1 and 2 and husband of Smt. Phemo Devi- proforma defendant who died during pendency of the suit. Kura Ram died on 17.11.1985. Only the daughters remained in the fray as legal heirs of Kura Ram, who succeeded the estate left by deceased Kura Ram and Phemo Devi. Kura Ram was the owner in possession of the suit land as described in the head note of the plaint. After the death of Kura Ram, plaintiffs and Phemo Devi became owners in possession in equal shares. With this background, the suit came to be filed.

[3]. Defendants contested the suit by raising number of objections regarding maintainability of the suit. They asserted that Kura Ram had adopted defendant No.1 vide registered adoption deed No. 76 dated 06.03.1984 and he also executed a registered Will No. 44 dated 16.02.1982 in favour of defendants No.1 and 2. These two registered documents were not challenged by the plaintiffs, therefore, they were estopped from

their own act and conduct to file the suit. The suit was claimed to be bad for mis-joinder of necessary parties. Defendants admitted the relationship of the plaintiffs with deceased Kura Ram and Phemo Devi. Date of death of Kura Ram was also admitted. Phemo Devi died during pendency of the suit. Ownership of the plaintiffs was denied altogether on account of adoption and Will in favour of the defendants. Defendants asserted that necessary ceremonies of adoption were solemnized. *Hawan* with “give and take ceremonies” were done on 05.02.1984 and a *bahi* entry was reduced into writing and finally an adoption deed was executed and the same was got registered by the deceased Kura Ram with the Sub Registrar on 06.03.1984. The document was thumb marked by the natural father Puran Dutt and Smt. Shanti Devi natural mother of the defendant No.1. The adoptive father Kura Ram and Phemo Devi adoptive mother of defendant No.1 also thumb marked the adoption deed. Earlier to adoption deed, deceased Kura Ram had executed his last Will on 16.02.1982. On the strength of these two documents, defendants asserted their right *qua* the suit land.

[4]. On completion of pleadings, both the parties went to trial on the following issues:-

“1. Whether the plaintiffs and the proforma

defendant no.3 are in possession of the suit property as alleged? OPP.

2. *Whether the suit is not maintainable in the present form? OPD.*
3. *Whether the defendant No.1 Jaipan was adopted by deceased Kura Ram as alleged? OPD.*
4. *Whether the deceased Kura Ram executed any valid will in favour of the defendants no.1 and 2 as alleged? OPD.*
5. *Whether the suit is bad for mis-joinder of necessary parties? OPD.*
6. *Whether the plaintiffs are estopped from filing the present suit by their own act and conduct? OPD.*
7. *Whether the suit is not properly valued for the purposes of court fee and jurisdiction? OPD.*
8. *Relief.”*

[5]. After the amendment of the pleadings, additional issue No.7-A was also framed to the following effect:-

“7-A. What is the effect of death of Smt. Phemo widow of Kura Ram deceased on the rights of the parties? OP Parties”.

[6]. Both the parties led their respective evidence to prove their case.

[7]. After appraisal of the evidence, trial Court dismissed the suit vide judgment and decree dated 19.05.1993. However, the lower Appellate Court reversed the same vide judgment and decree dated 18.04.1998.

[8]. According to the appellants, following substantial questions of law are involved in the appeal:-

- “(a). Whether there exist mis-reading, mis-construing and mis-interpretation of pleadings and evidence by the learned lower appellate court?
- (b). Whether once the appellant was able to establish the Will by way of cogent evidence by compliance of Section 63 of the Indian Succession Act and 65 of the Evidence Act, the Will is validly proved?
- (c). Whether the testimony of DW-3 adoption mother and DW-8 maternal uncle of plaintiffs clearly proves the case of the appellant?
- (d). Whether once the plaintiff did not appear in the witness box and no GPA was tendered for production of Sh. Bhagat Ram husband of plaintiff no.2, his testimony can be considered and adverse inference is required to be drawn against the plaintiffs in view of law in Janki Vashdev Bhojwani Vs. Indusind Bank Limited 2005(1) RCR (Civil) page 240?

- (e). Whether the adoption once registered, presumption is attached under Section 16 of the Hindu Adoption and Maintenance Act?
- (f). Whether once adoption is established and proved by cogent evidence, adoption is also established on record?

[9]. Having considered the controversy, this Court found that following substantial questions of law arise for consideration:-

1. Whether the registered adoption deed recording factum of adoption made and signed by the person giving and the person taking the child in adoption, shall presume that the adoption has been made in compliance with the provisions of the Act?
2. Whether the presumption is attached to the registered documents in the absence of any rebuttal made thereto by the defendants?
3. Whether the fraud alleged by the defendants is required to be pleaded and proved by them like a criminal charge of fraud?

[10]. I have heard learned counsel for both the sides and have also carefully perused the record.

[11]. Learned counsel for the appellants argued that defendant No.1 is the grand nephew of Kura Ram. Mutation was

lawfully sanctioned after the death of Kura Ram and the factum of adoption and Will had already been given effect. Plaintiffs alleged fraud in the replication only in respect of Will and adoption. Particulars of fraud were not pleaded and proved by the plaintiffs. Only PW-1 (husband of plaintiff No.2) was examined. No other evidence in respect of fraud adduced by the plaintiffs.

[12]. Learned counsel for the appellants submitted that Kura Ram was medically examined on 06.03.1984 by Dr. R.K. Saini, Medical Officer, Civil Hospital, Karnal and medical certificate Ex.D1 was issued to the effect that he was not suffering from any ailment and was found fit to make the statement.

[13]. Learned counsel for the respondents vehemently argued that the Will as well as the adoption deed were found to be executed in suspicious circumstances. The heirs were disinherited without any rhyme or reason. The propounder of the Will was required to prove the execution of valid Will beyond suspicion. The Will was executed on 12.02.1982 and it was allegedly thumb marked by Kura Ram. It was done in the presence of witnesses namely Suraj Bhan DW-5 and Vijay Ram DW-7. The Will was scribed by Vinod Kumar and it was allegedly explained to the testator. The attesting witnesses DW-5 and DW-7 allegedly had signed the document on the

same day. Learned counsel further argued that this aspect was not supported by the Will itself because at the last page of Will at Mark-A, one of the attesting witness Vijay Ram had written the date as 16.02.1982 under his signature. The witness had not explained as to how the said date had appeared. The witness stated that he had written the date on the date of registration of document which was done on 16.02.1982 before the Sub Registrar. Scribe DW-2 Vinod Kumar had also admitted that both the witnesses were present at the time of execution of Will and the same was signed by them. The signature of Vijay Ram were made on 16.02.1982 and not on 12.02.1982. Their names were not written by DW-2 scribe with his own handwriting. DW-2 simply mentioned the word *gawah* and did not mention the names of the witnesses. According to the learned counsel for the respondents, both the witnesses were not present and their signatures were obtained at a later stage.

[14]. Learned counsel for the respondents further argued that none of the witness of the Will deposed that he had signed the Will at a later stage. In view of Section 68 of the Indian Evidence Act, the document was required by law to be attested by two or more witnesses and each of them should have seen the testator signing or affixing thumb impression on the document. If the testator had not signed in the presence of the

attesting witnesses then the attesting witnesses should have received from the testator a personal acknowledgment of his signature and then each of the witness should have signed the Will in the presence of the testator. Such a requirement was not done by the defendants. DW-5 Suraj Bhan and DW-7 Vijay Ram, *Lambardar* made their signatures before Sub Registrar DW-12 on 16.02.1982 at the time of registration of the Will as the identifier of the testator Kura Ram. In this way, they could not be treated as attesting witnesses of the Will.

[15]. I have considered the submissions made on either side.

[16]. Deed writer was examined as DW2 who deposed that on the instructions of Kura Ram, he executed the adoption deed Ex.D-3 which was read over to him and he after admitting the same to be correct, thumb marked the same in the presence of the scribe. The witness further asserted that Kura Ram was personally known to him. Phemo Devi proforma defendant, the adoptive mother of defendant No.1 and natural mother of plaintiffs also deposed as DW3 that defendant No.1 was taken in adoption by deceased Kura Ram and herself after giving and taking ceremonies which took place in the village. Natural parents of defendant No.1 gave him in adoption to Kura Ram deceased and Phemo Devi DW3 and since then, he was residing with them as their son.

[17]. Adoption was made before the village community and some photographs were also taken. Sweets were distributed in the village and songs were sung. Pandit Dhanna Ram was examined as DW-4 who stated that deceased Kura Ram was distantly related to him and he showed his willingness for adoption. Deceased Kura Ram used to love Japan-defendant No.1 and ceremonies of adoption took place in his presence. Puran Dutt natural father and Smt. Shanti Devi natural mother of Japan gave him in adoption to Kura Ram deceased and his wife Phemo Devi. Hawan was performed by Pandit Kali Ram and the adoption ceremonies were performed in the presence of relatives and village community. Bahi writing (Ex.D-4) was also executed as per instructions of Kura Ram which was thumb marked and signed by Kura Ram and others present at the time of adoption ceremonies.

[18]. Attesting witness Banwari, Lambardar of the adoption deed also appeared as DW-6 and deposed in favour of adoption deed. The same was read over to Kura Ram and he after admitting the same to be correct put his thumb impression. Vijay Ram, Lambardar had also been examined as DW-7 who was second attesting witness of the adoption deed Ex.D-3. He also supported the version given by DW-6 Banwari. Dev Dutt Sharma, Advocate also appeared as DW-8 and supported the

adoption deed with reference to ceremonies. Pandit Kali Ram was examined as DW-9 who also deposed that adoption of defendant No.1 was done and he performed the poojan ceremonies and *Havan* was also performed by him. Ved Parkash, photographer was examined as DW-10 who also proved the photographs Ex.D-4 to Ex.D-15 and negatives Ex.D-16 to Ex.D-28. Puran Dutt father of defendant No.1 was examined as DW-11 who deposed in respect of the adoption of his son Japan by Kura Ram and his wife Phemo Devi.

[19]. On the basis of evidence, trial Court held that execution of adoption deed was duly proved and onus was successfully discharged by the defendants in respect of this registered document. Issue No.3 was concluded in favour of the defendants. Onus to prove issue No.4 of the Will was also on the defendants. Dhajja Ram DW-4 deposed on oath that Kura Ram told him at the time of adoption ceremony that he also executed a Will in favour of Japan defendant No.1 about 2-2½ years ago. Suraj Bhan attesting witness of Will was examined as DW-5 who had deposed that Kura Ram was personally known to him. He executed a registered Will Ex.D-2 which was scribed by Vijay Kumar deed writer and the same was read over to Kura Ram, who after admitting the same to be correct signed in the presence of attesting witnesses and the attesting

witnesses also signed the Will in the presence of Kura Ram. Vijay Ram, *Lambardar* attesting witness of the Will Ex.D-2 was examined as DW-7 who had also corroborated the statement of Suraj Bhan. Deed writer Vinod Kumar was examined as DW-2 who had stated that he had scribed the registered Will and the same was read over to Kura Ram deceased who signed the Will in his presence and in the presence of witnesses.

[20]. Similarly, DW-8 Dev Dutt Sharma, Advocate also stated that deceased Kura Ram was his uncle (parental aunt's husband) and told him that he had executed a Will in favour of defendants. Narinder Singh, DRO also appeared as DW-12 and his testimony was to the effect that in the month of August, 1982, he was posted as Sub Registrar, Safidon and the Will Ex.D-2 was presented before him for registration. His endorsement on the Will was Ex.D-2/A. The witness further deposed that Will was read over to Kura Ram who after admitting the same to be correct, signed the same in his presence and in the presence of Vijay Ram and Suraj Bhan attesting witnesses and certificates Ex.D-2/C and Ex.D-2/D were given.

[21]. The plaintiffs in rebuttal examined Bhagat Ram as PW-1 who deposed that deceased Kura Ram never executed any Will in favour of anyone. Except the statement of Bhagat

Ram PW-1, nothing was adduced by the plaintiffs that Kura Ram never executed any Will in favour of the defendants. The case pleaded in the replication was that the deceased Kura Ram never executed any Will and the same was obtained by fraud, mis-representation and undue influence. The particulars of fraud were not pleaded, nor any evidence was adduced by the parties.

[22]. The evidence led by the defendants on the factum of adoption gave irresistible conclusion in the absence of any evidence by the plaintiffs. There was a valid adoption made by deceased Kura Ram and presumption was attached to such document which recorded the adoption made and signed by the persons giving and taking the child in adoption. The Court has to presume valid adoption in terms of Section 16 of the Hindu Adoption and Maintenance Act, 1956.

[23]. The expressions '*onus probandi*' and '*animo attestandi*' are the basic features in testamentary depositions. '*Onus probandi*' lies in every case upon the party propounding a Will, whereas '*animo attestandi*' means and implies *animus* to attest. In common parlance, it means intent to attest. The attesting witness must subscribe with the intent that the subscription of the signature made stands by way of a complete attestation of a testamentary deposition and the evidence is admissible to show

whether such was the intention or not? The persons who had identified the testator at the time of registration of testamentary deposition and appended their signatures at the foot of the endorsement by the Sub Registrar, were not attesting witnesses as their signatures were not put '*animo attestandi*'. A person who had put his name under the word scribe was not an attesting witness as he had put his signature only for the purpose of authenticating that he was a scribe.

[24]. Similarly legatee who had put his signature on the Will in token of his consent to its execution was not attesting witness. The word attested occurs as part of the definition itself. To attest is to bear witness to a fact. The essential conditions of valid attestation are that (i) two or more witnesses have seen the executant signed the instrument or have received from him a personal acknowledgment of his signature and (ii) with a view to attest or to bear witness to this fact each of them has signed the instrument in presence of the executant. It is essential that the witness should have put his signature '*animus attestandi*' i.e., for the purpose of attesting that he has seen the executant signing or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for any other purpose i.e. to certify that he is a scribe or an identifier or a registering officer, he cannot be treated to be an attesting

witness.

[25]. The reference can be made to the aforesaid proposition in the light of observations made by the Hon'ble Apex Court in **N. Kamalam (dead) and another vs. Ayyaswamy and another, AIR 2001 Supreme Court 2802.**

[26]. It is a settled principle of law that the propounder has to prove the execution of valid Will. Any lapse on the part of the propounder would render the Will to be shrouded with suspicious circumstance. The Will in question was executed on 12.02.1982 according to the case of the defendants. Will was thumb marked by Kura Ram after understanding the contents in the presence of witnesses namely Suraj Bhan DW-5 and Vijay Ram DW-7. According to the defendants, the Will was scribed by Vinod Kumar and it was read over and explained to the testator and witnesses on 12.02.1982. The attesting witnesses had signed the document on the same day.

[27]. Perusal of the document shows that Vijay Ram attesting witness had signed the document on 16.02.1982 i.e. the date on which the document was registered. In view of the position as explained in the preceding paras, "*onus probandi*" was upon the party propounding the Will. "*Animo attestandi*" was in the form of *animus* to attest i.e. intent to attest. The

attesting witness should subscribe with the intent that the subscription of the signature made by him stands by way of complete attestation of the Will and the evidence will be admissible to show whether such was the intention or not. A person who had identified the testator at the time of registration of Will and appended his signature/thumb impression cannot be treated to be the attesting witness of the deposition as his signature was not placed *animo attestandi*. In view of aforesaid, the signature of Vijay Ram appearing on the Will cannot be taken to be in the capacity of attesting witness in view of the fact that those signatures were made on 16.02.1982 i.e. the date of registration of Will. Perusal of Will shows that Will was not signed by one of the attesting witness on the date of execution of the Will i.e. 12.02.1982. Though disinheritance of daughters alone was not a ground to disbelieve the Will, but coupled with other facts and circumstances, this could have been a ground to entertain a strong suspicion in the alleged execution of Will.

[28]. A legal flow based on terminologies of “*animus attestandi*” and “*onus probandi*”, anomaly with regard to date appearing at the foot of signature of one of alleged attesting witness of the Will and added inference with regard to non-inclusion of daughters in the Will would make the Will suspicious.

[29]. In addition to above circumstances, it may also be noticed that the statements of the DW-2 Vinod Kumar, DW-5 Suraj Bhan, DW-7 Vijay Ram Nambardar and DW-12 Narinder Singh Sub-Registrar were *inter se* contradictory. DW-2 Vinod Kumar the scribe of the document did not mention the names of the attesting witnesses in his own handwriting. The presence of attesting witnesses became doubtful at the time of execution of Will. Similarly DW-7 Vijay Ram put date of 16.02.1982 under his signature, but he claimed to have put his signature at the time of execution of the Will i.e. 12.02.1982. The witness also avoided reply to material questions put to him. This circumstance in addition was also relevant to find that the Will was not free from suspicious circumstances.

[30]. None of the attesting witnesses had stated the name of the person in whose favour Will was executed. Moreover none of the witnesses was from the village of the testator Kura Ram, who was well connected person and that fact itself can be appreciated from the depositions of DW-3 Phemo Devi, DW-7 Vijay Ram, DW-8 Dev Dutt Sharma, and DW-11 Puran Dutt. Testator was frequent visitor of the city and was in local contact with the Advocates, Doctors and Sarpanch. The factum of his getting medically examined by the Doctor before execution of documents was also suggestive of the fact that he was extra

careful. In view of aforesaid, the omissions in execution of Will could not be over looked easily. Had the testator been desirous to execute, he would have taken extra care in getting the documents executed as he was very much conscious of seeing the transaction to be cleared. The father of the minor defendant i.e. DW-11 Puran Dutt was present at the time of execution of Will. The fact could be gathered from the Ex.P-3 the statement of DW-5 Suraj Bhan which was made before the Sub-Divisional Magistrate, Safidon in some other proceedings.

[31]. The contradictions in the evidence of the defendants about the age of Kura Ram was also one of the factor to demolish the presumption attached to the Will. Ex.D-2, if read in conjunction with Ex.D-3 and statement of DW-11 that made the age of Kura Ram to be on fluctuating note and the same could not have been ignored. The beneficiaries of the Will were the grandsons of real brother of the testator on the ground that they were serving the testator. At the time of execution of Will the age of the beneficiaries was below 13 years and they were not residing with the testator, rather they were residing with the parents. This fact was admitted by DWs. Question of rendering service to the testator became a far-fetched story. No evidence was brought on record to show that Kura Ram was served by the beneficiaries of the Will. Kura Ram was served by his wife

Phemo Devi and none else. There was no reason with the Kura Ram to execute the Will in favour of the defendants because they never served him. It was not the case of the defendants that Kura Ram chose Japan and Vinod Kumar as his successors by excluding his heirs and other collaterals.

[32]. Kura Ram had executed Will on 12.02.1982 and then in the year 1984, he executed the adoption deed. Japan was not living with Kura Ram prior to the year 1984. There was no occasion for Kura Ram to show love and affection towards Japan being not with him, nor there was question of any exceptional love and affection towards Puran Dutt. i.e. father of Japan and Vinod Kumar or even to the mother of these two beneficiaries of the Will. No reason came forth as to why Kura Ram had excluded his heirs, heirs of other two brothers and favoured the grandsons of only one brother. Kura Ram was having three brothers, who lived with him and had joint cultivation of land. The other collaterals of Kura Ram had not come forward to challenge the Will because they knew that in case the Will was set aside, property would devolve upon his daughters and not to them. From this angle also the Will stood rendered doubtful. The reason for not giving property to his daughters was stated to be that they were already married and necessary *Bhat* and other ceremonies had already been

performed. If this fact is clinically examined in the light of statement of DW-3, it was found that Narinder Singh son of Hardei was married after the death of Kura Ram, who was having good relations with his daughters and he loved them also.

[33]. Though the disinheritance of the family members could not be a sole ground to presume that the Will was shrouded with suspicious circumstances, but if that factor is read in conjunction with other grounds, that may create some sanctity in over all assessment of the Will, whether shrouded with suspicious circumstance of which such an event was one of the component. Widow of Kura Ram had admitted in her cross-examination that she was being consulted by Kura Ram in all important decisions of the family, but while executing the Will, she was not consulted. She had good relations with Kura Ram till his death. This factor was also one of the circumstance which added fuel to other circumstances in making the Will to be suspicious. There was no reason with Kura Ram to exclude Phemo Devi from the property. The clause even if, mentioned in the Will in respect of Rs.2,000/-per month be paid to the lady will not prove the will to be genuine, rather it will show that all possible pleas were sought to be cordoned by the alleged testator.

[34]. Perusal of Ex.D-3 would show that there was conclusive averment that Japan would own all the moveable and immoveable property of Kura Ram. If, Kura Ram executed will Ex.D-2 in the year 1982, he would have got the same cancelled after the adoption of Japan as his son because in view of the Will only half property was to be given to Japan and the remaining half would be given to Vinod Kumar. This arrangement could not appeal to reason and common sense that the adoptive father would act *mala fidely* from beginning towards his adoptive son.

For all these reasons this Court does not subscribe due execution of Will, rather the same is proved to be shrouded with suspicious circumstances.

[35]. Since execution of adoption deed has been proved with reference to the evidence of the parties, therefore, reversal of issue of Will would have over all effect of inheritance by the heirs of Kura Ram. If Will is ruled out of consideration, the plaintiffs as well as adopted son would step into shoes of Kura Ram in terms of their respective inheritance.

[36]. Learned counsel for the appellants relied upon **Abhimanu and another vs. Hoshiyar Singh and others, 2014 (5) RCR (Civil) 809** and **Hari Singh vs. Gurcharan Singh and**

others, 2003 (3) RCR (Civil) 632 on the plea of fraud that the same has to be pleaded and proved beyond reasonable doubt like a criminal case. Since the fraud vitiates all solemn act, therefore the party found to be fraudulent can be thrown at any stage of litigation. Since the adoption has been proved, therefore on that premise, I am of the view that the findings recorded by the lower Appellate Court in decreeing the suit of the plaintiffs in *toto* are not sustainable. The evidence led on the authenticity of Will has been found to be just short of legal requirement. Since the propounder of Will could not remove the doubt regarding due execution of Will, therefore, even if the instances of fraud not pleaded, could be gathered from the circumstances which had appeared in the testimonies of witnesses of Will.

[37]. With regard to substantial question No.1 as formulated it is answered that registered adoption deed having recital of adoption and the adoption made by the parties by signing the documents and after giving and taking process of the child in adoption, carries the presumption of law in terms of its execution and there was no rebuttal to the aforesaid adoption deed. Question Nos.2 & 3 have to be answered in the manner that though the documents were registered, but so far as Will is considered, the same is found to be lacking on legal

parameters. Even if, pleadings of fraud were not made in the plaint, but replication is also part of pleadings. That apart, the evidence of the beneficiaries of Will itself is sufficient to discard the Will.

[38]. With the acceptance of adoption deed and rejection of Will, the impugned judgment and decree passed by the lower Appellate Court is accordingly modified, leaving the parties to assert their respective claim on the basis of succession to the property of Kura Ram in accordance with law.

[39]. With the aforesaid findings, this appeal is partly accepted and disposed of accordingly, leaving the parties to bear their own costs.

June 02, 2016

Atik

**(RAJ MOHAN SINGH)
JUDGE**