

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

RSA No. 2229 of 2016 (O&M)

Date of decision: 01.12.2016

Subhash Chander

...Appellant

vs.

Pawan Kumar and others

....Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. R.S. Bajaj, Advocate,
for the appellant.

AMOL RATTAN SINGH, J.

This is the second appeal of the plaintiff who instituted a suit seeking a decree of declaration to the effect that he and defendants no. 6, 7 and 8, who are his brothers, are co-sharers in land measuring 37 kanals 13 marlas, situated in the revenue estate of village Paniar, Had Bast No. 313, Tehsil and District Gurdaspur, to the extent therein, of the share of their late father, Charan Dass. The detailed description of the land was also given in the suit, as can be seen from the judgment of the learned Additional Civil Judge (Senior Division), Gurdaspur.

He also sought a consequential relief of permanent injunction, restraining defendants no. 1 to 3 from alienating any particular khasra numbers of the suit land.

2. The facts, as taken from the judgments of the learned courts below, are that as per the plaintiff, the suit land was originally owned by Munshi Ram, son of Bhari Ram, who died leaving behind four sons, i.e.

Dharam Chand, Charan Dass, Gopal Dass and Sham Lal. Charan Dass was the father of the plaintiff and respondents-defendants no. 6 to 8 (hereinafter referred to as defendants no. 6 to 8), whereas Dharam Chand is seen to be the father of respondents-defendants no. 1 to 3 (hereinafter referred to as defendants no. 1 to 3).

It was further contended that defendants no. 1 to 3 were threatening to alienate particular khasra numbers out of the suit land, despite requests not to do so, made by the plaintiff and his brothers.

Consequently, the suit was instituted on 18.01.2008.

3. Upon notice issued to them, defendants no. 1 to 3 filed a written statement taking preliminary objections with regard to the suit being time barred and the plaintiff having not right or interest in the suit land. The usual preliminary objections with regard to no cause of action and mis-joinder/non-joinder of necessary parties were also taken.

On merits, it was contended that neither the plaintiff nor his brothers, i.e. defendants no. 6 to 8, had stepped into the shoes of Charan Dass and in fact their mother had inherited the property up-to a 2/29th share, as per a valid registered will executed by Munshi Ram (grand-father of the parties), on 22.08.1988. Another 4/29th share was also stated to have been given by Munshi Ram, vide the aforesaid will, to his other sons, Gopal Dass and Sham Lal. A 2/29th share was given to defendant no. 3-Paras Ram and yet another 2/29th share was given to the father of defendants no. 1 to 3, Dharam Chand.

It was further contended that the mutation in this regard has also been entered in favour of the beneficiaries, as per the registered will.

Thus, with the aforesaid averments, denying all other averments in the plaint, it was prayed that the suit of the plaintiff be dismissed.

4. Though it is not stated in the judgment of the learned Civil Judge, however, as noticed in the judgment of the learned lower appellate court, defendants no. 4 to 8 appeared through their counsel but did not file any written statement. Of them, defendants no. 4 and 5 are seen to be the sons of Sham Lal and Munshi Ram and defendants no. 6 to 8, as already noticed, are the brothers of the plaintiff.

Thus, the following issues were framed by the learned Civil Judge:-

- “1. Whether the plaintiff is entitled to declaration as prayed for? OPP*
- 2. Whether the suit is time barred? OPP*
- 3. Whether the plaintiff has no locus standi to file the present suit? OPD*
- 4. Whether the plaintiff has no cause of action to file the present suit? OPD*
- 5. Whether the suit of the plaintiff is bad for non-joinder of the parties? OPD*
- 6. Relief.”*

5. The plaintiff examined himself, one Thakur Subash Singh and Kanti Kumar Sharma by way of oral evidence and also tendered the 'Jamabandi' (record of rights) for the year 2002-03, the report of an expert and a photographic chart, by way of documentary evidence.

The defendants examined defendant no. 1, one Kewal Krishan, a Deed Writer, Dharam Chand and tendered the will dated 22.08.1988. They tendered a 'Jamabandi' for the year 2007-08, an 'Aks-sajra' and a 'Khasra Girdiwari', by way of documentary evidence.

6. Upon considering the pleadings and arguments made before him and appraising the evidence, the learned Additional Civil Judge first recorded a finding that Munshi Ram was the original owner of the suit property and the plaintiff had not impleaded all co-sharers in the suit land, including his own mother, who was alive at the time of filing of the suit.

It was further found that in his cross-examination the plaintiff had admitted “terms of the writing dated 22.08.1988”, that a mutation in respect of the suit land had been entered in the name of the mother of the plaintiff, as also in the names of Dharam Chand, Paras Ram, Gopal Dass and Sham Lal. It was also found that, in fact, the father of the plaintiff, Charan Dass, had died before 22.08.1988, i.e. before his (Charan Dasss') father, Munshi Ram.

It was also found that DW-2, Kewal Krishan, was an attesting witness to the will Ex. D-1 and that he had deposed that it had been scribed by Dharam Chand, Deed Writer, at the instance of the executor, Munshi Ram, in the presence of this witness and in the presence of one Kishan Chand, another witness to the will.

DW-2 Kewal Krishan was also found to have testified that the will had been executed to the extent of the different shares described in the written statement of the defendants. This witness further deposed that the will was read over by the deed writer to Munshi Ram, who after admitting to its correctness, had signed it in Urdu in the presence of this witness, who had then signed in it in English and the other witness to the will, Kishan Chand, had affixed his thumb impression on it.

The will was thereafter stated to have been presented before the Sub-Registrar and had been registered.

As per DW-2, a mutation had also been entered qua the estate of Munshi Ram, in terms of the will and that in fact the plaintiff had knowledge of the will since the date of its execution.

Similarly, DW-3, Dharam Chand, also deposed to the effect that he had scribed the will and had read it over to Munshi Ram, who thereafter admitted to its correctness and signed in Urdu in his presence and in the presence of the witnesses thereto.

7. As regards an argument made to the effect that the signatures on the will were forged, a finding was recorded that the plaintiff had not brought any such evidence to prove that the signatures were obtained by force. The will being registered was also admitted by PW-3 Kanti Kumar Sharma, who also admitted in cross-examination that he had not compared the signatures of the executant of the will.

On the other hand, it was found that the will had been duly proved by the witnesses for the defendants and the plaintiff had also admitted to the mutation on the basis of the will having been entered in the year 1997.

On the aforesaid evidence, a finding was recorded by the learned Additional Civil Judge that thereafter (after the filing of the suit), the mother of the plaintiff had also died and after her death, a mutation had been entered in favour of the plaintiff and his brothers and sisters in the year 2007-08, as regards her share, which was proved from the '*Jamabandi*', Ex. D-2, that duly reflected mutation no. 6386.

In fact, all the brothers and sisters of the plaintiff were also found to have not been impleaded in the suit.

8. It was also held by that Court that the mutation on the basis of the will having been entered in the year 1997, with the suit having been

instituted on 18.01.2008, it was barred by limitation, and was bad for non-joinder of necessary parties.

Still further, it was held that no suspicious circumstances had been proved by the plaintiff as regards the execution of the Will dated 22.08.1988. The evidence of the hand-writing expert, i.e. PW-3, was held to be not material, with the will itself having been proved.

9. Thus, recording the aforesaid findings, the suit of the plaintiff was dismissed by the Additional Civil Judge.

10. In the appeal filed under Section 96 CPC by the plaintiff, in the first appellate court, the learned District Judge, after noticing the pleadings and recording the issues framed by the lower court, upon considering of the judgment of that court, as also the evidence led before it, found that the will was executed on the date given, i.e. 22.08.1988, and was registered on 31.08.1988; however, in his pleadings, the plaintiff-appellant had not challenged the will. Nor had he filed any re-joinder to the written statement of defendants no. 1 to 3, and even in their affidavits, Ex. PW-1/A and PW2/A, the plaintiff and PW-2 Thakur Subash Singh, had remained silent about the will. Though he had examined PW-3, i.e. a hand-writing and finger print expert, Kanti Kumar Sharma, who in his report had stated that the will had been scribed on a blank signed paper, his evidence was held to be inadmissible by the learned District Judge, on the ground that it was beyond pleadings. Even otherwise, it was found that the reasoning given by PW-3 to hold that the will had been scribed on “blank signed paper”, was not correct reasoning.

Thus was for the reasoning that, (as held by the first appellate court), that there was “no such spacing in the Will on the basis of which it

could be presumed that it has been written on blank signed paper”. Therefore, holding that it being a registered Will, even if there was some difference in “line spacing”, it became immaterial in view of the registration of the document.

Further, it was found that it was not the case of the plaintiff that the executor of the will, i.e. Munshi Ram, did not appear before the Sub-Registrar, or that the will was surrounded by any suspicious circumstances.

Yet further, the plaintiff, as PW-1, had admitted that Munshi Ram died in the year 1995 and that he himself (plaintiff) came to know of the will in the year 1997. In fact, as recorded by the learned District Judge, he categorically admitted that Munshi Ram had executed the will in his lifetime, but his signatures were obtained by force.

Hence, it was held that as a matter of fact, he had deposed contrary to his own case and that he had not explained as to why he had not challenged the will till date.

11. On the aforesaid reasoning, it was held that the Will had been correctly held to be a genuine document by the Additional Civil Judge and as such, there was no reason to reverse any finding of that Court.

Consequently, the first appeal filed by the present appellant-plaintiff, was dismissed.

12. Before this Court, Mr. R.S. Bajaj, learned counsel for the appellant, submitted that firstly the learned Civil Judge had wholly erred in holding the will to be time barred, as unless the defendants plead adverse possession, there is no limitation to seeking a declaration and possession of immovable property, if such declaration and possession is sought on the basis of the inherent title of the plaintiff, based on inheritance.

Mr. Bajaj next submitted that the suit property admittedly being in the ownership of Munshi Ram, the onus to prove the will to be a genuine document, was not on the plaintiff but upon the beneficiaries who had set up the will. Hence, even if the plaintiffs' contention was that the will was a forged and fabricated document, the onus was not upon him but upon defendants no. 1 to 3, who claimed part of the suit property on the basis of the will executed by Munshi Ram, to prove it to be genuine.

13. Having considered the aforesaid arguments of learned counsel, firstly it is to be noticed that as per the impugned judgments, the suit filed by the appellant-plaintiff was not one specifically seeking possession but only a declaration. However, that issue actually becomes immaterial in view of the fact that even wholly on merits, the contesting defendants, i.e. the present respondents no. 1 to 3, had discharged the onus cast on them as beneficiaries, to prove the will.

As per Section 63 of the Indian Succession Act, 1925, the testator is required to affix his signature or mark on the will, or get some other person to do so in his presence and by his direction, in a manner by which it appears that it was intended to give effect to the writing in the will.

In that regard, as held by the learned lower appellate court, the signatures of the testator and the witnesses, did not appear to be affixed in a manner so as to cast any doubt that the will had actually been signed after it was written, even if there was any difference in line spacing.

Section 63 (c) further stipulates that a will shall be attested by two or more witnesses, each of whom had seen the testator sign or affix his mark on it, or had seen some other person do so on the directions of the testator.

However, even with the aforesaid stipulation, it is clarified that it would be not necessary for more than one witness to be present at the time when such mark or signature is affixed by or on behalf of the testator, though each witness himself would sign in the presence of the testator.

Still further, Section 68 of the Indian Evidence Act, 1872, stipulates that if a document is required by law to be attested (as is in the case of a Will, by Section 63 (c) of the Act of 1925), then it shall not be used as evidence until at least one attesting witness has proved the execution of the document. This condition would need to be fulfilled, in the case of a will, even if it has been registered.

14. In the present case, it is seen that, as held by the learned Civil Judge with nothing to the contrary pointed out to this Court, that one of the attesting witnesses to the will, i.e. DW-2 Kewal Krishan, duly testified that it was signed in his presence by the testator, i.e. Munshi Ram, after which DW-2 and another witness, Kishan Chand, respectively signed and thumb marked the document.

Additionally, DW-3 testified to having scribed the will on the directions of the testator, to whom it was read over in the presence of witnesses, who also thereafter signed/thumb marked the document.

Hence, as regards the onus upon the contesting defendants to prove the will to be a genuine document, they duly discharged that onus. Thereafter, if the plaintiffs' contention was that the document was forged, or that the testators' signatures were obtained by force, the onus then lay upon him to prove his contention.

As already noticed, the learned lower appellate court, recorded a finding that the appellant had, in fact, admitted to the execution of the will in

question but had thereafter contended that the signatures of Munshi Ram were obtained by undue influence/force. However, neither could he prove his earlier contention (found to have actually not been pleaded either in his plaint or in his affidavit), to the effect that it was a blank document got signed from Munshi Ram, nor his plea that it was a document signed under duress.

15. Hence, it seems quite obvious that with, in fact, the appellants' mother herself having been a beneficiary of the will, the suit was obviously filed not on any sound basis but only to try and obtain more share in the property, as may have fallen to the plaintiffs' share, if Munshi Ram had died intestate.

Therefore, the learned courts below having recorded a concurrent finding of fact that the will in question stood duly proved, and no perversity whatsoever having been pointed out to this Court in those findings, I find no ground to interfere in the impugned judgments and decrees.

Consequently, this appeal is dismissed in *limine* but as no notice was issued, there is no order as to costs.

CM No. 5822-C-2016

In view of the fact that the appeal itself has been dismissed on merits in *limine*, the issue of condoning the delay of 219 days in filing the appeal has been rendered academic and is not gone into.

December 01, 2016
nitin

(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned
Whether Reportable

Yes/No
Yes/No