

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

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(1)

RSA No. 1556 of 2015 (O&M)

Date of Decision: January 07, 2016

Ved Parkash

-Appellant

Versus

Buta Singh & Ors.

-Respondents

(2)

RSA No. 3005 of 2015 (O&M)

Date of Decision: January 07, 2016

Chhoto Kaur and anr.

-Appellants

Versus

Buta Singh & Ors.

-Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. R.S. Dhaliwal, Advocate
for the appellant. (in RSA No.1556 of 2015)

Mr. Sukhdeep Singh Bhinder, Advocate
for respondents No.1 and 2.
(in RSA No.1556 of 2015)

Mr. Surjeet Singh Sodhi, Advocate
for the appellants (in RSA No. 3005 of 2015)

Mr. Sukhdeep Singh Bhinder, Advocate
for respondents No.1 and 2.
(in RSA No. 3005 of 2015)

RAJ MOHAN SINGH, J.

{1}. Vide this common judgment, RSA No. 1556 of 2015 titled as "Ved Parkash vs. Buta Singh & Ors." and RSA No.3005 of 2015 titled as "Chhoto Kaur and anr. vs. Buta Singh & Ors." are being decided. Since, both the aforesaid appeals have arisen from common judgments and decrees passed by the lower Appellate Court, therefore, common facts are being recorded. Plaintiffs Buta Singh and Sukhjit Singh filed suit for declaration that they are owners in possession of suit land to the extent of 1/8th share of total land measuring 277 Kanals 3 Marlas as shown in the plaint. Plaintiffs further alleged that Jasmel Kaur had executed a Will dated 15.12.2001 in favour of plaintiffs and they are entitled to the land in question and mutation thereof, is required to be entered and sanctioned in their favour in pursuance of the aforesaid Will. The entry of mutation No.4455

in the revenue record is result of fraud and is liable to be corrected as the plaintiffs alone are entitled to be declared as owners in possession of land to the extent of 1/8th share out of total land. Plaintiffs are in cultivating possession of the suit land without their being any interruption for the last 20 years and, therefore entries in the revenue record are liable to be declared as null and void. Taking undue advantage of the revenue entries, defendants are trying to alienate the suit land. With this background, suit in question came to be filed.

{2}. The suit has been contested by the defendants. Plea of plaintiffs being owners in possession has been denied. It has been stated that the defendants No.1 and 2 alongwith their brother Natha Singh are owners in possession in equal shares and mutation has been rightly sanctioned by discarding the alleged Will dated 15.12.2001. Defendants alleged that Jasmel Kaur never executed any alleged Will dated 15.12.2001 in favour of the plaintiffs and same is illegal and fraudulent.

{3}. Parties went to trial on the following issues:-

{1}. Whether the plaintiffs are entitled to declaration as prayed for? OPP.

{2}. Whether the plaintiffs are entitled for permanent injunction as prayed for? OPP.

{3}. Whether the suit of the plaintiff is not

maintainable in the present form? OPD.

{4}. Relief.

{4}. After appraisal of evidence, trial Court concluded that execution of Will dated 15.12.2001 has been proved. Both the parties knew the case of each other. The minor discrepancy vis-a-vis dictation of Will on 15.12.2001 or four days prior to the death of Jasmel Kaur has not been considered to be the discrepancy which may dis-credit the testimonies of the witnesses of PW1-Bharpur Singh and PW3-plaintiff Sukhjit Singh. Non-production of Ajaib Singh, the second attesting witness to the Will was held to be inconsequential as requirement of law has been complied with by examining Baldev Singh as PW2 besides the scribe Bharpur Singh as PW1. Since, the plaintiffs are the beneficiaries of the Will, Natha Singh is figured nowhere in the entire controversy in the suit. The exclusion of daughters namely Chhoto Kaur and Veero Kaur from the property cannot be held to be a suspicious ground to dis-believe the execution of Will as they were married about 20-25 years ago and are residing in their respective in-laws house. The testator Jasmel Kaur was living with the plaintiffs at the time of her death. Dis-inheritance of the defendants No.1 and 2 in itself was not held sufficient to observe that the Will was shrouded with suspicious circumstances. Reliance was made to

Jaswinder Singh and others vs. Kartar Singh and Ors., 2004

(3) CCC 80. Deprivation of natural heirs cannot be said to be a suspicious circumstance because Will is always meant to dislodge something from line of natural succession. Plea of disinheritance alone cannot be taken to be a suspicious circumstance until and unless other attending circumstances warrant to hold. Will is infact shrouded by suspicious circumstances.

{5}. Trial Court decreed the suit declaring mutation No.4455 to be null and void. Defendants Chhoto Kaur and Veero Kaur were not held entitled to get any share in the property of Jasmel Kaur on the basis of natural succession and sale deed No.15283 dated 26.12.2008 in favour of defendant No.3 Ved Parkash was declared to be null and void and mutation No.4665 in his favour was set aside. Consequently, 1/8th share of Jasmel Kaur in land measuring 277 Kanals 3 Marlas as per jamabandi Ex.P2 was held to devolve upon the plaintiffs in equal shares and the defendants were restrained from alienating the suit land or creating any charge over the property in any manner.

{6}. Defendant No.3 as well as defendants No.1 and 2 filed separate appeals against the judgment and decree dated 19.12.2012 passed by the trial Court. Both the appeals were clubbed by the lower Appellate Court and even decided by

common judgment and decree, thereby dismissing the appeals vide common judgment and decree dated 19.09.2014. That is, how two appeals came to be filed in this Court.

{7}. I have heard learned counsel for both the parties and have perused the material on record.

{8}. Learned counsel for the appellant has vehemently argued that inheritance in favour of defendants No.1 and 2 alongwith their brother Natha Singh has been lawfully appreciated by the revenue authorities in sanctioning mutation No.4455 by discarding the alleged Will dated 15.12.2001. This mutation was challenged by the plaintiffs before the Revenue Court on the basis of unregistered Will dated 15.12.2001, however, vide order dated 28.10.2005, the Assistant Collector Ist Grade, Bathinda approved mutation No.4455 in favour of all the legal heirs to the exclusion of the plaintiffs by holding that Will dated 15.12.2001 is shrouded by suspicious circumstances being an unregistered Will. The order passed by Assistant Collector Ist Grade, Bathinda was approved by the District Collector on 28.10.2005 due to non-appearance of the parties. The original Will was produced before the revenue authorities. The file of the Revenue Court was duly summoned before the trial Court.

{9}. Defendant No.1 alienated her share which she

received by way of inheritance from Jasmel Kaur by way of sale deed No.15283 dated 26.12.2008 to defendant No.3 and mutation No.4665 was also sanctioned in favour of Ved Parkash (defendant No.3). The plaintiffs also contested the said mutation but the revenue Court did not accept the contention of the plaintiffs and they remained unsuccessful in appeal before the Collector as well who dismissed the appeal against Ex.P4 vide order dated 03.08.2012 Ex.D5. The aforesaid sale was made during pendency of suit. Veero Kaur transferred the land which she got by way of inheritance from Jasmel Kaur by executing General Power of Attorney in favour of Ved Parkash. In this way, defendants No.1 and 2 transferred their shares in favour of defendant No.3 during pendency of suit.

{10}. Original Will has been summoned from the revenue file and the same has been produced in Court by Office Kanungo- Gurdeep Singh, District Complex, Bathinda. In order to prove execution of Will, Bharpoor Singh has been examined as PW1 who identified thumb impression of Jasmel Kaur as well as thumb impression of Baldev Singh attesting witness on the Will. The witness also identified his writing and signature on the original Will. He admitted that he had written the Will at the instance of Jasmel Kaur and after writing, the same was read over to the executant and she affixed her thumb impression on

the Will after admitting the contents to be true. The witness further deposed that the attesting witnesses Ajaib Singh and Baldev Singh remained present and they had also affixed their thumb impression on the Will in his presence. The Will was executed in favour of her grandsons in lieu of services rendered to the executant Jasmel Kaur by them. The Will was executed in village Ganga in the house of Jasmel Kaur. Attesting witness Baldev Singh was also examined as PW2 who also identified thumb impression of Jasmel Kaur as well as his thumb impression on the Will. The witness also admitted that writing work was done by Bharpur Singh scribe and other witness Ajaib Singh Nambardar also attested the Will. Plaintiff Sukhjot Singh also appeared as PW3 and deposed in terms of pleadings contained in the plaint. The cross-examination of these witnesses could not yield any incriminating thing in favour of the defendants. The execution of Will even though unregistered, has been proved by producing scribe as well as one of the attesting witness who withstood the cross-examination and nothing could be extracted by the defendants from the cross-examination of these witnesses. Scribe as well as attesting witnesses belong to the same village Ganga and have been held to be natural witnesses and scribe of the said Will by the Courts below. The Will was never kept hidden by the beneficiaries. By producing

the scribe and attesting witness of the Will, the plaintiffs have discharged the initial burden of proving the execution of Will. Thereafter, the burden of proving shifted upon the defendants to establish any such suspicious circumstance which makes the Will to be not trustworthy.

{11}. Both defendants No.1 and 2 namely Chhoto kaur and Veero Kaur did not appear before the trial Court in the witness box. Though, the case has been contested by them being daughters of Jasmel Kaur, but they did not appear to depose in the present case. Even during pendency of suit, Chhoto Kaur alienated her share in favour of defendant No.3 and Veero Kaur also executed General Power of Attorney in favour of defendant No.3 Ex.D1, therefore Ved Parkash remained the only person/defendant who appeared before the trial Court on behalf of the defendants No.1 and 2. Defendant No.3 was impleaded in the suit on 31.10.2012 and he adopted the written statement earlier filed by defendants No.1 and 2 by making statement on 31.10.2012. Ved Parkash-defendant No.3 submitted before the trial Court in writing that he does not wish to cross-examine any witness earlier produced by the plaintiffs and does not want to raise any new issue in the suit. While appearing as DW1, Ved Parkash has only placed on record the orders passed by the Revenue Court regarding mutation Nos.4455 and 4665. The

sole witness of the defendants Ved Parkash did not make any statement in respect of any suspicious circumstances, fraud or undue influence in execution of Will dated 15.12.2001. Even Ved Parkash has not pleaded nor proved the plea of his being bonafide purchaser in the case. The statement of DW1 Ved Parkash is wholly inconsequential and has not highlighted any such incriminating fact vis-a-vis the execution of Will as well as his plea of being bonafide purchaser of the suit land during pendency of suit. Learned counsel for the appellant has also argued that there is a variance in the testimonies of PW1 and PW3 in the context of date of dictation of Will either on 15.12.2001 or four days prior to death of Jasmel Kaur. Jasmel Kaur died on 30.12.2001 and, therefore on the strength of testimonies of witnesses PW1 and PW3, learned counsel for the appellant seeks to assail the Will on the ground that it is shrouded by suspicious circumstances. The aforesaid diversion has been considered by the Courts below and both the Courts have concurrently held that the slight discrepancy cannot be allowed to be blown out of proportions to dis-credit both the witnesses whose testimonies are otherwise trustworthy. The slight variation is attributable to the time spent between the date of execution of Will and the depositions of these witnesses made before the Court. The statement of the learned counsel for

the appellant that second witness has not been examined has also been dealt lawfully to hold that a document which is required by the law to be decided is to be proved by way of testimony of the scribe and one of the attesting witness. Baldev Singh one of the attesting witness has been examined besides the scribe Bharpoor Singh who has been examined as PW1. In view of that, the execution of Will has been held to be lawful. Once the initial onus was discharged by the plaintiffs by examining the scribe as well as one of the attesting witnesses then in terms of Section 68 of the Indian Evidence Act, the onus shifted upon the defendants to prove that the Will was shrouded by suspicious circumstances. Defendants No.1 and 2 did not prefer to appear in the witness box, rather, allegedly they alienated the suit property to the extent of their share during pendency of suit in favour of defendant No.3. Defendant No.3 himself was impleaded as party-defendant No.3 on 31.10.2012 and he himself did not raise any new issue in the suit, nor filed his written statement, rather adopted the written statement filed by defendants No.1 and 2. These witnesses did not adduce any evidence except to appear as DW1 and only placed on record orders passed by the Revenue Courts in respect of mutations No.4455 and 4665. He even did not depose with regard to his being bonafide purchaser in the case.

{12}. Natha Singh was not the beneficiary of the suit land in any manner, therefore, his role was held to be inconsequential in nature. Dis-inheritance of defendants No.1 and 2 in the Will on the strength of **Jaswinder Singh and others vs. Kartar Singh and Ors. (supra)** was held to be not of any consequence as that ground alone is not sufficient to clothe the Will with any suspicious circumstance. In case of **M/s Divya Exports vs. M/s Shalimar Video Company and Ors., 2012 (1) RCR (Civil) 154,** Hon'ble Apex Court has held that the solitary instance of deprivation of natural heir in the Will has no ground to dis-credit the Will or to presume that the Will is shrouded with suspicious circumstance until and unless other grounds are found to be prominent to prove that the Will is suspicious in nature.

{13}. The expressions "Onus Probandi" and "animo attestandi" are two basic features in testamentary depositions before the Court. "Onus Probandi" lies in every case upon the party propounding a Will, whereas expression "animo attestandi" means 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 by him stands by way of complete attestation of the Will and the evidence is admissible to show whether such was the intention or not. The persons who had identified testator at the time of registration of Will and had

appended their signature cannot be treated to be attesting witnesses of the deposition as their signatures were not put “animo attestandi”. A person who had put his signature under the word scribe was held not to be an attesting witness as he had put signature only for the purpose of authenticating that he was a scribe of the document. Similarly, the legatees who had put their signatures on the Will in token of their consent were not the attesting witnesses. To attest is to bear witness to be a fact. The essential conditions of a valid attestation are that (i) two or more witnesses have seen the executant signing the instrument, (ii) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. The witness should have put his signature “animo attestandi”, i.e., for the purpose of attesting that he has seen the executant signed or has received from him a personal acknowledgment of his signature. Word attested in relation to an instrument means that two or more witnesses each of whom has seen the executant signing the instrument or has seen some other person signing the instrument in the presence and by the direction of the executant. The requirement in terms of Section 68 of the Indian Evidence Act has been complied with by examining the scribe as well as one of the attesting witness Baldev Singh who have made their depositions and nothing

incriminating have come out from their cross-examinations.

{14}. Learned counsel for the appellant further argued that the plea of plaintiffs being in possession for the last 20 years cannot be appreciated in the light of their ages shown in the memo of parties before the trial Court. This plea of first appearance seems to be attractive but on larger consideration cannot be appreciated. Plea of being owner in possession does not signify that the person can qualify himself being owner. It is only that the ownership depicted in terms of revenue record over the person or their father or predecessor-in-interest. Once the mother of the plaintiffs was proved to be lawful owner in possession of the suit land and execution of Will has been duly proved, therefore, plaintiffs would be deemed to be owner in possession and it cannot be considered that the argument raised by the learned counsel for the appellant would go in any way to create any suspicion in the execution of Will. Learned counsel for the appellant relies upon **Surjit Singh vs. Raju 2009 SCC Online (P&H) 5533** to contend that suit is not maintainable under Section 34 of the Specific Relief Act. In this case, no such proposition is involved inasmuch as that mother of the plaintiffs was owner in possession of the suit land after lawful execution of Will, plaintiffs became owners in possession of the suit land. The transfers made during pendency of suit are hit by

doctrine of lis pendens. Even in case of defendant Veero Kaur, no such sale deed has come to them rather suit is sought to be transferred by way of General Power of Attorney in favour of defendant No.3. The transfers made during pendency of suit are hit by lis pendens. Even defendant No.3 did not prove his plea of bonafide purchaser in any manner rather adopted the written statement filed by defendants No.1 and 2 originally. Even if no issue in respect of Will is framed, since both the parties knew the case of each other and led evidence in the said context, therefore non-framing of issue regarding Will is of no consequence. Even defendants No.1 and 2 did not appear in the witness box. Only defendant No.3 appeared as PW1. Plaintiffs witnesses have not been cross-examined, therefore in the absence of any bonafide purchaser by defendant No.3 and non cross-examination of plaintiffs witnesses proved the Will to the hilt.

{15}. The question of law as formulated in para No.25 of the Grounds of Appeal have no application. Defendant No.3 has not pleaded himself to be a bonafide purchaser. The sale deed at the instance of defendant No.1 came to be executed during pendency of suit.

{16}. So far as Veero Kaur is concerned, no sale deed has been executed rather, the suit land has been transferred on the

basis of General Power of Attorney. There is no material on record to prove defendant No.3 to be bonafide purchaser. Defendant No.3 has not cross-examined the witnesses of the plaintiffs. Even defendants No.1 and 2 did not appear in the witness box. There is no evidence of the defendants worth consideration and question no. (a) does not arise. Question no. (b) does not arise at all as the same is not a substantial question of law. In view of impeachable testimonies of PW1 to PW3, defendants cannot be treated to be true owners in any circumstance, rather plaintiffs are proved to be true owners on the strength of Will in question. Question no. (c) does not arise for any consideration. Question no. (d) does not arise inasmuch as that the declaration sought on the basis of Will is not the cause of action rather the cause of action starts from the date on which the possession of the plaintiffs is by making threat of alienation. Challenge to the mutation proceedings sanctioned by the Revenue Officers ultimately prompted the plaintiffs to challenge the proceedings and claiming title on the basis of Will. Since, the suit is based on title, therefore no such plea of limitation arise. Question no. (e) is a question of fact only and cannot be treated to be a substantial question of law. Question no. (f) has been dealt in question no. (d), therefore it is not a question of law for any other consideration. Defendant No.3 has

appeared as DW1. He neither pleaded himself to be a bonafide purchaser nor led any evidence. He did not cross-examine the witnesses of the plaintiffs. Defendants No.1 and 2 did not step into the witness box nor independent written statement has been filed by defendant No.3. In view of aforesaid, question no. (g) does not arise at all. No material has been led by defendant No.3 to prove plea of bonafide purchaser. Even otherwise, the sale deed at the instance of Chhoto Kaur came to be registered during pendency of suit and there is no sale deed at the instance of Veero Kaur who sought to transfer the land only by means of General Power of Attorney. In view of aforesaid, question no. (g) does not arise. Question no. (h) is a pure question of fact only. Question no. (i) does not arise inasmuch as that sale effected during pendency of suit is squarely hit by doctrine of lis pendens. No other evidence has been led by defendants. Natha Singh was not the beneficiary of the Will. Defendants No.1 and 2 did not appear in the witness box. In overall assessment of material on record, no such question could be answered in favour of the appellant. Question no. (j) is not a substantial question of law. Question no. (k) does not arise at all as defendants have been given opportunity of proving their case. In their wisdom, defendants No.1 and 2 did not appear in the witness box and defendant No.3 did not file independent

written statement, neither cross-examined the plaintiffs witnesses nor proved himself to be a bonafide purchaser.

{17}. In the light of aforesaid discussion, no explanation can be made to the impugned judgment and decrees passed by the Courts below in this appeal. Therefore, this appeal is totally found to be devoid of merits and the same, is accordingly dismissed.

January 07, 2016

jyoti Y.

**(RAJ MOHAN SINGH)
JUDGE**