

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No. 4502 of 2015 (O&M)
Date of Decision : 01.12.2016

Devinder Kumar

.....Appellant

Versus

Amit Ohri

....Respondent

CORAM: HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Ishan Sharma, Advocate
for the appellant.

Mr. Sanjeev Duggal, Advocate
for the respondent.

Surinder Gupta, J.

This is second appeal by defendant-Devinder Kumar against concurrent judgments of Courts below decreeing the suit of plaintiff-respondent (Amit Ohri) for possession of suit property situated in the area of Haryana, *Tehsil* and District Hoshiarpur, as fully described in headnote of the plaint and for recovery of ₹22,000/- on account of use and occupation charges for the period w.e.f. 27.08.2002 to 27.07.2003.

BRIEF FACTS:-

2. Case of plaintiff, in brief, is that the shop in dispute was purchased by Chaman Lal Ohri @ Mehanga Ram through registered sale deed dated 24.08.1982. He was running business of selling sweets in this shop till his death except for a period from 27.08.2002 onwards when the appellant-defendant, taking benefit of illness of Chaman Lal Ohri, illegally, forcibly and unauthorizedly broke opened the lock of the shop and occupied the same. He also gave injuries and shock to Chaman Lal

Ohri, who could not bear the humiliation and ultimately died on 13.09.2002. Appellant-defendant was requested by plaintiff to vacate and surrender possession of the shop in question to plaintiff alongwith articles lying therein as Chaman Lal Ohri due to love and affection and services rendered by plaintiff had bequeathed this shop to him and his $2\frac{1}{2}$ *killas* of land to his grandson Pushpinder Ohri through registered Will which was acted upon after his death. The shop in question require immediate reconstruction as it has outlived its life and is in dilapidated condition. Plaintiff also claimed damages for the use and occupation of the shop in question by the defendant from 27.08.2002 to July, 2003 @ ₹2000/- per month amounting to ₹22,000/-. A legal notice dated 15.04.2003 was also served on the defendant through counsel but in vain, hence this suit.

3. The defendant-appellant contested claim of plaintiff *inter alia* pleading that Chaman Lal Ohri died at the age of 80 years at PGIMER, Chandigarh on 13.02.2002. In the shop in dispute he was running *halwai* shop with defendant and was joint in mess and residence with him and his sons Pawan Kumar, Rajinder Kumar and Davinder Kumar, who served him till his death. Last rites of Chaman Lal Ohri were also performed by Pawan Kumar, Rajinder Kumar and Davinder Kumar. Plaintiff is son of Buta Ram, who had been living in village Khanpur. Buta Ram never visited Chaman Lal Ohri during his last days due to strained relations. Tarsem Lal one of the sons of Chaman Lal Ohri predeceased him. Sunita Rani, Rohit Ohri and Neena Ohri are the legal heirs of Tarsem Lal (deceased). Chaman Lal left behind his sons Pawan

Kumar, Rajinder Kumar and Davinder Kumar, legal heirs of predeceased son Tarsem Lal and Boota Ram father of plaintiff besides daughter Asha Rani, who all have succeeded the property of Chaman Lal Ohri in equal shares. Plaintiff has no right or concern whatsoever with the shop in dispute and his claim of title over disputed shop based on alleged Will executed by Chaman Lal Ohri, was denied. It was alleged that defendant alongwith other legal heirs of Chaman Lal Ohri has filed civil suit claiming inheritance to property of Chaman Lal by natural mode of inheritance.

4. Pleadings of parties led to framing of the issues and additional issue as follows:-

- (1) Whether plaintiff is entitled to possession of shop as shown red in site plan attached with plaint? OPP
- (2) Whether plaintiff is entitled to recover Rs.22,000/- as damages for use and occupation of the shop, alongwith the interest, if so at what rate? OPP
- (3) Whether the suit is not maintainable? OPD
- (4) Whether the suit is not properly valued for the purposes of court-fee and jurisdiction? OPD
- (5) Whether the plaintiff is estopped by his act and conduct to file the present suit? OPD
- (6) Whether the plaintiff has no *locus standi* to file the present suit? OPD
- (7) Whether the suit is bad for non-joinder of necessary parties? OPD
- (7A) Whether deceased Chaman Lal had executed legal and valid Will dated 29.08.2002 in favour of plaintiff and Pushpinder Ohri, as alleged? OPP
- (8) Relief.

5. Learned Additional Civil Judge (Senior Division),

Hoshiarpur upheld the Will dated 29.08.2002 executed by Chaman Lal Ohri in favour of plaintiff and his brother Pushpinder Ohri and decreed the suit. Not satisfied, the defendant filed appeal, which was dismissed by Additional District Judge (Ad hoc) Fast Track Court, Hoshiapur.

6. Learned counsel for the appellant has argued that Will dated 29.08.2002 propounded by plaintiff-respondent is not duly proved as per Section 69 Evidence Act as no evidence was led by plaintiff to prove that the Will bears signatures of testator. This Will was executed on 29.08.2002 while Chaman Lal Ohri died on 13.09.2002 i.e. within a fortnight of execution of the Will which casts shadow of doubt about genuineness of the Will. The testator, an oldman, was admitted in PGI, Chandigarh and was of unsound mind and not competent to execute the Will. Both the Courts have held the Will to be a genuine document ignoring the evidence and facts. In support of his contention, he has relied on the observations in cases of *Hardeep Singh Vs. Kulwinder Singh 2012 (4) Law Herald 3314 (P&H)*; *Harpal Kaur Vs. Raj Joginder Singh and others 2011(3) PLR 605 (P&H)*; *Mohinder Singh Vs. Nagina 1993 (3) PLR 153*; and *Gurcharan Singh and others Vs. Angrez Kaur and another 2008(4) PLR 595(P&H)*.

7. Learned counsel for the respondent has argued that Will dated 29.08.2002 is a registered document. There are two beneficiaries under the Will and the land of testator conferred on other beneficiary Pushpinder Ohri has been mutated in his name and that mutation has never been challenged by the appellant or any other legal heirs of Chaman Lal Ohri. Execution of the Will in question is duly proved by

examining son of both the marginal witnesses, registration clerk and Sub Registrar, who registered the Will. Boota Ram PW14 has proved signatures of testator on the Will and his testimony is unrebutted.

8. Sole challenge to the Will dated 29.08.2002 is on the ground that it is not duly proved as per provisions of Section 69 of the Evidence Act as plaintiff has failed to prove that this Will bears signatures of testator. Admittedly, both the marginal witnesses of the Will have died and Section 69 of the Evidence Act deals with situation where no attesting witness can be found and it reads as follows:-

“69. Proof where no attesting witness found.

If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

9. Will is a document which requires attestation by marginal witnesses. Section 68 Evidence Act requires that it should be proved by calling an attesting witness, if alive and is subject to the process of the Court and capable of giving evidence. Section 69 Evidence Act gives an alternate method to prove a document required to be attested by law. This section applies when no attesting witness can be found. In order to prove a document, where no attesting witness can be found, the propounder of a Will is required to prove that attestation of one of the attesting witness at least is in his hand-writing. He should also prove that

signature of the person executing the document is in the handwriting of that person, meaning thereby that the propounder of the Will is required to examine a person who can identify the signature/hand-writing of executant and attesting witness.

10. Testing the instant case on the yardsticks as laid down under Section 69 of Evidence Act, I find that respondent-plaintiff has duly proved the execution of the Will. He examined Ravinder Kumar PW7 who identified the signature of his father Dharambir Singh on the Will dated 29.08.2002 (Ex.P25). Dharambir Singh had died on 27.12.2004 as per his death certificate Ex.P27. He also examined son of other marginal witness Siri Ram namely Rahul Dhanota as PW8. Siri Ram died on 20.01.2009 and this witness had identified the signatures of his father on the Will and also his photograph appended on the last page of the Will at the time of registration. In this manner, the respondent-plaintiff has proved that the signatures of the marginal witnesses on the Will were in their own hand-writing.

11. To fulfill the next requirement under Section 69 of Evidence Act that signatures of the testator were also in his hand-writing, plaintiff examined Boota Ram, son of testator as PW14, who has categorically stated in his affidavit Ex.P14/A tendered in his examination in chief that the Will dated 29.08.2002 (Ex.P25) bears signatures of his father Chaman Lal and he identified his signatures. He has further stated that the Will was executed with regard to the landed property and shop owned by Chaman Lal. Land of testator was bequeathed in favour of Pushpinder Ohri grand son of Chaman Lal and shop in dispute was bequeathed to

Amit plaintiff-respondent. It appears that while bequeathing the shop in dispute to the respondent-plaintiff, his physical handicap weighed in the mind of testator. He mentioned in the Will reason for giving the shop in question to Amit so as to enable him to earn his livelihood. The arguments of learned counsel for the appellant-defendant that the Will is not duly proved as per provisions of Section 69 of Evidence Act, as such, carries no merit.

12. I have gone through the citations referred by learned counsel for the appellant, which basically deal with the mode and manner in which a Will can be proved as per provisions of Section 68 and 69 Evidence Act. As already discussed, the plaintiff has successfully proved the Will as per provisions of Section 68 and 69 Evidence Act, the observations in case of *Hardeep Singh Vs. Kulwinder Singh; Harpal Kaur Vs. Raj Joginder Singh and others; and Gurcharan Singh and others Vs. Angrez Kaur and another* (supra), which provide as to how a Will is to be proved as per provisions of Section 68 and 69 Evidence Act are not helpful in advancing case of the appellant. In case of *Mohinder Singh Vs. Nagina* (supra), Division Bench of this Court observed that a Sub Registrar cannot be considered to be an attesting witness. In this case, the plaintiff has examined Sub Registrar but the provisions of Section 69 Evidence Act are duly complied with by examining Boota Ram PW14. The testimony of Sub Registrar, even if not helpful in proving that the Will bears the signatures of testator, PW14 Boota Ram has duly proved this fact.

13. Learned counsel for the appellant has pointed towards two

suspicious circumstances surrounding the Will; (1) that Chaman Lal Ohri died on 13.09.2002 and the Will was executed only 15 days before his death; (2) that testator was old man and was admitted in PGI, Chandigarh and was of unsound mind, as such, was not in a position to execute the Will.

14. On perusal of the written statement, I find no plea of appellant-defendant that Chaman Lal was of unsound mind and not competent to execute the Will. Rather, it appears that testator was vigilant enough to get the Will registered in order to safeguard the interest of the respondent-plaintiff. There is no medical evidence on record to prove that deceased Chaman Lal was of unfit and unsound mind for 3-4 months prior to his death. No other suspicious circumstance surrounding the Will has been pointed out by learned counsel for the appellant and his argument that testator was not of sound disposing mind at the time of execution of the Will has no merits and is discarded.

15. The finding of fact recorded by the Courts below that the shop in dispute has fallen to the share of respondent-plaintiff and he is entitled to possession of the same, being the owner suffers from no legal or factual infirmity, calling for any interference.

16. Learned Additional Civil Judge allowed the mesne profits/damages for the use and occupation of the shop for the period from 27.02.2002 to 27.07.2003. Respondent-plaintiff became the owner of the shop in dispute on the death of testator Chaman Lal on 13.09.2002. He is not entitled to any damages for the use and occupation of the shop prior to the death of Chaman Lal. The title of the shop vested in him

w.e.f. 14.09.2002 and he is entitled to damages for the use and occupation of the shop from that day onwards.

17. As a sequel of my above observations, the contention of appellant challenging Will dated 29.08.2002 of testator Chaman Lal, has no merit and no substantial question of law requiring determination arises on this issue.

18. The appeal is partly accepted and the judgment and decree passed by the Courts below is affirmed with modification that respondent-plaintiff shall be entitled to recovery of damages on account of use and occupation of the shop from 14.09.2002 to 27.07.2003 @ ₹2,000/- per month.

December 01, 2016
jk/*Sachin M.*

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable

Yes/No