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

**RSA-2664-2014 (O&M)
Date of decision : 05.09.2016**

Gurdev Singh

... Appellant

Versus

Sukhvir Kaur and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. S.S. Sidhu, Advocate
for the appellant.

Mr. M.S. Sachdev, Advocate
for respondent No.2.

Mr. Amit Jain, Advocate
for respondent No.3.

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?

AMIT RAWAL, J. (ORAL)

The appellant-plaintiff is aggrieved of the concurrent findings of fact, whereby the suit seeking declaration, permanent injunction and joint possession against respondents-defendants, has been dismissed by both the Courts below.

Mr. S.S. Sidhu, learned counsel appearing on behalf of the appellant-plaintiff submits that Gurdev Singh, vide judgment and decree dated 31.07.1991, transferred the entire holding of the land measuring 75 kanals in favour of his wife, namely, late Kashmir Kaur. Unfortunately, Kashmir Kaur died on 02.12.1997. In the mutation proceedings, the

respondents-defendants came out with a Will and it is, in this background of the matter, the suit was filed. The defendants as stated above propounded the registered Will dated 25.02.1992 allegedly attested by Agya Ram and another witness, namely, Major Singh and the Scribe, namely, Narinder Singh. The original Will in the primary evidence had not been proved, but by way of additional evidence, it has come through the testimony of attorney-holder of defendant No.2, namely, Kulvir Singh. The Scribe Narinder Singh when appeared in the witness-box did not depose in terms of the provisions of Section 63 (c) of the Indian Succession Act, much less, stated that the record of maintaining the register of recording of the Will had been lost. Major Singh was not examined. Agya Ram had died and his son, namely, Vikram Sharma, had appeared and identified the signatures of his father Agya Ram. He in cross-examination also stated that he was adopted son. The Courts below heavily relied upon the provisions of Section 69 of the Indian Evidence Act ignoring the fact that there is no compliance of Section 63 (3) of the Indian Succession Act and Section 68 of the Indian Evidence Act, in essence, the original Will, which has come in additional evidence, has not put to deed writer Narinder Singh, much less, Vikram Sharma DW-4, and therefore, the Will has not been proved, therefore, there was no question for rebuttal of the same. Kulvir Singh when appeared as defendants' witness stated that both the daughters did not attend the last rites of their mother Kashmir Kaur, in essence, there was no love and affection for her and therefore, the Will was surrounded by the suspicious circumstances. The Will did not disclose about the appellant being the husband and the transfer of the property by way of judgment and decree *ibid*. All these factors have not been noticed by both the Courts below, thus,

urges this Court for formulation of the following substantial question of law:-

1. Whether the Will dated 25.02.1992, though registered, had been proved in accordance with the provisions of Section 63 (c) of the Indian Succession Act and 68 of the Indian Evidence Act?
2. Whether the judgment and decree of both the Courts below suffers from illegality and perversity.

Mr. Amit Jain, learned counsel appearing on behalf of respondent No.3 submits that he is the subsequent vendee and purchased the land measuring 24 kanals 17 marals vide sale deed dated 18.05.2006. He submits that the original Will had, though, not been the light of the day, but proved as the requirement of Section 69 of the Indian Evidence Act is sufficient for discharging the onus. Once, the appellant-plaintiff had relinquished his share in favour of Kashmir Kaur, she had become the absolute owner and could alienate the property in any manner which she wants to do. The husband has no right to succeed to the estate of the wife.

He submits that Major Singh was summoned to examine as witness, but report came that he has gone abroad, thus, it does not hold that requirement of law had not been complied with.

He further submits that even if, this Court intends to form different opinion, then even otherwise, the property agreed to be sold commensurate with 1/3rd share and therefore, his interest be protected.

Mr. M.S. Sachdev, learned counsel appearing on behalf of respondent No.2 submits that the Will has been proved in accordance with law and there is compliance of the provisions of Sections 68 and 69 of the Indian Evidence Act. He adopts the arguments of Mr. Amit Jain, learned

counsel appearing on behalf of respondent No3.

He further submits that DW-3 Sarabjit Kumar, Registration Clerk office of Sub-Registrar, Phagwara had also appeared in the witness-box. The deed writer-Narinder Singh had also deposed in terms of the contents of the Will, thus, urges this Court affirming the findings under challenge as the concurrent findings of fact cannot be assailed until and unless there is gross illegality and perversity.

I have heard the learned counsel for the parties and appraised the paper book

It would be apt to reproduce the provisions of Section 63 (c) of the Indian Succession Act and as well as the paragraph Nos.2 to 5 of the statement of the Deed Writer Narinder Singh DW-2 and the same reads thus:-

“Section 63 (c) of Indian Succession Act:-

The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

Paragraph No.2

That the deponent has drafted one WILL on ask of Kashmir

Kaur in favour of his both daughters in equal shares regarding his property on 25.02.1992. The said WILL was drafted by deponent and after drafting the deponent has read over the contents of the WILL to Kashmir Kaur. After understanding the contents in sound mind and affirmating the contents, the said Kashmir Kaur has signed over the WILL. The said WILL was signed by Kashmir Kaur in her sound mind and without any pressure with her own consent.

3. *That both the witnesses namely, Major Singh S/o Santokh Singh, resident of Phagwara and Numberdar Agya Ram, resident of Phagwara, attested the signatures of Kashmir Kaur and after that signed the said Will.*

4. *That the deponent has seen the photocopy of Will today in the case file. This is the same WILL the deponent has drafted on 25.02.1992 on ask of Kashmir Kaur and the same is*

5. *That now the deponent has lost the record of the same and with regard to that the deponent has made a report No.7, dated 12.11.1998 with the police station, P.S. Sadar, Phagwara. Photocopy of the report is attached herewith.*

On going through the aforementioned paragraphs, he does not specify that the Will had been attested on the directions of the testator and the witnesses had signed as per her directions. Even the record maintaining the original Will had been destroyed. The witnesses have been confronted only with the photocopy of the Will, whereas the original Will has come by way of additional evidence through the testimony of Kulvir Singh DW-1

dated 19.02.2011. The original Will had not been confronted to the deed writer. The Courts below ought not to have taken the aid of the provisions of Section 69 of the Indian Evidence Act as it has not been proved that Vikram Sharma was the adopted son of Agya Ram. As Kulvir Singh had been examined by additional evidence, an attempt could have been made to examine Major Singh as and when he returned or his statement could have been recorded through Video Conference. Having not taken such steps, I am of the view that the defendants have failed to discharge the onus, much less, rebut the suspicious circumstances, therefore, the registration of the Will would not be sufficient to prove the same. The Will does not specify the change of line of succession, particularly the fact that Kashmir Kaur was married to the plaintiff. In my view, the property ought to have been mutated as per natural succession. There is also no force in the submissions of Mr. Amit Jain that the Will was contested before the Revenue Court during the mutation proceedings. Mutation proceedings does not confer the title, it is only the Civil Court, where evidence has to be seen. Even the respondents-defendant have miserably failed to prove the genuinity of the document. It was too late in a day to bring the original Will which was not confronted as noticed above.

In view of the aforementioned facts, the Courts below ought to have decreed the suit by giving 1/3rd share in favour of the appellant-plaintiff by way of natural succession.

Accordingly, the judgment and decree of both the Courts below are hereby set aside. However, the sale deed in favour of the defendant No.3 is upheld as it is confirming the 1/3rd share of one of the legal representatives of Kashmir Kaur. The appellant-plaintiff is held entitled to

1/3rd share in the property.

Preliminary decree is ordered to be drawn.

With the aforesaid observations, the appeal stands allowed.

05.09.2016
yogesh

(AMIT RAWAL)
JUDGE

	✓
Whether speaking/reasoned	Yes/ No
	✓
Whether Reportable	Yes/ No