

In the High Court of Punjab and Haryana at Chandigarh

Date of Decision: February 10, 2016

1) *R.S.A. No. 5416 of 2015 (O&M)*

Jagraj Singh and others ... *Appellants*

Versus

Jaspal Kaur and others ... *Respondents*

2) *R.S.A. No. 5417 of 2015 (O&M)*

Jagraj Singh and others ... *Appellants*

Versus

Jaspal Kaur and others ... *Respondents*

**CORAM: HON'BLE MR. JUSTICE PARAMJEET SINGH
DHALIWAL**

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

Present: Mr. H.S. Bhullar, Advocate,
for the appellants.

Paramjeet Singh Dhaliwal, J.

By this common order, both the regular second appeals i.e. RSA Nos. 5416 of 2015 and 5417 of 2015 are being decided together as these arise from the same suit i.e. Civil Suit No. RT-371 dated 18.01.2008/09.04.2011.

Both the aforesaid regular second appeals have been preferred by the appellants against the judgment and decree dated 22.07.2013 passed by learned Additional Civil Judge (Senior Division), Moga, whereby suit

filed by the respondents/plaintiffs for declaration and permanent injunction has been decreed, as well as, against the judgment and decree dated 21.07.2015 passed by learned Addl. District Judge, Moga, whereby two separate appeals filed by the appellants have been dismissed by a common judgment.

For convenience sake, hereinafter parties will be referred to as they are arrayed in the Court of first instance.

The detailed facts are already recapitulated in the judgments of the Courts below and are not required to be reproduced. However, brief facts relevant for the disposal of this second appeal are that the plaintiffs filed a suit for declaration and permanent injunction on the ground that the plaintiffs and defendants no.1 to 3 are the children and defendant no.4 is the widow (since deceased), of deceased Gurdev Singh, who was owner of land measuring 59 kanals 05 marlas, as detailed in first para of the plaint. The plaintiffs being daughters of the deceased Gurdev Singh have 3/7 share in the said property. Defendants no.1 to 3 claim that the deceased Gurdev Singh had executed a registered Will in their favour on 8.4.1975, but the plaintiffs do not admit the legality and validity of thereof. The said Will is surrounded by suspicious circumstances as the same was never executed by the deceased Gurdev Singh with his freewill. Gurdev Singh died on 27.6.2007 and after his death, defendants no.1 to 3 got sanctioned mutation No.13013 in their favour, on the basis of said Will. The said mutation has been contested and proceeding are still pending before Assistant Collector, Moga. Balwant Kaur-defendant no.4, has also filed a

civil suit against defendants no.1 to 3 claiming her 1/4 share out of the property of the deceased Gurdev Singh. The defendants were requested to get mutation of inheritance of deceased Gurdev Singh sanctioned in favour of the plaintiffs also, but they refused to do so. Panchayat was also convened in this regard, but to no avail. Rather, defendants no.1 to 3 threatened to alienate the suit property. Hence, suit was filed.

Upon notice, defendants appeared and filed two separate written statements. Defendants no.1 to 3 filed a joint written statement taking preliminary objections regarding maintainability; locus standi; cause of action; estoppel; concealment of material facts etc. On merits, it was averred that Will dated 8.4.1975 is a genuine document, which was executed by Gurdev Singh with his freewill in favour of the answering defendants as he was being looked after by them during his life time. Deceased Gurdev Singh had already given the share of his daughters in the marriage performed in the years 1974, 1980 and 1985 by spending huge amount on their marriage and on the occasions of births of their children. It was further averred that there was litigation between defendants no.1 to 3 and defendant no.4, but later on compromise was effected, and now defendant no.4 has no objection qua the ownership of the answering defendants.

Defendant no.4 filed a separate written statement on the same lines as that of the written statement of defendants no. 1 to 3.

On the basis of the pleadings of the parties, the Court of first instance framed the following issues:-

- “1. Whether the plaintiffs are entitled to declaration as prayed for?OPP*
- 1-A Whether Gurdev Singh had executed a Will dated 8.4.1985 in favour of defendants?OPD*
- 2. Whether the Will dated 8.4.1975 allegedly executed by Gurdev Singh in favour of defendants no.1 to 3 is forged and fabricated document?OPP*
- 3. Whether the plaintiffs are entitled to joint possession? OPP*
- 4. Whether the plaintiffs are entitled to permanent injunction?OPP*
- 5. Whether the plaintiffs have no locus standi to file the present suit?OPD*
- 6. Whether the plaintiffs have no cause of action?OPD*
- 7. Whether the plaintiffs have not come to the court with clean hands?OPD*
- 8. Whether the plaintiffs are estopped by their act and conduct?OPD*
- 9. Relief.”*

The Court of first instance, after perusal of the evidence led by the parties, decreed the suit vide judgment and decree dated 22.07.2013. Against that, two separate appeals one filed by defendants – Jagraj Singh, Gian Kaur and Iqbal Singh and second filed by defendants – Jagraj Singh, Kulwant Singh and Pal Singh through his LRs. were filed, which have been dismissed by the learned lower appellate Court vide judgment and decree dated 21.07.2015. Hence, these second appeals.

I have heard learned counsel for the appellants.

Learned counsel for the appellants has submitted that the following substantial questions of law formulated in para no.9 of grounds

of appeal, arise for consideration in this second appeal:-

- “1) *Whether the facts admitted are required to be proved by any evidence?*
- 2) *Whether a registered document, if more than 30 years old, proves itself under Section 90 of the Evidence Act is still required to be proved by leading evidence?”*

Learned counsel for the appellants contended that both the courts below have erred in appreciating the evidence on record. Learned counsel further contended that the findings recorded by both the Courts below are against law and not sustainable in the eyes of law.

I have considered the contentions raised by learned counsel for the appellants and perused the record.

Both the Courts below, after appreciating the evidence on record, have recorded findings of fact. The learned lower appellate court recorded the following findings:-

“13. The facts are not disputed that the suit property was owned and possessed by Gurdev Singh, father of the plaintiffs and defendants no.1 to 3 and husband of defendant no.4. The plaintiffs being daughters of Gurdev Singh have claimed their shares in the suit property on the basis of natural succession, whereas defendants no.1 to 3 have claimed ownership of the suit property on the basis of a Will dated 8.4.1975 alleged to be executed by Gurdev Singh in their favour. Now, the questions which require adjudication are that :-

- (1) Whether execution of the Will dated 8.4.1975 propounded by defendants no.1 to 3 has been duly proved?*
- (2) Whether impugned Will being more than 30 years old*

can be presumed to have been duly executed and attested in view of provisions of Section 90 of the Indian Evidence Act?

(3) Whether the impugned Will is surrounded by suspicious circumstances?

14. It is undisputed that in view of Section 63(c) of the Indian Succession Act, 1955 and Section 68 of the Evidence Act, Will is required to be proved by examining at least one attesting witness thereof. In the instant case, however, the defendants version is that both the attesting witness of the Will have since died. For such a situation provision is made in Section 69 of the Evidence Act which lays down that if no attesting witness can be found, then it must be proved that attestation of one attesting witness at least is in his handwriting and that signature of the executant/testator is in the handwriting of that person. In the case in hand however, provision of Section 69 of the Evidence Act has not been satisfied by the defendants as they have not led any evidence to prove that the impugned Will bears the signatures of the testator. Even the defendants have not led any cogent and clinching evidence to prove attestation of at least one attesting witness of the Will to be his handwriting. Although, the defendants have examined Randhir Singh (grandson of attesting witness Arjan Singh) as DW5 and Gurmeet Singh (grandson of attesting Mohinder Singh) as DW4 to prove that the impugned Will bears the respective signatures of their grandfathers Arjan Singh and Mohinder Singh. However, both these witnesses have not uttered even a single word that they are familiar with the handwriting of their grandfathers or they have ever seen their grandfathers writing and signing some documents. In such circumstances, their simple

statements that the impugned Will bears the signatures of their grandfathers are not sufficient to hold that the impugned Will bears the signatures of attesting witnesses Mohinder Singh and Arjan Singh. Moreover, signatures of Mohinder Singh-attesting witness are in Urdu language on the impugned Will. His grandson Gurmeet Singh does not know Urdu language, as admitted by him in his cross-examination. Thus, the question of identification of the signatures of Mohinder Singh in Urdu language by his grandson Gurmeet Singh does not arise. In such circumstances, the learned trial court rightly held that the execution of the Will has not been proved as required by Section 69 of the Indian Evidence Act as the defendants failed to prove that attestation of one attesting witness at least is in his handwriting and the signatures of the executant/testator Gurdev Singh are in his handwriting.

*15. The contention of the learned appellants counsel that the impugned Will being more than 30 years old could be presumed to have been duly executed and attested in view of Section 90 of the Evidence Act, is also not acceptable, in view of the law laid down by Hon'ble Punjab & Haryana High Court in case titled as **Gurmail Singh and others v. Gurdev Singh and another**, 2011(2) Latest Judicial Reports 763, wherein it was held that Section 90 of the Evidence Act is not applicable to prove the Will and in case of Will, provision of Section 68 or Section 69 of the Evidence Act has to be complied with. Similar view has been taken by Hon'ble Supreme Court in case titled as **Bharpur Singh and others v. Shamsher Singh**, 2009(1) R.A.J. 502 : **Kapil Dev and another v. Smt. Sarinder @ Bimla Kaul and others**, 2006(2) L.J.R. 2821 (P&H) and **Harpal Kaur v. Raj Joginder Singh***

and others, VOL.CLXIII-(2011-3) 605 (P&H).

16. Furthermore, the impugned Will is also surrounded by suspicious circumstances. It is the case of the defendants that Gurdev Singh solemnized marriage of all his three daughters during his life time. The marriage of one daughter was solemnized in year 1974, the marriage of second daughter was solemnized in year 1980 and the marriage of third daughter was solemnized in year 1985. The impugned Will was executed in year 1975. It means that two daughters were unmarried at the time of execution of the impugned Will. Even wife of Gurdev Singh was alive at the time of execution of the Will. No reference was made with regard to unmarried daughters and wife by testator Gurdev Singh. No doubt, Will is always executed to exclude some near and dear from inheritance, but in our Hindu mythology, father always make some arrangements for his unmarried daughters as well as wife in order to secure their future. Non-reference of unmarried daughters and wife by Gurdev Singh with regard to their future arrangements as well as with regard to expenses of unmarried daughters is also one of the strong suspicious circumstance which creates doubt regarding genuineness of the Will.”

The main issue in the suit was with regard to the validity of the Will and proving the same in accordance with law. The Will has not been proved by leading cogent evidence as per the provisions of Sections 68 and 69 of the Indian Evidence Act (hereinafter referred to as the “Act”). The contention that the Will is more than 30 years old, therefore, could be presumed to have been executed and attested in view of Section 90 of the Act, is also not acceptable in view of the law laid down by this Court in

Gurmail Singh and others vs. Gurdev Singh and another, 2011(2) **Latest Judicial Reports**, 763, wherein it is held that Will is to be proved as per provisions of Section 68 or Section 69 of the Act and Section 90 of the Act is not applicable.

Hon'ble Supreme Court of India in **Bharpur Singh and others vs. Shamsher Singh**, (2009) 3 SCC 687, has held as under:-

“19. The provisions of Section 90 of the Evidence Act, 1872 keeping in view the nature of proof required for proving a will have no application. A will must be proved in terms of the provisions of Section 63(c) of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872. In the event the provisions thereof cannot be complied with, the other provisions contained therein, namely, Sections 69 and 70 of the Evidence Act providing for exceptions in relation thereto would be attracted. Compliance with statutory requirements for proving an ordinary document is not sufficient, as Section 68 of the Evidence Act postulates that execution must be proved by at least one of the attesting witnesses, if an attesting witness is alive and subject to the process of the court and capable of giving evidence.”

It is, therefore, crystal clear from **Bharpur Singh's case** (**supra**) that Section 90 of the Act is not applicable to will. So far as proving the Will is concerned, even though the Will might be 30 years old and produced from proper custody, yet the same is to be proved strictly in accordance with Sections 68 and 69 of the Act and must fulfill the conditions laid down in Section 63(c) of the Indian Succession Act, 1925.

Concurrent findings of fact have been recorded by both the Courts below. Learned counsel for the appellants could not show that the

said findings are perverse or illegal or based on misreading, non-reading or mis-appreciation of the material evidence on record. It is settled law that this Court cannot interfere in the findings of fact recorded by the Courts below on appreciation of evidence brought on record, unless the findings are perverse. No perversity has been pointed out by the learned counsel for the appellant. No question of law, much-less substantial question of law, as alleged, arises for adjudication in this second appeal.

No other point has been urged.

Both the aforesaid second appeals are dismissed in limine

February 10, 2016
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[Paramjeet Singh Dhaliwal]
Judge