

In the High Court of Punjab and Haryana at Chandigarh

Civil Revision No. 221 of 2015

Date of Decision: 09.10.2017

Savitri Devi

.....Petitioner

Versus

Phool Singh and others

.....Respondents

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. Johan Kumar, Advocate
for the petitioner.

Mr. Kul Bhushan Sharma, Advocate
for the respondents.

ANITA CHAUDHRY, J

The petitioner is aggrieved with the order dated 23.12.2014 (Annexure P-5) passed by the Additional Civil Judge (Senior Division), Palwal whereby the application filed by respondent No. 1 for leading secondary evidence with respect to the Will was allowed.

The plaintiff had approached the Court with a plea that she was owner of half share of the suit land being daughter of Ram Chand. It was pleaded that Ram Chand had died in the year 1997 and had left behind the plaintiff and defendant No. 1 as his legal heirs. She came to know of a mutation entered on 8.9.1998 in favour of respondent No. 1 and made enquiries and came to know that the mutation had been entered on the basis of some oral Will. The Will was challenged and it was pleaded that if there was a Will, it was forged and fabricated and fictitious document and was

in collusion with the revenue officials and that she had come to know of this fact only in June 2009. The plaintiff prayed for a decree for declaration and joint possession.

Phool Singh brother of the plaintiff pleaded that the plaintiff had not come to the Court with clean hands and the suit was time barred and took the following plea in para 7 of the written statement:-

“7. That the father of answering defendant namely Ram Chand son of Mam Chand previously was owner in possession of the suit land and the father of the answering defendant executed a will on or about 3.1.1997 vide which he bequeathed away all his right, title or interest in favour of the answering defendant qua the suit land regarding which mutation no. 614 has already been sanctioned on or about 8.9.1998 after the death of the father of the answering defendant is in possession of the suit land and as owner thereof and the plaintiff has got no right, title or interest therein. It may be further mentioned here that at the time of sanctioning the mutation on the basis of the said Will and the affidavit of Lekh Raj Sharma and Smt. Jainam, the mother of the answering defendant and Mehar Chand appeared before A.C. Ist Grade, Palwal who after verifying the truth regarding the said will and affidavit mentioned the said in favour of the answering defendant and therefore, the present suit is not maintainable in the present form and is liable to be dismissed.”

The defendants also pleaded that the suit had, in fact, been filed by his own son but using the name of the plaintiff and the plaint, vakalatnama and the documents were not signed by the plaintiff. In para 4 of the reply parawise it was pleaded as under:-

“X X X X X X

It is also denied that the will dated 3.1.97 is illegal, null and void, and not binding upon the plaintiff and is forged and

fictitious document as alleged. It is also denied that the said Will never executed or thumb marked by late Ram Chand as alleged.”

After the written statement was filed, the plaintiff moved an application for direction to the defendants to produce the original will. This application was moved in October 2009. The defendant filed its reply almost a year later and pleaded that the Will had been misplaced and the same was not in his possession and he had made efforts to trace out and whenever it is traced out he would produce it.

Issues were framed and the trial had commenced.

The defendants moved an application to lead secondary evidence with respect to the Will. It was pleaded that the plaintiff had challenged the Will which was unregistered. It was pleaded that the mutation was signed after examining the scribe and the attesting witnesses and thereafter the mutation was sanctioned on 8.9.1998. It was pleaded that the original Will was handed over to the revenue authorities and its photocopy could be retained by them. It was pleaded that the defendant could not collect the original Will from the revenue authorities and subsequently he engaged a counsel and approached the revenue authorities who made a vague report on the application saying that it could not be traced out. It was pleaded that the revenue authorities have mentioned in their record that it was a 'Jubani' Will.

The plaintiff filed reply to the application pleading that it was only when the plaintiff moved the application to place the Will on record the defendants have come up with a plea that the Will had been misplaced.

It was pleaded that there was no Will nor any such Will was executed nor

The trial Court noted the following:-

“After hearing ld. Counsel for the parties, this court is of the opinion that as PW-2, plaintiff, in her cross examination, deposed that a will was extracted from her father. This means that in fact, a will of late Ram Chand was in existence. Mutation no. 614 shows that in a note written on this mutation, it was mentioned by the revenue authority that the will was unregistered in nature. This means that an unregistered will, in the form of a document existed at the relevant time. Now the applicant/defendant claims that the will has been misplaced by revenue officers. In Balbir Singh vs. Avtar Singh (Supra), it was held that where prima facie existence and loss of will is proved, petitioner is entitled to lead secondary evidence of will. In present case, the existence and loss of will is being prima facie proved. Now it is for the applicant to lead secondary evidence on the impugned will and if it is not proved, the matter shall end. Under Section 65 (c) of Evidence Act, 1872, secondary evidence includes oral account of contents of a document given by some person who has himself seen it. In view of said provision applicant can be allowed to give oral evidence of impugned will. In view of foregoing discussion the application is allowed. To come upon 06.01.2015 for evidence of defendants.”

I have heard both the sides.

Counsel for the petitioner contended that the defendants had never mentioned whether the Will was oral, unregistered or registered and they had only referred to the mutation that was sanctioned on 8.9.1998. It was urged that the lower Court had permitted the defendants to lead secondary evidence and they want to examine the scribe and they are now pleading that the Will was lost by the revenue authorities. It was pleaded that the Will did not exist and the original or the photocopy was never

produced during the proceedings and the application could not have been allowed unless its existence and its loss was proved. Reliance was placed upon *Mangat Ram versus Prabhu Dayal and others* 2002(4) R.C.R. (Civil) 706, *Hari Singh versus Shish Ram* 2002(4) R.C.R. (Civil) 830, *Banarsi Dass versus Om Parkash and others* 2005(2) R.C.R. (Civil) 72 and *Namburu Bulli Veera Bhanra Prasad and others versus Vegi Venkata Satyanarayana (died) and others* 1998(2) CivCC 209.

The submission on the other hand is that there is a reference to the Will in the mutation proceedings and the original Will was retained by the revenue officer and was not available, therefore, *prima facie* existence and loss had been proved and they were entitled to lead secondary evidence and the requirement of Section 63 of the Evidence Act has been made. Reliance was placed upon *Balbir Singh versus Avtar Singh and others* 2013(4) Civil Court Cases 109 (P&H), *Mohinder Singh and others versus Lachhman Singh and others* 2013(13) R.C.R. (Civil) 607, *Shangara Singh versus Jawala Singh* 1993(1) PLR 171, *Sobha Rani versus Ravi Kumar* 1999(1) R.C.R. (Civil) 98, *Gurchetan Singh versus Karnail Kaur* 1992(1) PLR 490, *M/s Gopal Krishan Jiwan Kumar versus Puran Singh* 1998(2) R.C.R. (Civil) 103 and *Ram Sahai Sood versus Om Parkash Sood and others* 2005(3) R.C.R (Civil) 585. It was further submitted that the loss has not to be proved in the absolute terms and when the Court grants permission it does not record an evidentiary value to be attached to the secondary evidence and opportunity would be given to the other side to cross-examine the witness and the order be upheld.

I have considered the submission of both sides.

On a reading of para 7 of the written statement, it is clear that

the defendants were non-committal as to whether the Will was oral or in writing. Immediately after the written statement was filed, the plaintiff moved an application for direction to the defendants to produce the copy of the Will and after a year the defendants had responded that the Will had been misplaced and they will produce it whenever they got hold of it. It was never stated that original Will was with revenue authorities. The defendants were seeking permission to lead secondary evidence with respect to the Will. It is settled that when a party alleges the existence of a document he has to prove firstly the existence and if he is unable to produce it then he has to prove its loss. In the present case, the defendants have been non-committal in their written statement and when they were asked to produce its copy, they had pleaded that it had been misplaced. The Court could have granted permission to lead secondary evidence only when its existence and loss was proved. After the defendants had proved the loss of the document only then, they could have been permitted. The lower Court has ignored both the aspects. The defendants did not disclose in their written statement that they did not have the copy of the Will. They did not lay proper foundation which was a condition precedent for permitting secondary evidence. They did not mention in the written statement that the Will was misplaced then which means they had the Will when the written statement was filed. They would have pleaded then that they were not in a position to produce the original Will or its copy. They were required to specifically plead that fact in the written statement. They have not even pleaded in the application as to when it was misplaced and whether it was with them when the written statement was filed. There is also a dispute whether the Will was oral or in writing. Therefore, in these circumstances, the order has to be

set aside.

The revision petition is allowed. Order 23.12.2014 (Annexure P-5) is set aside. The trial Court would decide the application afresh after hearing both the sides and before that the defendants would positively commit by way of an affidavit whether the Will was oral or written.

The parties are directed to appear before the Court below on 30.10.2017.

A copy of the order be also sent to the trial Court.

(ANITA CHAUDHRY)
JUDGE

October 09, 2017
Gurpreet

Whether speaking/reasoned : Yes
Whether reportable : No