

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

RSA No.3855 of 2009 (O&M)

Date of decision : 16.08.2017

Sukhvir Singh

...Appellant

Versus

Surjit Singh and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Sarju Puri, Advocate for the appellant.

Mr. Vijay Lath, Advocate for respondent No.1.

ANIL KSHETARPAL, J.

The defendant No.5 has filed this Regular Second Appeal against the judgment passed by the learned Additional District Judge, Nawanshahr.

The plaintiff-respondent No.1 namely Surjit Singh filed a suit for declaration claiming 1/6th share in the estate of his father namely Mehar Singh.

The defendants in the written statement setup a registered Will allegedly executed by Mehar Singh on 24.09.1990. It was claimed that by registered Will, the property was bequeathed in favour of defendant Nos.2, 4 to 7.

The learned trial Court dismissed the suit filed by the plaintiff.

The first appeal preferred by the plaintiff was accepted. The First Appellate Court recorded a finding that due execution and registration of Will is not proved either in terms of Section 68 or Section 69 of the Indian

Evidence Act.

I have heard learned counsel for the parties at length and with their able assistance gone through the record of the case.

Counsel for the appellant has submitted that there is due compliance of Section 69 of The Indian Evidence Act, 1872 as Sub Registrar has been examined as DW6. He further submits that even the son of scribe has been examined as DW7. Learned counsel further submits that since attesting witnesses had died, therefore, the Will had to be proved as per Section 69 of The Evidence Act, 1872.

On the other hand, learned counsel for the plaintiff has submitted that there is no compliance of Section 69 of The Evidence Act, 1872 as no witness has been examined to prove the attestation by one of the attesting witness. He further submitted that executant's thumb impression on the Will have also not been proved.

Section 69 of the Indian Evidence Act, reads as under:-

“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.”

From a careful reading of Section 69, it is clear that if no attesting witness can be found, the attestation of one attesting witness at least is to be proved to be in his handwriting. Further signatures/thumb impression of the Executant of the Will are to be proved. In the present case, the appellant has failed to fulfill both the requirements. No one has been

examined to prove that the attestation is under the handwriting of one of the attesting witness. Further, no evidence has been led to prove that thumb impressions on the Will are of Mehar Singh.

Learned counsel for the appellant has submitted that the Will is a registered document and there is a presumption that the Will was duly executed and registered.

I have considered the submission. The Will has to be proved in accordance with the provision of Section 68 of the Indian Evidence Act. However, if none of the attesting witness can be found, the propounder of the Will is required to prove the Will in accordance with Section 69 of The Evidence Act, 1872.

Learned counsel for the appellant has submitted that Naib Tehsildar has been examined as DW6.

I have carefully read the statement of Naib Tehsildar. No doubt, the Naib Tehsildar says that he knew one of the attesting witness, however, he admits that Will was not scribed in his presence. He has further submitted that he did not know the Executant and other attesting witness also.

In my considered opinion, merely because a Sub Registrar has been examined who knows one of the witness, requirements of Section 69 of The Evidence Act, 1872 does not stand complied with. The appellant has made no attempt to prove the thumb impression of Mehar Singh.

The learned First Appellate Court has further held that the Will is surrounded by suspicious circumstances as it has been written in the Will that the plaintiff, who is son of Mehar Singh, has not been heard for 30-32 years. It is further recorded in the alleged Will that the Executant does not

know whether his son is alive or not. The learned first Appellate Court has found that son was residing hardly 26 KM away from the place of residence of the father. It is not possible to believe that father would not know whether his son is alive or not, particularly when he is living just 26 KM away. The plaintiff has stepped into the witness-box and has stated that he used to visit the village twice a month. The learned First Appellate Court while dealing with the aforesaid issue has held as under:-

“Plaintiff examined Hansa Singh who is maternal uncle of the plaintiff and the defendant and clearly deposed that the plaintiff used to reside at Phagwara and was earlier employed at Phagwara Mill and thereafter started cycle repair shop at Phagwara and Surjit Singh also attended the cremation of his father Mehar Singh. In the cross-examination Hansa Singh PW2 deposed that Surjit Singh came to the village on the death of Mehar Singh on the information given by Sohan Singh defendant. The defendants have not been able to show any enmity of this witness with Sohan Singh. PW1 Niranjana Dass was examined who is the resident of the village Gunachor where Mehar Singh deceased used to reside. He also deposed that Surjit Singh reside at Phagwara and comes after about 15 days to Village and Phagwara is at a distance of about 26 KM from Gunachor. The appellant also examined official of the Punjab National Bank who deposed that account in the name of Surjit Singh resident of Village Gunachor was opened in their bank on 16.7.1971. PW4 Investigator B.D.P.O. Office Phagwara was examined who deposed that as per record yellow card has been issued in the name of Surjit Singh. Surjit Singh himself appeared in witness box and deposed that he never remained absent for 7 years and he was living at Phagwara and now he is doing private job at Ludhiana

and he has constructed his house at Phagwara and living their and he is entitled to the property by way of natural succession. Sansar Chand photographer was examined who duly proved the photographs clicked by him and the negative as PW6/A to PW6/D. From the evidence discussed above it is clear that the plaintiff was living at Phagwara which is only 26 KM from Gunachor. Thus applying the principle of preponderance of probability, it cannot be said by any stretch of imagination that the plaintiff was not heard of by the villagers of Gunachor. Even Hansa Singh who is maternal uncle and has no axe to grind against any of the brother of the plaintiff deposed that the plaintiff was present at the time of cremation of his father Mehar Singh. The reason given in the Will for disinheriting the appellant is not valid and this cast doubt on the authenticity of the Will.”

It is also not in dispute that even scribe of the Will has not been examined. The appellant has only examined the son of scribe, although, the scribe was very much alive.

In view of the aforesaid discussion, I do not find any reason to interfere with the findings of fact arrived at by the learned Additional District Judge.

Appeal is dismissed.

All pending miscellaneous applications are disposed of, in terms of the aforesaid judgment.

16.08.2017

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No