

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

**RSA No.1157 of 2010
Date of Decision: 30.10.2017**

Jagbir Singh and others

.....Appellants

Vs.

Yashbir Singh and others

.....Respondents

CORAM: HON'BLE MS. JUSTICE RITU BAHRI

Present:- Mr.Amit Jain, Advocate, fore the appellants.

Mrs.Baljeet Mann, Advocate, for respondents No.1 & 3
and LR's of respondent No.2.

RITU BAHRI, J. (ORAL)

The appellants/plaintiffs has come in appeal against the judgments of the trial Court dated 22.05.2008 and learned appellate Courts dated 29.01.2009 whereby suit for possession by way of partition by metes and bound in respect of the property situated in Gurgaon, has been dismissed.

The brief facts of the case are that Kartar Singh and Jagbir Singh filed a suit for possession by partition by metes and bounds in respect of the property in question, pleading that Sh.Murari Singh was father of the parties and was owner of the house in dispute having purchased the same on 12.02.1968. He expired on 24.03.1999 leaving behind the plaintiffs and defendants. The suit was contested by the defendant No.1 and it was stated that Sh.Murari Singh executed and got a Will registered during his lifetime and bequeathed the suit property to defendant No.1 to 3 in equal share. The

plaintiff and defendants No.4 had no concern with the same.

Upon notice, defendant No.1 denied the claim of the plaintiffs and came with the plead that he and defendants No.2 and 3 were exclusive owner of the house in dispute on the basis of Will dated 08.09.1992 Ex.D1 executed by their father.

Defendants No.2 and 3 in their separate written statement took the same plea. Defendant no.4 supported the claim of the plaintiffs and pleaded that she had no objection if house in dispute was partitioned by metes and bounds among all the legal heirs of Murari Singh.

For the pleadings of the parties, following issues were framed by the trial Court:

- (1) Whether the plaintiffs are entitled to a decree of possession by way of partition of the suit property by separating 1/6th share each of the plaintiffs by metes and bounds? OPP.
- (2) Whether the suit is bad being for partial partition? OPD.
- (3) Whether Sh.Murari Singh deceased executed a Will on 08.09.1992, as alleged and what its effect? OPD.
- (4) If issue No.3 is proved, whether the said Will was cancelled? OPD.
- (5) Whether the defendant No.2 affected any improvement in the suit property, if yes, then its value and effect?
- (6) Relief.

In support of his case, defendants No.2 and 3 have proved the execution of the Will by examining one of its attesting witness, namely Sh.Ajit Singh Dahiya, Advocate DW5. This witness specifically deposed that the Will was signed by the testator and both attesting witnesses in the

the Will, the testator was of sound and disposing mind. The will was got scribed by Sh.Mohar Singh. He signed the same in his presence as well as other attesting witness of the Will namely Sh.Dayanand Suhag, Advocate. The Will was prepared in duplicate. One copy was in the register of Sub-Registrar, Gurgaon. The Will as well as the copy were attested by him and other witness in the presence of Sh.Mohar Singh. Sh.Mohar Singh signed the Will at that very time. He was of sound and disposing mind and he never disclosed that he had cancelled the Will.

On the abovesaid ground, learned trial Court has dismissed the suit of the plaintiff as they are not entitled to the relief of partition of the suit property.

Aggrieved against the same, plaintiffs have come in appeal before first appellate Court.

Learned appellate Court has held that as per Section 63 of the Indian Evidence Act, the Will is required to be attested by two or more witnesses each of whom has been the testator signing or affixing his thumb impressions on the Will. Once Will is executed in terms of 66 of the Indian Registration Act, same required to be proved before the Court in terms of Section 68 of the Evidence Act. It contemplates that if a document is required to be attested, it shall not be used as evidence unless one attesting witness at least has been called for the purpose of proving its execution of there been an attesting witness alive. Section 71 of the Evidence Act says that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. In this case, defendants No.2 and 3 have proved the execution of the Will by examining

one of its attesting witness, namely Sh.Ajit Singh Dahiya, Advocate DW5. He specifically deposed that Will was signed by the testator and both attesting witnesses in the presence of each other. He has further deposed that at the time of execution of the Will the testator was of sound and disposing mind. This is sufficient to prove the execution of the Will and the Court found no ground to disbelieve his testimony. It is true that Sh.Ajit Singh Dahiya, Advocate DW5 has not stated that the Will was also presented before the Sub Registrar for registration and before the Sub Registrar also it was signed by the testator and both the attesting witnesses in the presence of each other. But that is not sufficient to discard the Will and it is not requirement of law that the Will must be signed by the testator and both the attesting witnesses in the presence of each other even before the Sub Registrar at the time of registration. Learned appellate Court has further held that the appellate Court has given its finding that it is agreed that first page of the Will is not signed either by the testator or by attesting witnesses but back page of the same would show that when the Will was presented before the Sub-Registrar for registration, it was signed by the testator at two places. There is an endorsement of the Sub Registrar on the back of the said page that the contents of the Will were read over and explained to the testator and the witnesses and they signed the same in the presence of each other. Said endorsement is per se admissible in evidence. Back of the second page bears the signatures of both the attesting witnesses before the Sub-Registrar. Meaning thereby, when the Will was presented before the Sub Registrar for registration, the testator and both the attesting witnesses were present and they had signed the same in the presence of

each other.

In the present case, both the Courts below have examined the other aspect of the case that testator was an educated person having degree in law and he was retired as an IAS officer. He knew well the implication of execution of the Will. In the Will he has explained the reason why he has given house in dispute to his three sons and as to why he has excluded his two other sons and daughter. It was not the only Will executed by him. He had executed first Will on 02.05.1989 and got it registered. By way of said Will he gave the house in dispute to defendants No.1 to 3. He revoked said Will vide another Will dated 26.12.1989. It too was got registered. By way of said Will he gave house in dispute to defendants No.1 to 3 and one more son Kartar on the understanding that he would also settle at Gurgaon. But when he found that he would settle at Gurgaon, third Will dated 08.09.1992 copy of which has been placed on the file as Ex.D1 was executed and by way of said Will, the testator reverted to his original Will executed on 02.05.1989. Meaning thereby, the testator had clear intentions in his mind to give house in dispute only to his those sons who wanted to settle at Gurgaon. Since, defendants No.1 to 3 were residing at Gurgaon, he gave said house to them by way of Will dated 02.05.1989. Lateron his forth son Kartar Singh plaintiff No.1 also expressed his intention to settle at Gurgaon, Therefore, testator revoked the Will dated 02.05.1989 by way of Will executed on 26.12.1989 and give him a share in the house along with defendants No.1 to 3. but lateron Kartar Singh did not carry his words and continued to live at Chandigarh. Therefore, the testator revoked the Will dated 26.12.1989 by way of Will executed on 08.09.1992 and reverted to

his original Will dated 02.05.1989. In view of the facts narrated above, learned appellate Court affirmed the finding of learned trial Court and dismissed the appeal of the plaintiffs.

So in the light of the discussion, the orders of the Courts below do not reflect any material irregularity or perversity which warrant interference. Hence the present regular second appeal stands dismissed.

(RITU BAHRI)
JUDGE

30.10.2017

anil

Whether speaking/reasoned Yes/No

Whether reportable Yes/No