

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

RSA No.4275 of 2010 (O&M)

Date of decision : 17.08.2017

Nand Singh and others

...Appellants

Versus

Devi Singh (deceased) through his LRs and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Baldev Raj Mahajan, Sr. Advocate with
Mr. Deepak Sabharwal, Advocate and
Mr. Vaneet Soni, Advocate and
Mr. Akhilesh Vyas, Advocate and
Mr. Saurabh Mago, Advocate for the appellants.

Mr. Rajesh Garg, Advocate with
Mr. Amit Chaudhary, Advocate
for respondent Nos.2, 5 to 7 and 15.

ANIL KSHETARPAL, J.

The defendants-appellants are in Regular Second Appeal against the judgments passed by the Courts below.

The following question of law arises for determination in the present appeal:-

- i) Whether the judgments passed by the Courts below ignoring the registered Will dated 30.11.1987 after finding that the Will is proved in accordance with law, are perverse?

The detailed facts have been given in the judgment of the Courts below. However, to complete narrative, some facts are being given.

Dispute is with regard to the estate of late Smt. Banti who died on 18.12.1994. Late Smt. Banti was issueless. Her husband had pre-deceased her. The plaintiffs are children of sister of the husband, whereas defendants-appellants are brother of late Smt. Banti and children of another pre-deceased brother of late Smt. Banti.

Late Smt. Banti is alleged to have executed a registered Will dated 30.11.1987 Ex.DW4/C bequeathing 3/4th share of her property in favour of Prem Singh-defendant No.1 (brother) and 1/4th share in favour of Raghubir and Jodh Singh sons of Rasal Singh-defendant Nos.2 and 3 (children of pre-deceased brother).

The defendants-appellants also filed the counter claim for passing a decree for declaration to the effect that they are owners in possession.

The learned trial Court held that the execution and registration of the Will dated 30.11.1987 is proved as one attesting witness namely Nek Chand was examined as DW4 and Scribe was examined as DW5. Even the official from the office of Sub-Registrar was examined.

The learned trial Court after recording a finding that the execution of the Will is proved, ignored the Will on following grounds:-

1. Second attesting witness of the Will namely Surat Singh has not been examined in the Court.
2. There has been unequal distribution of the property by the Will.
3. Natural heirs have been ignored.

The appeal preferred by the defendants-appellants was also dismissed for similar reasons. However, the First Appellate Court further

added that the Will was executed in the year 1987 whereas Smt. Banti died on 18.12.1994 i.e. after a period of 7 years, therefore, the Will which was executed 7 years prior to the death cannot be taken as last wish of the testator. The First Appellate Court also held that on 30.11.1987, the Document Writer has scribed many documents and Surat Singh was witness in all the documents. Therefore, it was held that Surat Singh appears to be stock witness.

I have heard learned counsel for the parties and with their able assistance gone through the judgments passed by the Courts as well as record.

Learned counsel for the appellants has submitted that as per the findings of the Courts below, execution of the Will has been proved in accordance with the provision of Section 68 of the Indian Evidence Act. The plaintiffs have not challenged the aforesaid findings. He has further submitted that mere non-examination of Surat Singh-the second witness cannot be taken as suspicious circumstance. He submitted that Will is a natural Will as late Smt. Banti would certainly had preference for her brother and children of her another pre-deceased brother as compared to relations of her husband. He has further submitted that late Smt. Banti had executed the Will after four years of death of her husband, Nathu, who died on 02.01.1984. It has come in evidence that Prem Singh, the major beneficiary under the Will started residing with late Smt. Banti proved from the ration card and the voter list.

He has further submitted that on the date of the execution of the Will, late Smt. Banti and her sister Subhadra had jointly executed many

documents. It may be mentioned here that Subhadra and Banti were real sisters who were married to two brothers i.e. Ram Saran and Nathu. Subhadra was married to Ram Saran whereas Banti was married to Nathu. On 30.11.1987, both the sisters i.e. Subhadra and Banti executed a sale deed jointly in favour of Jit Singh. Subhadra also executed a Will. Similarly, Banti executed a Will which is in dispute. All the documents were scribed by Document Writer-Avninder Kumar who appeared as DW5. In all the documents, Nek Chand and Surat Singh are the attesting witnesses. Nek Chand is a retired Patwari and Ex-Numberdar whereas Surat Singh is Ex-Sarpanch of Village Jaini. On 30.11.1987, Avninder Kumar-Document Writer also scribed two rent deeds and a pronote executed in favour of Nek Chand. All these documents are witnessed by Surat Singh. According to the learned counsel, once Surat Singh was present in the Tehsil premises, the evidence of Surat Singh in all the documents is natural particularly when he was Ex-Sarpanch.

On the other hand, learned counsel for the respondents-plaintiffs has asserted that Surat Singh, second witness has not been examined. He has further pointed out that statement of Nek Chand and Scribe is contradictory as Nek Chand states that he was summoned by Smt. Banti whereas on that day, a pronote had been executed in favour of Nek Chand.

Learned counsel for the respondents-plaintiffs has further submitted that there is total unequal distribution of the property as one brother i.e. defendant No.1 has been given 3/4th share whereas children of other brother has been given 1/4th share only. Learned counsel for the

respondents has further submitted that no reason has been given as to why the Class-I heirs of the husband have been ignored.

In this case, both the Courts have concurrently found that the execution and registration of the Will dated 30.11.1987 is proved in accordance with the provisions of Section 68 of the Indian Evidence Act. Such finding of the Court is not being disputed.

The original Will is Ex.DW4/C at page No.349. The thumb impressions of Banti are affixed on every page as well as on the back page where endorsement of the registration has been entered by the Sub-Registrar.

Both the Courts have taken adverse inference of the fact that Surat Singh, second witness has not been examined. As per the requirement of Section 68 of the Indian Evidence Act, at least one attesting witness is required to be examined and if that attesting witness is able to prove due execution of the Will as per Section 63 of the Indian Succession Act, then other attesting witness is not required to be examined. Section 68 of the Indian Evidence Act, is extracted as under:-

“68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16

of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied] ”

In the present case, Nek Chand was man of confidence of late Smt. Banti. It is established on the record that late Smt. Banti had executed a General Power of Attorney in favour of Nek Chand with respect to the entire property on 02.07.1984 Ex.D1 on the record. Since, Nek Chand was appointed as attorney and he never misused the attorney, therefore, late Smt. Banti had immense confidence in Nek Chand. Hence, it was natural that Nek Chand would be called upon to be a witness to the Will also.

The Courts below have also found that Surat Singh is Stock witness because he has signed several documents as an attesting witness on 30.11.1987. Surat Singh is Ex-Sarpanch of Village Jaini. As noticed earlier late Smt. Banti and her sister Subhadra on that day, executed three documents i.e. one sale deed and two Wills. All the documents are attested by Nek Chand and Surat Singh. Fourth document is pronote executed in favour of Nek Chand. Surat Singh was obviously available witness. Still further, Surat Singh also attested two rent deeds. Since Surat Singh was available and all the documents were being scribed by Document Writer- Avninder Kumar, therefore, Surat Singh also attested those documents. This is a normal practice. Once the Ex-Sarpanch is available at a particular time in the office of Document Writer, he will be requested to attest the documents as attesting witness. In my considered view, the Courts below have taken a perverse view in holding that Surat Singh was a Stock witness.

Learned Courts below have further held that there was unequal distribution of the property by late Smt. Banti. The Will is executed for

distributing the property according to the wishes of the testator. The testator bequeaths the property according to his/her wishes. There is nothing strange about it. Further plaintiffs have no locus standi to dispute the unequal distribution as the property has not been bequeathed in favour of the plaintiffs. The defendant Nos.2 and 3 who are said to have received smaller share have not objected to the Will. Therefore, the view taken by the Courts is clearly perverse.

The Courts below have further taken a view that natural heirs have been ignored. The finding of the Courts below is perverse even on this score. The case has to be examined in the peculiar facts of the case. It is admitted position on record that Nathu husband of late Smt. Banti died on 02.01.1984. There is ample evidence available on the file to prove that Prem Singh-defendant No.1, her brother, started living with her. Ration card as well as voter list has been produced to prove this fact. Naturally, late Smt. Banti would have inclination towards her brother and sons of her another pre-deceased brother. Late Smt. Banti was issueless. In these circumstances, the Courts below were wrong in taking a view that natural heirs have been ignored.

The learned First Appellate Court has further taken a view that the Will was executed and registered on 30.11.1987. She remained alive for more than 7 years. The Court has taken a view that Will was executed 7 years back and, therefore, it cannot be taken as last wish of the testator.

In my view, the conclusion drawn by the First Appellate Court is totally erroneous. Once, it is proved on the file that Banti remained alive for more than 7 years and she did not change her Will, that itself shows that

Banti had executed a Will out of her free will and volition and she stood by the Will during 7 years, she remained alive. Last Will of deceased is to be enforced. In the present case, the last and the only Will was executed on 30.11.1987. Hence, view of the learned First Appellate is clearly erroneous.

Learned counsel for the respondents has submitted that there is a contradiction in the statement of Nek Chand attesting witness and scribe. The contradiction is only with respect to whether Nek Chand himself came or he was called by Banti. In my view, there is no contradiction. Nek Chand says that he was called by Late Smt. Banti. It is not the evidence of DW5-Scribe that Banti had not called Nek Chand. Merely because that pronote was also executed in favour of Nek Chand would not prove any contradiction. Once Nek Chand was there in the Tehsil premises, he also got executed a pronote. Therefore, there is no force in the submission of learned counsel for the respondents.

The Will in the present case is a registered document. The original Will is part of the record. No doubt, the Will can be ignored on the basis of suspicion. However, in case of registered Will, the Courts will be very careful before doubting the genuineness of the Will. Registered Will cannot be ignored simply on the basis of conjectures and surmises. Once the execution of the Will is proved, unless there is some strong circumstance which creates a doubt either about the validity of the Will or about the mental health of the testator, the Courts would not interfere with the wishes of the testator.

In view of the discussion made above, the question of law as framed earlier is answered in favour of the appellants, Although, as per the

latest judgment of the Constitution Bench, in the case of *Pankajakshi (Dead) Through Legal Representatives and others Vs. Chandrika and others, 2016(6) SCC 157*, wherein it has been held that with respect to the Punjab and Haryana, second appeal would be governed by Section 41 of the Punjab Courts Act and not by Section 100 CPC. Section 41 of the Punjab Courts Act, gives much wider power to the High Court to entertain the second appeal.

Appeal is allowed.

All pending miscellaneous applications are disposed of, in view of abovesaid judgment.

17.08.2017

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No