

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

RSA No.1418 of 2013 (O&M)

Date of Order:4th September, 2017

Gian Singh and others

..Appellants

Versus

Devinder and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.S.D.Bansal, Advocate,
for the appellants.

Mr. J.K.Chauhan, Advocate,
for respondents no.1 and 2.

ANIL KSHETARPAL, J.

Plaintiffs are in regular second appeal against the judgment passed by the learned first appellate Court, dated 16.10.2012.

Learned trial Court had decreed the suit filed by the plaintiffs, whereas learned first appellate Court has reversed the judgment and decree passed by the trial Court.

Plaintiffs had filed a suit for declaration and possession claiming the property on the basis of Wills dated 16.11.1998 and 25.10.1999. The estate of Bant Singh is in dispute in the present case. Plaintiff No.1 is son of Bant Singh and plaintiffs no.2 to 4 are legal heirs of Anoop Singh, pre-deceased son of Bant Singh. Whereas defendants are legal heirs of pre-deceased son of Bant Singh, namely, Om Parkash. Defendants had set up another Will, dated 10.09.2000, Ex.DW1 on the record.

Learned trial Court after appreciating the evidence available on the file, held that the plaintiffs were successful in proving Wills dated

16.11.1998 (registered Will Ex.P3 on the file) as also Will dated 25.10.1999 Ex.P4 on the record, which is notarized. Learned trial Court further held that the Will dated 10.09.2000 set up by the defendants is not proved on the file.

Defendants filed the first appeal. Learned first appellate Court has upheld the findings of the trial Court that the Will dated 10.09.2000 is not proved on the file. Learned first appellate Court has also held that the Will dated 16.11.1998 (registered) and Will dated 25.11.1999, are also not proved in accordance with the provision of Section 68 of the Evidence Act. Learned first appellate Court has also held that the suit is bad for non-joinder of parties as remaining legal heirs of Bant Singh have not been added as party.

In my considered opinion, following substantial questions of law arise for consideration in the present case:-

- (i) Whether the Wills dated 16.11.1998 and 25.10.1999 are proved to be executed and attested in accordance with the provision of Section 63 of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872?
- (ii) Whether the judgment and decree passed by the first appellate Court is result of misreading of evidence?
- (iii) Whether the plaintiffs who are claiming title on the basis of testamentary succession are required to implead all the legal heirs or only those legal heirs who are disputing the testamentary succession?

At this stage, it would be appropriate to extract Section 63 of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872.-

“63. Execution of unprivileged wills.-Every testator, not being a Collected by the All India Christian Council, soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:--

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

“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.”*

It is clear that unprivileged Will is required to be attested by

two or more witnesses, each of whom has seen the testator's sign and affix

his mark. It is also provided that each of the witnesses shall sign the Will in

the presence of the testator. However, it shall not be necessary that one more witness be present at the same time.

Section 68 of the Evidence Act, 1872, provides that if a document is required to be attested by law, it shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution.

Questions No.(i) & (ii)

In the present case, one attesting witness, namely, Harminder Singh, Advocate, has been examined as PW2. Harminder Singh has stated that he is the author of the Wills as well as an attesting witness. He has signed both the Wills, Ex.P3 and Ex.P4 as an attesting witness. He has further stated that he had seen the testator signing both the Wills in his presence. He has further stated that Gian Singh the attesting witness of Will dated 25.10.1999 had also signed in his presence.

Now the dispute is whether Harminder Singh has made any statement about the signatures of Hari Singh, the other attesting witness of the Will dated 16.11.1998 or not?

A careful reading of the statement given in the Court as PW2 by Harminder Singh shows that Hari Singh was known to Harminder Singh as he used to work as a clerk with him. He further states that he recognized his signatures. In the next sentence he states that Bant Singh who had got the Will executed had also signed in his presence. Obviously, the word also refers to the signatures of Hari Singh, the other attesting witness.

In my considered opinion, once no suggestion was given to the witness that Hari Singh has not signed in his presence and no clarification was sought from Harminder Singh, PW2 during cross examination, the

obvious inference is that Hari Singh had signed the Will dated 16.11.1998 in the presence of Harminder Singh, which is not being challenged. The Will dated 16.11.1998 is a registered Will, bearing the photographs of the testator. The official from the office of Sub Registrar has been examined as PW5.

Keeping in view the aforesaid statement of Harminder Singh, the attesting witness, the requirement of Section 68 of the Evidence Act, 1872 stands complied with in respect to both the Wills i.e. 16.11.1998, Ex.P3 and 25.10.1999, Ex.P4. Hence, the finding of the learned first appellate Court that attestation of the Will is not proved in accordance with the provision of Section 63 of the Succession Act and Section 68 of the Evidence Act are found to be erroneous.

In view of the above, the questions no.1 and 2 are answered in favour of the plaintiffs-appellants.

Question No.(iii)

Learned first appellate Court has also accepted the appeal and dismissed the suit filed by the plaintiffs on the ground that other legal heirs have not been impleaded as party.

The plaintiffs were claiming the property on the basis of Wills dated 16.11.1998 and 25.10.1999. The plaintiffs had impleaded all the legal heirs of third son, who were contesting the entitlement of the plaintiffs on the basis of both the Wills. It is further apparent from the record that the defendants did not take a plea of non-joinder of parties in the pleadings filed. The learned first appellate Court also recorded that it amounts to waiver. The findings recorded by the first appellate Court in paragraph 47 is as under:-

“The defendants did not take the plea of non-joinder and the provisions of Order 1 Rule 13 are clear that the objection should be taken at the earliest opportunity and if not taken, it would amount to waiver. The defendants had waived their right and cannot be allowed to take objection of non-joinder at the Appellate stage.”

However, thereafter, the Court held that since all the legal heirs are not party-defendants, therefore, no effective order can be passed. In my considered view, the plaintiffs were claiming their entitlement only on the basis of testamentary succession i.e., Wills dated 16.11.1998 and 25.10.1999, than the plaintiffs were justified in impleading only those legal heirs who were contesting the Wills or were setting up a counter Will and excluding the other legal heirs of Bant Singh, if any, who were not disputing the Wills. This is not a case of claim to the property on the basis of natural succession. Learned first appellate Court has also not pointed out that as to who are the other legal heirs who has not been impleaded as party and what was their right. In these circumstances, the findings of the learned first appellate Court on this aspect is also erroneous and therefore, set aside.

In view of the discussion made above, the question no.3 is also answered in favour of the appellants.

In view of what has been recorded hereinabove, the judgment and decree passed by the learned first appellate Court is set aside and the judgment and decree passed by the learned trial Court is restored.

Appeal allowed.

4th September, 2017
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned
Whether reportable

: Yes/No
: Yes/No