

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

RSA No.1885 of 2017 (O&M)
Date of Decision: May 12, 2017

Smt. Sita Rani

..Appellant(s)

Versus

Shri Ulfat Rai Sharma & Ors.

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. B.R. Mahajan, Sr. Advocate with
Ms. Manpreet Ghuman, Advocate
for the appellant.

ANITA CHAUDHRY, J.

This is the defendant's second appeal aggrieved by the judgments passed by both the Courts below.

The plaintiffs are the sons of Gian Chand whereas the defendants no.1 to 5 are the daughters of Gian Chand. The case of the plaintiffs was that the plaintiffs and defendants no.1 to 4 were the owners and in possession of the disputed property and an unauthorized entry was got made in the revenue record by defendants no.5 in collusion with the revenue authorities. The relief of permanent injunction was made. It was pleaded that Lajya Wanti wife of Gian Chand was a co-owner to the extent of 21 Kanal 7 Marla and she died on 13.12.1996 leaving behind sons and daughters and they all inherited

the estate to the extent of share disclosed in the plaint. Defendant no.5 daughter of Raj Karni – defendant no.1 got a wrong entry made on the basis of a bogus Will and therefore, the mutation entered thereupon was liable to be corrected.

Defendants no.2, 4 and 5 only came forward to contest the suit. It was pleaded that Lajya Wanti had executed a Registered Will on 22.12.1981 in favour of defendant no.5 and she had inherited the entire share and the mutation was rightly sanctioned.

On the pleadings of the parties following issues were framed:-

1. Whether the plaintiff and defendant no.1 to 4 are owners in possession of the suit land? OPP
2. Whether mutation No.7582 dated 20.06.1997 is illegal, null and void? OPP
3. Whether the plaintiff is entitled to declaration prayed for? OPP
4. Whether the plaintiff is entitled to permanent injunction prayed for? OPP
5. Whether the suit is not maintainable? OPD
6. Whether the suit is bad for mis-joinder and non-joinder of necessary parties? OPD
7. Whether the suit is not properly valued for the purposes of court fee and jurisdiction? OPD
8. Whether the plaintiff has no cause of action to file the present suit? OPD
9. Whether Smt. Lajya Wanti executed a valid registered Will in favour of defendant no.5 on 22.12.1981? OPD

Additional Issue

Whether the plaintiff is entitled to possession in the alternative as alleged? OPP

10. Relief

The lower Court held that the defendant had failed to prove that the Will was executed as none of the contesting witnesses were examined. It was observed that DW3 had admitted in the cross-examination that as per the record maintained in the office of the Sub-Registrar, there was only one witness i.e. the mother Rajni Rani. It was claimed by the defendant that there were two attesting witnesses and Khushi Ram had died and the other witness Rajni Rani was old and she could not appear in the Court to make a statement. The suit was decreed on the basis of the findings recorded on the issues. An appeal was preferred by Sita Rani and it was observed as under:-

21. The defendants in order to prove its will has examined one Kamal Kumar, clerk of the above stated Harbhajan Singh Advocate from the year 1978 to 1985. He clearly stated that the above stated will bears the signature of Khushi Ram Advocate as witness and it has been drafted by Harbhajan Singh and he also identified his signatures. But when he has been cross examined, he admitted that he did not work with Khushi Ram Advocate. So when a person has not worked with some one, then it is improbable that he identified his signatures. There are thousands of advocates practising at Judicial Courts Complex, Amritsar and it does not mean that any person who has been working as clerk with one Advocate would identify the signatures of all the advocates who were practising at that time. So identification of the signatures of Khushi Ram above stated witness does not inspire confidence of this Court. As far as Harbhajan Singh, Advocate is concerned, above stated witness has clearly admitted that even

today Harbhajan Singh Advocate has come present in the court and he has been sitting at his seat. It means that at that time when the above stated witness identified the signatures of Harbhajan Singh Advocate, Harbhajan Singh, Advocate is alive and he is the best person who has come present and state that the above stated will has been drafted by him at the instance of deceased Lajya Wanti but defendant has never examined him. The other witness examined is defendant herself who only reiterated the version of plea taken by her in the present case and relied upon will Ex.D1 on record. But she is not attesting witness of the will.

22. The other witness examined by the defendant is Pawan Kumar who is clerk of office of Sub Registrar, Amritsar who brought on record the will Ex.D1 by stating that it bears signatures of Sub Registrar, Amritsar and endorsement of Sub Registrar, Amritsar on it is Ex.D2 as the above stated will is registered one but when he was cross examined, he admitted that in the register brought by him, there is a copy of will dated 22.12.1981 pasted in it and as per the record brought by him will dated 22.12.1981 attested by only one attesting witness namely raj Karni wife of Late Mahnga Ram, Rani Ka Bash, Amritsar. It is not attested by second attesting witness. The signatures of witness appearing on Ex.D1 at point 'A' are not appearing in the copy of will pasted in their register. He cannot say if Ex.D1 is correct as per the record by him or not.

23. It shows that the copy of will Ex.D1 which has been pasted in the register of Sub Registrar bears the signatures of one witness i.e. Raj Karni and not of

Khushi Ram. It means that when the above stated will has been presented before Sub Registrar for the registration then only Raj Karni was present and Khushi Ram independent witness as he is not related to Lajya Wanti was not there. It also casts doubt on the genuineness of the above stated will.

24. *Besides it there is another crucial point which has not been explained by the defendant. Raj Karni is one of the beneficiary of the above stated will and she has been also cited as defendant no.1 in the present suit. But she never came into witness box to prove the above stated will being witness.*

As per section 68 of the Indian Evidence Act it has been held that 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.”

The counsel for the appellant had submitted that there were two attesting witnesses to the Will and Khushi Ram had died and they were unable to produce the other witness as she was old and application was moved before the lower Court for permission to get her statement recorded through a Local Commissioner but that permission was declined. It was urged that an application had also been moved for additional evidence before the Appellate Court and that application was dismissed though there is no reference to it in the judgment under appeal but they have mentioned this fact in the grounds of appeal. It

was urged that Raj Karni was the only attesting witness alive and she was more than 80 years old and it was difficult for her to travel 250 kilometers.

On a query made, the counsel for the appellant admits that no revision was filed challenging that order vide which prayer for appointment of Local Commissioner was made.

The statement given by Pawan Kumar, Clerk of the office of Sub-Registrar, Amritsar completely demolishes the case of the appellant. The copy of the Will available in the office of Sub-Registrar showed that there was only one attesting witness. The case set up by the defendant was that the Will was signed by Raj Karni and Khushi Ram, Advocate. The Appellate Court has dealt with the issue elaborately and both the Courts below had rightly rejected the Will. There was a contradiction in the statement made by Kanal Kumar, Clerk to the Advocate when he had stated that the Will was signed by Khushi Ram, Advocate. He had stated that he was working with another counsel but had seen Khushi Ram, Advocate signing. In the cross-examination he admitted that he had never worked in the office of Khushi Ram, Advocate. The testimony of Kamal Kumar was rightly rejected.

The Will which was found pasted in the office of Sub-Registrar had only the signatures of one witness i.e. Raj Karni and not of Khushi Ram. Raj Karni was interested person as her daughter was to get the property. Raj Karni intentionally failed to appear in the witness box. She could not face the test of cross-examination. The appellant

failed to examine the Sub-Registrar who in the circumstance could be a crucial witness. The Will had not been proved as none of the attesting witnesses were examined. It is clearly established that the Will was signed only by one witness who chose to stay away from the witness box.

I find no infirmity in the findings recorded by both the Courts below. There is no merit in the appeal. The appeal is dismissed in limine.

May 12, 2017

sunil

(ANITA CHAUDHRY)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No