

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

**RSA No.1281 of 1991
Date of decision:12.02.2018**

Mohinder Singh ... Appellant
Vs.

Jagga Singh alias Jaggu Singh and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Anupam Gupta, Senior Advocate with
Ms. Harmanjeet Kaur, Advocate
for the appellant.

Mr. Ashok Jindal, Advocate
for the respondent(s).

AMIT RAWAL J.

The present appeal is at the instance of appellant-defendant no.1, who was not able to defend the suit filed by his brother seeking joint possession of 3/9th share as owner of the land described below:-

“khewat no.4, khitonai no.9, khasra no.15(8-0), 16(11-15), 65 (8-0), 80/1(4-0), khatoni 10 khasra no.14 min (5-10) khatoni 11 khasra no.14 min (2-10), total measuring 39K-15mls. situated in the area of V. Fateh Garh Nihal, Tehsil Phillaur according to the jamabandi of the year 1982-83 with all rights appurtenant thereto, with rights in Taur Chah, Arr Chah Mahal Chah, land revenue Rs.6/-.”

The suit had been decreed by the trial Court and the appeal preferred before the Lower Appellate Court was dismissed.

It would be necessary to give few facts emanating from

pleadings of the parties.

Plaintiffs - Jagga Singh alias Jaggu son of Hakim Singh, Sucha Singh son of Hakin and Mayan daughter of Hakim instituted a suit against the appellant-defendants -Mohinder Singh, their brothers Chinda, Makhan Singh, Biddo-daughter, Naino-widow claiming the share in the aforementioned suit property on the premise that Hakim Singh son of Sardara Singh was owner in possession of the land. In December 1986, he died leaving behind the plaintiffs and defendants as his legal heirs. Defendants no.6 to 13 were the legal heirs of one of the sons of Hakim, namely Gajjan Singh, who died during the life time of Hakim Singh. However, defendants no.1 and 2 set up a Will dated 21.07.1986 executed by Hakim Singh in their favour and also got sanctioned mutation bearing no.50, which was sought to be declared illegal, null and void.

Defendants no.1, 2, 3 and 5 filed joint written statement challenging the locus standi of the plaintiffs and admitted that the suit land was owned by Hakim Singh but by virtue of valid Will bequeathed the entire property in their favour. Even the mutation proceedings were also decided by the revenue Court in their favour, vide order dated 12.01.1987. The Will was executed owing to the fact that he was served by his three sons i.e. defendants no.1 to 3.

Since the parties were at variance, the trial Court framed the following issues:-

- “1. Whether Hakim Singh deceased executed a Will dated 21.07.1986. If so, its effect? OPD*
- 2. If issue no.1 is not proved, whether plaintiffs are entitled*

to the land in dispute to the extend of 3/9 share as natural heirs of the deceased. OPP

3. *Whether the plaintiffs have got no locus standi to file the present suit? OPD*

4. *Whether the suit as framed is not maintainable? OPD*

5. *Relief.”*

Since the onus to prove the Will was upon the defendants, they examined DW1-Jagtar Singh, DW2- Shangara Singh, attesting witnesses of Will Ex.D1, DW3-Jasbir Singh, scribe of Will, Ex.D1 and Mohinder Singh appeared as DW4.

The plaintiffs appeared as PW5 and examined PW2-Sham Sunder, PW3-Milkha Singh and PW4, Inspector Balwant Singh, Finger Print Expert, Finger Print Bureau, Phillaur and closed their evidence.

Both the Courts below on the pre-ponderance of evidence decreed the suit. It is in this backdrop of the matter, the present appeal has been filed at the instance of the appellant.

Mr. Anupam Gupta, learned Senior counsel assisted by Ms. Harmanjeet Kaur, Advocate appearing on behalf of the appellant submitted that both the Courts below have committed illegality and perversity in decreeing the suit by holding that the Will did not give any reason for excluding the natural heir, whereas, on close scrutiny of the Will, it explicitly referred to the services rendered by the appellant, much less financial assistance.

The execution of the Will, was proved by complying with the provisions of Section 68 of Indian Evidence Act. It is not necessary that

Will has to be scribed by a regular deed writer. Law does not prescribe for registration of the Will. The Courts below erred in not accepting the testimony of PW4, which was totally demolished in cross-examination. Both the attesting witnesses had been coherent and consistent in their testimony, therefore, the impugned judgments and decrees are liable to be set aside as there is abdication, illegality, much less perversity.

Mr. Ashok Jindal, learned counsel appearing on behalf of the respondents submitted that appellant-defendant no.1 had no subsisting right in the aforementioned property owing to the order dated 18.10.1995 passed by this Court. There is no illegality and perversity in the judgments and decrees of both the Courts below which are based upon the pre-ponderance of evidence.

During the course of hearing, he drew the attention of this Court to the order dated 15.11.1991 passed by this Court while hearing the application for stay, the appellant was directed to deposit a sum of ₹3,000/- every year by 15th of December and any default of payment would entail into vacation of the stay. However, during the pendency of the appeal, appellant-defendant no.1 was attempting to alienate the suit property and civil miscellaneous application was filed seeking restraint order and this Court, vide order dated 31.05.1995, restrained him to deliver the possession of the property in dispute to the vendees but submitted that prior to that on 15.05.1995, noticing the fact that appellant did not deposit the amount, vacated the stay. For the purpose of disposal of application, statement was made at bar purportedly on 18.10.1995, for, appellant had already parted with the land by selling his entire share. It is in this backdrop of the matter,

civil miscellaneous application seeking restraint order was dismissed and urged this Court for dismissal of the appeal.

I have heard the learned counsel for the parties, appraised the judgments & decrees of the Courts below as well as record and of the view that there is no force and merit in the submissions of Mr. Gupta.

Before adverting to the arguments, it would be apt to reproduced the orders referred above which read thus:-

18.10.1995

“C.M.No.2266-C of 1995 in RSA No.1281 of 1991

Mr. Anupam Gupta, Advocate for the appellant.

Mr. Ashok Jindal, Advocate for the respondent-applicant.

Mr. Gupta informs that the stay order granted in favour of the appellant has already been vacated as his client did not deposit the money as directed by this Court. He further informs that his client has already sold his entire share. In the situation, no relief can be granted to the applicant-respondent in these proceedings. Civil misc. is consequently dismissed.”

31.05.1995

“Mr. Ashok Jindal, Advocate for the applicant.

Notice of civil misc. to the appellant for 18.7.1995.

Meanwhile, he is restrained to deliver possession of the property in dispute to the vendees.”

15.5.1995

C.M.No.1434-C of 1995 in RSA No.1281 of 1991

Mr. Ashok Jindal, Advocate.

Mr. Anupam Gupta, Advocate.

The applicant alleges that the appellant has not deposited any money in pursuance to directions given by this Court vide its order dated November 15, 1991 passed in C.M.No.1969-C of 1991. On this basis, learned counsel for the applicant prays that the appellant be restrained from cutting/threshing of the crops from the land in dispute.

Notice of the application was given to the learned counsel for the appellant. No reply has been filed. Mr. Anupam Gupta states that the letter sent by him to Mohinder Singh has been received back.

Counsel for the parties heard. Vide order dated November 15, 1991, it had been directed that the appellant shall deposit a sum of Rs.3,000/- every year by the 15th of December till the appeal is decided. It was further ordered that default of payment would 'mean the vacation of stay'. Since the appellant has not made the deposit, the interim stay granted by this Court on June 11, 1991 stands vacated. The respondent-applicant is consequently free to execute the decree. He may do so. The application is, accordingly, disposed of."

Concededly, the appellant during the pendency of the appeal, has sold the property to third party, who acquired the right and has not come forward by moving an application under Order 22 Rule 10 CPC. The Courts below have rightly discarded the Will on the premise that PW4 Balwant Singh, Finger Expert deposed that thumb impressions of Hakim Singh at

point D and E on the Will were different from the thumb impressions on the agreement Ex.P3.

The Will was suffering from suspicious circumstances as it was stated to be scribed in Tehsil Complex Phillaur, wherein admittedly, few of the deed writers sit but DW3 Jasbir Singh was not a regular deed writer and register has not been properly maintained by him in the manner required to be. To a specific question in the cross-examination, he candidly admitted that when he appeared before the revenue Court, in the mutation proceedings with regard to the Will, one of the page of the register was blank and there was only one thumb impression and that page was written by him now. No explanation has come forward as what was the reason for filling that blank paper, much less register was not page marked. Jasbir Singh in cross-examination also stated that he asked Hakim Singh, testator to get the Will registered but he refused to do so. It has not surfaced as to why Hakim Singh did not opt for registration of the Will.

The witnesses have not deposed as per the provisions of Section 63(c) of Indian Succession Act, 1925 (in short "1925 Act"). For the sake of brevity, Section 63 (c) of 1925 Act and statements of both the witnesses, i.e., DW1-Jagtar Singh and DW2- Shangara Singh read as under:-

Section 63(c) of 1925 Act

“(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 acknowledgement of his signature or mark, or 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.”

“DW1-Jagtar Singh s/o Bhim Singh s/o Bhila Singh age 35 years, cultivator r/o Nau-Bramad, District Ferozepur on SA:-

I knew Hakam Singh deceased, who executed a Will in favour of Mohinder Singh and Chhinda Singh on 21.7.86. This will was written by scribe at Phillaur, at the instance of Hakam Singh. The scribe read over the Will to Hakam Singh and witnesses and Hakam Singh, after admitting it correct, put his thumb impression. I and Shangara Singh witnessed the said Will. I signed, while Shangara Singh, thumb marked the Will. I have seen the original Will, which is Ex.D1. Hakam Singh was in sound disposing mind at the time of execution of the Will. The scribe also made entry of this Will. In his register, where also Hakam Singh put his thumb impressions.

XXXX

Deferred, as counsel for plaintiff is not available.

R.O & A.C

SJIC/4.12.87”

“DW2-Shangara Singh s/o Kishan Singh s/o Gulab Singh age 40 years, cultivator r/o Sangowal, Tehsil Phillaur on

S.A:-

I knew Hakam Singh deceased personally, who executed a Will in favour of Mohinder Singh and Chhinda Singh on 21.7.86. It was written by the scribe at the instance of Hakam Singh at Phillaur. The scribe read over the contents of the Will to Hakam Singh and witnesses and after admitting the same as correct, Hakam Singh put his thumb impression. I and Jagtar Singh witnessed the Will. I have seen the original Will Ex.D1, which bears my thumb impression. Hakam Singh was in sound disposing mind at the time of Will. The scribe also made entry of this Will in his register, where also Hakam Singh put his thumb impressions.

XXXX

Deferred, as counsel for plaintiff is not available.

R.O &A.C

SJIC/4.12.87”

There is a requirement of law that witnesses have to append the signatures/thumb impressions on the direction of the testator. The aforementioned clause is explicitly wanting.

The provisions of Section 63(c) of 1925 Act have been deliberated upon by the Supreme Court of India in **Janki Narayan Bhoir Vs. Narayan Namdeo Kadam 2003(1) RCR (Civil) 409**, wherein, it has been held that in the absence of compliance, the Will has to be discarded.

Having failed to prove the Will, I am of the view that suit had rightly been decreed. Since the subsequent events as noticed above which have taken place during the pendency of the appeal, appellant-defendant

no.1 had no subsisting right in the property. The stay was already vacated and the judgments and decrees, must have been resiled to the reality.

As an upshot of my findings, there is no illegality and perversity in the findings recorded by both the Courts below which are based upon the appreciation of oral and documentary evidence much less no substantial question of law arises for adjudication of the present appeals.

Accordingly, the appeal stands dismissed.

(AMIT RAWAL)
JUDGE

February 12, 2018

savita

Whether Speaking/Reasoned

Yes/No

Whether Reportable

Yes/No