

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

**RSA No.1563 of 1991 (O&M)
Date of decision:13.7.2018**

Charanjit Singh and others ... Appellants

Vs.

Naib Singh and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Arvind Mittal, Advocate
for the appellants.

Mr. R.S.Chauhan, Advocate
for the respondents.

AMIT RAWAL J.

The appellant-defendants are in Regular Second Appeal against the judgment and decree dated 10.10.1990 rendered by the Lower Appellate Court, whereby, finding on issue no.2 asserting right in respect of estate of Mewa Singh on the basis of Will dated 20.10.1983, has been reversed.

For adjudication of the appeal, following facts would be essential and necessary:-

The respondent-plaintiff instituted the suit for declaration to the effect that plaintiff and defendants no.5 to 7 were owners in equal share of 1/6th share left by Mewa Singh son of Mehma Singh in joint possession of land comprised in khasra no. 81/100, khasra no.317(4-0), 318(4-0), 319(4-0), 320(4-5), 321(6-9), 322(3-1), 323(5-17), 324(4-0), 325(4-0), 326(3-3),

327(4-0), 328(4-0), 461(0-16), 461(0-16), 462(2-15), 467(4-0), 468 (1-10), 962/469 (2-12), 470(2-6), 471(2-6), 541(1-1), 695(1-8), 722(6-8), 724(2-18), 726(3-1) situated within the revenue limits of village Badala Naya Shehar, H/B No.188 vide jamabandi relating to the year 1980-81. It was averred that Mewa Singh died on 15.01.1986 and during his life time owing to the assistance and facility of life, executed a Will dated 8.1.1986 in favour of the plaintiff and defendants no.5 to 7. Defendant no.8 was not beneficiary as he did not desire to inherit the property. Defendants no.1 to 4 had set up a forged and unnatural Will allegedly executed on 20.10.1983 and on the basis of aforementioned Will, in connivance with revenue authorities obtained the mutation of inheritance sanctioned on 06.03.1986. Defendants no.1 to 4 were requested to admit the claim but they refused. Owing to circumstances, suit aforementioned was filed.

The contesting defendants in the written statement denied the averments made in the plaint with regard to the fact that Mewa Singh had executed a Will dated 8.1.1986 in favour of the plaintiff and defendants no.5 to 7 and laid emphatic reliance upon the Will dated 20.10.1983, being last and final executed by Mewa Singh. It was alleged that the aforementioned Will was registered one and carried a presumption of truth. The mess and cultivation of the land of the defendants with Mewa Singh was joint and owing to services rendered, the Will aforementioned was executed.

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

“1. Whether Mewa Singh executed a valid Will on 8.1.1986 in favour of plaintiff and defendants no.5 to 7, as alleged?If so its effect?OPP

2. Whether Mewa Singh executed a valid Will on 20.10.1983 in favour of defendants no.1 to 4 as alleged. If so, its effect?OPD

3. Whether suit has not been properly valued for the purposes of court fee and jurisdiction?OPP

4. Whether suit in the present form is not maintainable?OPP

5. Relief.”

The respondent-plaintiff in support of the pleadings examined following witnesses:-

PW1 - Ram Chand, Copy Clerk, Court of Additional District Judge, who brought the summoned file titled as Raghbir Singh Vs. Jagir Singh No.369 of 10.04.1986.

PW2 - Bharat Mitter, Scribe of the Will dated 8.1.1986.

PW3- Jagdev Sigh, Lambardar, attesting witness of the Will (Ex.P1).

PW3/A- Naib Singh, brother of Mewa Singh

and brought on record the following documents:-

Ex.P1 copy of the Will dated 08.01.1986

Ex.P2 copy of the jamabandi

Ex.P3 copy of site plan

Ex.P4	copy of site plan
Ex.P5	copy of order dated 14.03.1986
Ex.P6	copy of order dated 06.03.1986
Ex.P7	copy of mutation order

The defendants on the other hand examined following witnesses:-

DW1	Avinash Sharma, copying clerk
DW2	Sarja Singh
DW3	Tehsal Singh
DW4	Balwant Singh
DW5	Kuldip Singh

and brought on record the documents Ex.D1, Ex.D2, Ex.D3, Ex.D4 to Ex.D8 and Ex.DW5/A.

The trial Court on the basis of aforementioned evidence dismissed the suit but rendered the finding on issue no.2 in favour of the defendants holding therein that defendants no.1 to 4 were entitled to inherit the landed and other property of Mewa Singh bequeathed as per the Will dated 20.10.1983.

The plaintiff assailed the aforementioned finding by filing an appeal which has been allowed by discarding both the Wills and estate of Mewa Singh has been held to devolve by way of natural succession.

Mr. Arvind Mittal, learned counsel appearing on behalf of the appellants submitted that Lower Appellate Court has committed illegality and perversity in not noticing the following stark evidence produced on record:

(a) Defendant no.6 admitted that testator used to reside with defendants no.6 and 7 before the death and they were in joint cultivation. The testator died at the house of defendant no.6 and his ashes were immersed by defendant no.7 at Gurudwara Patalpuri Kiratpur Sahib.

(b) The Lower Appellate Court erroneously held that attesting witness of the Will dated 20.10.1983 was resident of the same village. In fact, except DW3-Tehal Singh and all other witnesses were resident of village Badala Naya Shahr.

(c) The Lower Appellate Court has wrongly held that Shiv Ram and Mulkh Raj, attesting witnesses of the Will dated 20.10.1983 were professional witnesses, for, plaintiff had not asked specific question in the cross-examination of the defendants. It is not necessary for the testator to mention in the Will as to why he disinherited the other beneficiaries from the property. The finding that registered Will would not be sufficient ground for valid execution of the Will is neither here nor there as no evidence has been placed on record on behalf of the plaintiff to render a single instance of alleged suspicious circumstances.

(d) Defendants no.2 to 4 resided in the village upto 1980 and they were in 9th, 10th and 7th class respectively and defendant no.1 studied upto 9th or 10th class in the village and then left for army 6/7 years back. In fact, defendant no.6-Balwant Singh was the attorney of defendants no.1 to 4, so he appeared on behalf of defendants no.1 to 4 and thus, urged this Court for setting aside the findings of the Lower Appellate Court by restoring the finding on issue no.2 of the trial Court in favour of the

appellants.

Per contra, Mr. R.S.Chauhan, learned counsel appearing on behalf of the respondents submitted that attesting witnesses of the Will had not deposed as per the provisions of Section 63(c) of Indian Succession Act, 1925 (for short “1925 Act”). In support of the aforementioned submission, reliance has been laid to the judgment rendered by Hon'ble the Supreme Court in **Janki Narayan Bhoir Vs. Narayan Namdeo Kadam 2013(1) RCR (Civil) 409**. The Lower Appellate Court exercised the jurisdiction as per the provisions of Section 96 of the Code of Civil Procedure being the last Court of fact and law. The respondent-plaintiff did not assail the findings of the trial Court vis-a-vis discarding the Will dated 8.1.1986 propounded by the plaintiffs. The judgment and decree of the Lower Appellate Court is on equity and does not call for any interference and thus, urged this Court for dismissal of the appeal.

In rebuttal, Mr. Arvind Mittal laid strong reliance upon the findings rendered in paragraph 17 of the judgment rendered by Hon'ble the Supreme Court in **Gopal Swaroop Vs. Krishna Murari Mangal and others 2010(14) SCC 266** to contend that there is no requirement in law that both the witnesses should have signed the Will on the direction of the testator. It is only in those circumstances when some other person signed on behalf of the testator which is acknowledged by him.

I have heard the learned counsel for the parties, appraised the judgments and decrees as well as record of both the Courts below and of the

view that there is no force and merit in the submissions of Mr. Mittal.

DW3-Tehal Singh son of Joginder Singh was the attesting witness of the Will. His examination in chief reads as under:-

“Naib Singh Vs. Charanjit Singh etc.

On S.A.

DW3 Tehal Singh son of Joginder Singh aged 46/47 years, cultivator/Govt. Contractor, Tehsil Complex, Kharar, r/o village Sukhgarh.

I have been working as paper selling contractor for the last 15 years in the tehsil premises. The Will Ex.D1 was typed by Sarja Singh petition writer at the instance of Mewa Singh. Mewa Singh was in perfect senses at that time. I knew Mewa Singh personally. I know all the four brothers personally. The Will was read over to Mewa Singh by the petition writer, who after accepting the same to be correct signed the same in Urdu. Myself Mulkh Raj and Shiv Ram were present when Mewa Singh signed the Will. We all witnesses also attested the Will in the presence of Mewa Singh. Then the Will was presented before the Sub Registrar, who read it over to Mewa Singh and in token of the acceptance of the Will as correct, Mewa Singh signed the endorsement Ex.DW1/A in the presence of the witnesses and the witnesses also attested the same before Mewa Singh. I identify my signatures on the Will as well as on the endorsement. I have seen the original in the summoned file

and its attested copy is Ex.D1.”

From the perusal of the examination in chief of aforementioned witness did not conform to the ingredients of Section 63(c) of 1925 Act. For the sake of brevity, provisions of Section 63(c) as well as paragraph nos.6 to 8 and 10 of Janki's case (supra) read as under:-

“The provisions of Section 63 (c) of the Indian Succession Act provides three conditions to be complied with; (i) The Will should have been attested by two or more witnesses, each of whom had seen the testator either sign or affix his mark to the Will or seen some other person signing the Will in the presence; (ii) 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 (iii) 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.”

Paragraph nos.6 to 8 and 10 of Janki's case (supra)

“6. At the hearing the learned counsel for the respondent fairly submitted that Raikar was only the scribe and he was not the attesting witness. Even looking to the evidence of Raikar himself it is clear that he gave evidence as the scribe. There is nothing on record to indicate that he had any intention to attest the Will. The attesting witness Sinkar has not stated that the

other attesting witness Wagle attested the Will in his presence.

On the other hand, he has stated that he did not see Wagle present at the time of execution of the Will. Wagle, the other attesting witness, being alive ought to have been examined in order to prove the Will. Nothing is brought on record to show that any attempt was made to examine Wagle or there was any impediment in examining him. It is true that although will is required to be attested by two witnesses it could be proved by examining one of the attesting witnesses as per Sections 68, Indian Evidence Act.

7. We think it appropriate to look at the relevant provisions, namely, Section 63 of the Indian Succession Act, 1925 and Sections 68 and 71 of the Indian Evidence Act, 1872 which read:

Section 63 of the Succession Act "63. Execution of unprivileged wills.- Every testator, not being a 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)

(b)

(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 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."

Section 68 of the Evidence Act "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 it's execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided..."

Section 71 of the Evidence Act "71. Proof when attesting witness denies the execution.- If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

8. To say will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of Section 63 of the

Succession Act are to be complied with i.e., (a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.

10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested 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 an evidence. It flows from this Section that if there be an attesting witness

alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses

mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory

requirements of Section 68 of the Evidence Act.”

It would be apt to reproduce paragraphs 14, 15, 16 and 17 of Gopal Swaroop's case (supra) which read as under:-

“14. The decisions of this Court in Bhagwan Kaur W/o Bachan Singh v. Kartar Kaur W/o Bachan Singh & Ors. 1994 (5) SCC 135, Seth Beni Chand (since dead) now by [L.Rs. v. Smt. Kamla Kunwar and Ors.](#) 1976 (4) SCC 554, [Janki Narayan Bhoir v. Narayan Namdeo Kadam](#) 2003 (2) SCC 91, [Gurdev Kaur and Ors. v. Kaki and Ors.](#) 2007 (1) SCC 546, [Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and Ors.](#), 2009 (4) SCC 780, Rur Singh (dead) Through LR's. and [Ors. v. Bachan Kaur](#), 2009 (11) SCC 1 and [Anil Kak v. Kumari Sharada Raje and Ors.](#) 2008 (7) SCC 695 recognize and reiterate the requirements enumerated above to be essential for the proof of execution of an unprivileged Will like the one at hand. It is, therefore, not necessary to burden this judgment by a detailed reference of the facts relevant to each one of these pronouncements and the precise contention that was urged and determined in those cases. All that needs to be examined is whether the requirements stipulated in [Section 63](#) and distinctively enumerated above have been satisfied in the instant case by the appellant propounder of the Will. Our answer to that question is in the affirmative. The deposition of

Shri Vilas Tikhe clearly proves that Panna Lal had executed a Will in favour of the appellant, Gopal Swaroop and had signed and affixed his signature in his presence. The Trial Court and the High Court have concurrently held that the Will had been signed by the Testator in the presence of the attesting witnesses. First and the foremost requirement prescribed under [Section 63](#) of the [Indian Succession Act](#), 1925 is, therefore, clearly satisfied.

15. Coming then to the second requirement namely, the placement of the signature of the Testator on the Will, we find that the signature of the Testator appear at the right hand bottom part of the Will. The placement of the signature on the document is, therefore, appropriate and clearly suggestive of the fact that the document was intended to be given effect to as a Will. We must also mention that no argument was advanced by learned counsel for the respondent on the requirement of an appropriate placement of the signature of the Testator on the document.

16. That brings us to the third requirement, namely, that the Will must be attested by two or more witnesses each of whom has seen the Testator signing and affixing his mark to the Will or has seen some other person signing in the presence and by the direction of the Testator. The deposition of Shri Vilas Tikhe

in our opinion satisfies this requirement also in as much as the witness has in clear and unambiguous terms stated that not only he but Shri Manoj, the other attesting witness to the Will was also present at the time the Testator affixed his signature on the Will. It is noteworthy that, the above statement has not been questioned in cross-examination nor any suggestion made to the effect that while Shri Vilas Tikhe, the witness may have been present, Manoj was not so present at the time the Will was signed by the Testator. As a matter of fact, the witness has made a categorical statement that Manoj met the Testator in the Court and was taken along and that not only at the time of signing of the Will by the Testator, but even before the Registrar, Manoj Kumar was present in person. The witness has while answering a question in cross-examination specifically stated that Manoj was present even at the time the witness signed the Will in question.

17. On a careful and proper reading of the deposition of Shri Vilas Tikhe DW-2, we are satisfied that the requirement of attestation of the Will by two witnesses each of whom has seen the Testator signing or affixing his mark has been satisfied in the present case. So also the fourth requirement that the attesting witnesses sign the Will in the presence of the Testator stands firmly established. In that view of the matter, the

Division Bench of the High Court fell in error in holding that the requirement of [Section 63](#) of the Indian Succession Act had not been satisfied in the instant case. As was observed by this Court in [H. Venkatachala Iyengar v. B.N. Thimmajamma](#) AIR 1959 SC 443, in the matter of proof of documents as in the case of the proof of Wills, it is idle to expect proof with mathematical certainty. The test to be applied always is the test of satisfaction of a prudent mind in such matters. Applying that test to the case at hand we have no manner of doubt that the Will executed by Shri Panna Lal which is a duly registered document is not surrounded by any suspicious circumstances of any kind and is proved to have been duly and properly executed.”

I am afraid the argument of Mr. Mittal placing reliance upon findings rendered in the aforementioned judgment does not come to the aid as time and again there has been reference to the provisions of Section 63(c) of 1925 Act but Hon'ble the Supreme Court was not called upon to decide on the point of requirement of law *vis-a-vis* each of the witnesses had appended the signature on the direction of the testator. In fact, in paragraph 14 after noticing the contention of the parties and judgments cited at bar, Hon'ble the Supreme Court gave answer in affirmative by holding that all needs to be examined was whether the requirements stipulated in Section 63 and distinctively enumerated had been satisfied or not. The applicability of

one of the requirement that both the witnesses had signed on the direction of the testator had not been subject matter of debate or point of consideration in the judgment cited aforementioned, whereas, in the judgment rendered in **Janki Narayan Bhoir's case (supra)** as extracted above, the aforesaid point had been raised and answered.

Though this was not the reason assigned by the Lower Appellate Court but on examination of statement of Tehal Singh, Lower Appellate Court found that in cross-examination, he stated that other witnesses of the Will, Mulkh Raj and Shiv Ram always remained in Tehsil Complex and Tehal Singh had been a Government Contractor for selling various forms and papers in Tehsil premises.

It is a matter of record that no such person from the village of the executant had been examined. Raghbir Singh, Jagir Singh and Naib Singh had been living in the village since 1965 and Sant Singh came in the village in 1979, therefore, neither he nor his son Charanjit Singh was having any opportunity of serving Mewa Singh, therefore, genesis of the Will that Mewa Singh had executed Will owing to the services falls flat.

As an upshot of my findings, I do not find any illegality and perversity in the findings rendered by the Lower Appellate Court which are based upon the appreciation of oral and documentary evidence, much less no substantial question of law arises for adjudication of the present appeal.

No other argument has been raised.

The appeal stands dismissed.

(AMIT RAWAL)
JUDGE

July 13, 2018
savita

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No