

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

RSA No.238 of 1991 (O&M)

Date of decision:06.03.2018

Khem Chand

... Appellant

Vs.

Jagan Nath (since deceased) through LR's and
others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. A.P.S.Sandhu, Advocate
for the appellant.

Mr. Jatinder Nagpal, Advocate
for respondents No.1 to 5 and 12 to 19.

AMIT RAWAL J.

The appellant-plaintiff is in Regular Second Appeal against the judgment and decree dated 15.01.1990 rendered by the Lower Appellate Court, whereby, judgment and decree dated 10.04.1987 of the trial Court partly decreeing the suit, has been set aside, in essence, the suit had been dismissed.

Before advertng to the arguments of learned counsel for the parties, it would be apt to give preface of the matter.

The appellant-plaintiff Khem Chand being son of Jagdish Rai son of Moti Ram filed a suit against Jagan Nath son of Moti Ram and other defendants, i.e., 20 in number claiming to be owner of a residential house bearing house tax number 659 situated in Gali Telian Wali Sirsa and of agricultural land measuring 130 kanals 12 marlas, rect. no.9 killa no.23(8-0)

24(8-0) 25(8-0), rect. No.12 killa no.3(8-0) 4(8-0) 5(8-0) 6(8-0) 7(8-0) 8(8-0), 9/1(0-8) and rect. no.13 killano.1(8-0) 2(7-12) 9(7-12) District Ferozepur (Punjab) on the basis of Will dated 15.05.1977 executed by Moti Ram son of Bahadur Chand.

It was stated that Bahadur Chand had two sons, namely Shankar Dass and Moti Ram. Moti Ram died on 09.01.1978, who had three sons and three daughters and widow-Shanti Devi. During his life time, plaintiff used to serve him and therefore, Moti Ram executed a Will dated 15.05.1977 in his favour by bequeathing the property described above and also other assets which stood credited in the account of Moti Ram deceased in the books of M/s Gordhan Gopal Lakshmi Narain which were withdrawn by the plaintiff. During his life time, the plaintiff Moti Ram allowed defendants no.2 to 5 to reside in the first floor of the house in dispute as they were children of his pre-deceased son. After his death, their status became of that licencees. When plaintiff requested them to vacate the premises, they refused to do so and challenged the title of the plaintiff regarding the house in dispute, similarly defendant no.2 was also in possession of agricultural land and used to cultivate on behalf of Moti Ram, he also refused to accept the ownership of the plaintiff, much less Will executed by Moti Ram, necessitating the plaintiff to claim declaration.

Defendants No.2 to 5 filed joint written statement, wherein it has been averred that Will was a forged document and Moti Ram was no in his senses during his last days and therefore, he was incapable of executing the Will. Prior to the aforementioned Will, Moti Ram had executed three Wills dated 21.08.1973, 8.2.1976 and 23.06.1976, vide which he had

bequeathed the property in favour of all his sons and not excluded any of his legal heirs. In the last Will dated 23.06.1976, he expressed his intention that he was to execute any other Will, he would make a specific mention for the cancellation of the Will dated 23.06.1976 and get the Will registered. LRs of Madan Lal deceased were residing on the first floor of house in dispute as owners thereof which was purchased by Moti Ram out of the earnings of the ancestral land and therefore, it was a coparcenary property. They being coparcenars have right in the property by virtue of their birth, thus, the plaintiff could not become the exclusive owner of the house in dispute and share in the other property was also denied. It was also averred that Moti Ram had no right to bequeath the same in favour of plaintiff excluding the right of other coparcenars.

Defendants No.6 to 11 admitted the claim of plaintiff, whereas, defendants no.12 to 19 contested the suit and filed a written statement in the same lines as that of defendants No.1 to 5.

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

- “1. Whether Moti Ram deceased executed a valid Will dated 15.5.1977 appointed the plaintiff his sole legal heir. If so, its effect? OPP*
- 2. Whether the plaintiff is entitled to possession of the suit property? OPP*
- 3. Whether the suit is not maintainable? OPD*
- 4. Whether Moti Ram bequeathed the house in suit to defendants no.1, 3 and 4 vide Will dated 8.2.1986 and*

23.06.1976? If so, to what effect? OPD

5. *Whether this Court has no jurisdiction to try the suit?*

OPD

6. *Whether the plaintiff is estopped by his own act and conduct from filing the suit? OPD*

7. *Whether the suit is not properly valued for the purpose of Court fee and jurisdiction? OPD*

8. *Whether the plaintiff is sole owner of the property in dispute? OPD*

9. *Relief.”*

The plaintiff in support of pleaded case produced and examined the following documents and witnesses:-

- i) Will dated 15.5.1977 (Ex.P2),
- ii) jamabandi for the year 1976-77 (Ex.P3),
- iii) copy of house tax assessment register for the year 1978-79 (Ex.P4),
- iv) death certificate of Moti Ram (Ex.P5)

Witnesses

- i) PW1 - Vijay Kumar
- ii) PW2 - Khem Chand, plaintiff
- iii) PW3 - Din Dayal, deed writer
- iv) PW4 - Ratish Mohan
- v) PW5 - Tara Chand.

On the other hand, defendants in support of pleaded case examined the following witnesses:-

- i) DW1- Joginder Mohan
- ii) DW2 – Mohan Lal
- iii) DW3 – Gurdeep Singh
- iv) DW4 – Bhagwan Dass
- v) DW5 – Sarwan Singh
- vi) DW6 – Bacha Ram
- viii) DW7 – Kanhya Lal
- viii) DW8 -Jagan Nath

and brought on record the following documentary evidence:-

- i) three Wills executed by Moti Ram Ex.D1, Ex.D2 and Ex.D3.
- ii) certified copy of Will dated 21.08.1973 (Ex.D4)
- iii) copy of Will dated 23.06.1976 (Ex.D5)
- iv) copy of order passed by the revenue Court (Ex.D6).
- v) application dated 12.03.1948 (Ex.D3/1) submitted by Moti Ram.
- vi) application dated 12.03.1948 (Ex.D3/2) submitted by Shankar Dass.
- vii) parchi allotment (Ex.D3/3).
- viii) jamabandi for the year 1946-47 (Ex.D6).
- ix) aksh sajra, cloth map (Ex.D6/2)

The trial Court on the basis of aforementioned evidence observed that Will dated 15.05.1977 was proved by the plaintiff and by virtue of the same, he had become the sole owner of house no.484 but had become owner to the extent of share of Moti Ram, in addition to his share in the agricultural land detailed and described in the head note of the plaint by

holding it to be ancestral property, in other words, suit was partly decreed. The plaintiff was held entitled to possession of above said property and the suit qua remaining agricultural land was dismissed.

One set of defendants preferred an appeal bearing no.93-CA of 1987 titled as “Jagan Nath and others Vs. Khem Chand”, another set of defendants, Shanti Devi and others Vs. Khem Chand filed appeal bearing No.97-CA of 1987 and plaintiff Khem Chand filed appeal bearing No.96-C of 1987 titled as “Khem Chand Vs. Jagan Nath and others”. Both the appeals were assigned to one particular Additional District Judge, Sirsa, and vide common judgment and decree dated 15.01.1990 disposed of the same by accepting the appeals bearing Nos. 93-A and 97-CA of 1987, while setting aside the judgment and decree of the trial Court and dismissed the appeal bearing No.96-CA of 1987. Since there was a common decree in the aforementioned appeals, therefore, the present Regular Second Appeal has been filed on behalf of the appellant-plaintiff. Vide order dated 28.11.2013, this Court had taken on record the following substantial questions of law which read thus:-

“A Whether the Will dated 15.05.1977 Ex.P2, executed by Moti Ram duly proved on record has been wrongly discarded by the First Appellate Court?

B. Whether the onus of examining the finger print expert was on defendants when the plaintiff has done what is required to be done to prove the Will under the Evidence Act read with Indian Succession Act?

c) Whether the judgment of First Appellate Court suffers

from perversity and liable to be set aside?”

Learned counsel appearing on behalf of the appellant in support of memorandum of appeal submitted that Lower Appellate Court has committed illegality and perversity in dismissing the appeal of appellant and allowing the appeal of defendants by overlooking the oral and documentary evidence, for, Will dated 15.05.1977 was proved on record but the Lower Appellate Court abdicated in not referring to the statement of witnesses. The findings of the Lower Appellate Court by placing a burden upon the plaintiff to produce the finger and handwriting expert for proving the Will is neither here nor there. Once it had been proved through the testimony of the attesting witness, onus was upon the defendants as deed writer PW3 and attesting witnesses PW4 and PW5 were examined.

The earlier Wills Ex.D1, Ex.D2 and Ex.D3 had been cancelled by the propounder which was specifically mentioned in the last Will dated 15.05.1977, therefore, there was no question for doubting the same. The finding of the trial Court on the aforementioned Will was well reasoned and justified. The agricultural land had not been proved to be ancestral at the hands of Moti Ram. It is in that aspect of the matter, the appeal was preferred by the appellant which had been dismissed by the Lower Appellate Court without assigning any reasons. The Will executed in favour of the plaintiff was free from any doubt or suspicious circumstances as the executant was in sound disposing mind. It is not necessary that every Will has to be registered and non-registration of the Will would render the Will inadmissible. Will dated 21.08.1973 (Ex.D4) revealed that executant had bequeathed the property in equal shares, whereas, vide Ex.D5, plaintiff had

been given more share in the property than the other legal heirs which proved that executant had more love and affection towards the plaintiff. It is for that reason the last Will dated 15.05.1977 Ex.P2 was executed. No evidence has been placed on record to prove that agricultural land was allotted to deceased Moti Ram. The aforementioned land was not ancestral, thus, could be bequeathed by way of Will, as there was no need of necessity.

On the other hand, Mr. Jatinder Nagpal, learned counsel appearing on behalf of contesting respondents No.1 to 5 and 12 to 19 submitted that judgment and decree of the Lower Appellate Court is perfectly legal and justified. The Will dated 15.05.1977 has rightly been doubted by the Court below as it was surrounded by suspicious circumstances. The Will dated 15.05.1977 was bereft of reasoning and explanation with regard to cancellation of the previous Will which was specifically mentioned in the Will dated 23.06.1976. The statements of the attesting witnesses have not been in terms of provisions of Section 63(c) of Indian Succession Act, rather plaintiff wanted to usurp the entire property, for, last Will dated 23.06.1976 vide which the testator had bequeathed the share in his property. The whole attempt of the plaintiff was to usurp the entire property by fabricating the Will dated 15.05.1977, Ex.P2. The Will dated 15.05.1977, was also wanting reasons for denying the share to other sons, for, father would not deprive any other sons and grandsons until and unless any circumstances brought on record would show that owing to attribution of such family members, disinheritance was caused. By concluding the aforementioned arguments, he prayed for dismissal of the appeal.

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 learned counsel for the appellant, for, there was no compliance of the provisions of Section 63(c) of Indian Succession Act, 1925. Section 63 reads as under:-

“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) 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.

© 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.

The aforementioned provisions of the Act envisaged three situations: one Will has to be attested by two or more witnesses and each of them had seen the testator to either append his signatures or thumb impressions or mark or has seen the 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 third situation, each of the witnesses signed in the presence of the testator.

However, on persual of the testimony of statements of PW4 and PW5, none of the witnesses have deposed that they have appended the signatures or thumb impressions on the “Direction Of The Executant”, i.e. Moti Ram which is one of the essential requirement to be complied with. The aforementioned view of mine is derived from the ratio decidendi culled out by the Hon'ble Supreme Court in **Janki Narayan Bhoir Vs. Narayan Namdeo Kadam 2003(1) RCR (Civil) 409** and by this Court in **RSA No.1875 of 2013 titled as Surender Kumar Vs. Subhash Chander and others decided on 4.12.2015.**

The aforementioned witnesses have not stated that they have signed the Will on the asking or direction of the Court or testator, had acknowledged their signatures. They just said that they had signed together and the testator had signed in their presence. This is not the compliance of statutory provisions of the Act, thus, the Will dated 15.05.1977 has not been proved and therefore, the plaintiff cannot be permitted to derive the benefit,

though the Lower Appellate Court had not discarded the Will on the aforementioned ground but I cannot remain oblivious of the statutory provisions of the law as for the purpose of answering the questions of law, I browsed the statements of PW4 and PW5. This fact has also not been controverted by learned counsel for the appellant during the course of hearing.

The genesis of the suit was claiming the possession of house and agricultural land on the basis of the Will. In the absence of the Will, suit of the plaintiff has failed and rightly relief sought has been rejected. The Lower Appellate Court found that Will dated 21.08.1973 (Ex.D4) was not relied upon but referred to and was not executed by Moti Ram, whereas, issue vis-a-vis Will dated 23.06.1976 was framed. It has come on record through the testimony of DW7 that Moti Ram had purchased the house from his own funds and therefore, being self-acquired property. It has also been proved on record that Moti Ram had submitted applications Ex.D3/1 and Ex.D3/2 for allotment of land described above. The property, as a necessary implication, would devolve upon the legal heirs. The Court below did not believe the Will set up by the defendants and held that parties are entitled to the share in the agricultural land measuring 130 kanals 12 marlas as per respective share.

I am in agreement with the aforementioned findings, for, both the parties have miserably failed to prove the Will. Resultantly, the substantial questions of law are answered in favour of the respondents and against the appellant.

As an upshot of my findings, I do not find any illegality and perversity in the judgment and decree of Lower Appellate Court which are based upon the appreciation of oral and documentary evidence.

No other argument has been raised.

Accordingly, the appeal stands dismissed.

(AMIT RAWAL)
JUDGE

March 06, 2018

savita

Whether Speaking/Reasoned

Yes/No

Whether Reportable

Yes/No