

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

RSA No.3477 of 2002 (O&M)

Date of decision : 26.06.2018

Phoolwati and others

...Appellants

Versus

Prem Singh and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Mr. Ashish Aggarwal, Sr. Advocate with
Mr. Parunjeet Singh, Advocate for the appellants.

Mr. Akshay Jindal, Advocate for the respondents.

ANIL KSHETARPAL, J.

CM No.7208-C of 2002

Delay of 1 day in refiling the present appeal is condoned.

Application is allowed.

Main Case

The plaintiffs-appellants are in the Regular Second Appeal against the concurrent findings of fact arrived at by both the Courts below.

Dispute in the present case is with regard to the estate of Pitambar Singh who died on 12.09.1971. The suit was instituted on 19.08.1997 after a period of 26 years. In fact, the dispute is only with respect to the share inherited by Smt. Ramvati, the mother of Pitambar Singh who got 1/5th share being Class-I heir. Widow and children of Pitambar Singh have now propound an unregistered Will executed by Pitambar Singh dated 25.08.1971 Ex.P1. Smt. Ramvati also died on

20.03.1997. Smt. Ramvati transferred her 1/5th share through a family settlement in favour of defendant Nos.4 to 6 which is acknowledged by a Civil Court judgment and decree dated 28.02.1979.

This Court has heard the learned counsel for the parties at length and with their able assistance gone through the judgments passed by the Courts below and the record.

Learned Senior Counsel appearing on behalf of the appellants has submitted that before the First Appellate Court, an application was moved for examining a Handwriting and Finger Print Expert to compare the signatures of Sukhbir Singh, the attesting witness who appeared as PW3 and has stated that he never put his thumb impression on the Will-testamentary document and he never attested the Will as a attesting witness. Learned counsel further submitted that in the present case, even if a attesting witness has denied the attestation of the Will, still the Will stands proved in accordance with Section 71 of the Indian Evidence Act, 1872.

On the other hand, learned counsel for the respondents has supported the judgments passed by the Courts below and prayed for dismissal of the appeal.

As regards the first argument of the learned counsel for the appellants, it is significant to note that the aforesaid testamentary document dated 25.08.1971 has been for the first time produced claiming succession to the property on that basis only on 19.08.1997 i.e. after a period of 26 years. The testamentary document is allegedly attested by two witnesses namely Arjan Singh and Sukhbir Singh. Arjan Singh is said to have died and his son Jaswant Singh has been examined as PW1. He merely states that

he recognizes the signature of his father which is in Urdu language, however he admits that he does not know Urdu. He does not know what has been written by his father. In fact on the second page, where narration of the Will concludes, Arjan Singh with his own hand had allegedly written that the Will was scribed by him but the son Jaswant Singh could not distinguish between the writing and the signatures, so, therefore, the evidence of Jaswant Singh has been rightly discarded by the Courts below.

As regards the evidence of Sukhbir Singh, the other attesting witness who has been examined by the plaintiff as PW3, he has stated that he has never thumb marked the Will or attested the testamentary document. He was not got declared hostile. He was not even suggested that the thumb impression on the Will belongs to him. Still further, no attempt was made to prove the thumb impression of Pitambar Singh, the executant/testator. No doubt, an application was filed under Order 41 Rule 27 CPC to examine the thumb impression of Sukhbir before the First Appellate Court but that would not improve the case of the plaintiffs. The plaintiffs should have been more vigilant in moving such application before the trial Court.

Still further, in the pleadings, it has been pleaded by the plaintiffs that Phoolwati, the widow had misplaced the testamentary document-the Will and was not able to trace out. However, when Nakli Singh, the son of Pitambar Singh appeared in the evidence, he stated that he found the testamentary document in the family note book. The word used is “*Neonda Bahi*”. Such notebook is used for recording the 'shagun' received (Gifts in cash or kind) the various occasions in the family and Nakli Singh admits that such note book was also used when he got married but at that

time the Will was not in the aforesaid notebook. In view of the aforesaid evidence, it is not proved that the Will was found after a period of 26 years particularly keeping in view the pleadings which is not in consonance with the evidence led. If the widow Phoolwati knew about the Will at the time of death of Pitambar Singh, she would have objected to the mutation of the 1/5th share in the property left by late Sh. Pitamber Singh in favour of late Smt. Ramvati at the appropriate time.

As regards the argument of learned counsel for the appellants that the Will has been proved by other evidence, it may be noticed that no other evidence has been produced. No doubt, if the attesting witness does not re-collect having attested the Will or denies the attestation, the testamentary document can be proved by other evidence but in the present case, other evidence has not been produced. The other evidence has to be of unimpeachable credence to prove the testamentary document. In the present case, no such evidence has been produced on the file.

For the reasons given above, this Court does not find any good ground to interfere with the concurrent findings of fact arrived at by both the Courts below.

Regular Second Appeal is dismissed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

26.06.2018

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:-

Yes/No

Whether reportable:-

Yes/No