

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

RSA No.4903 of 2010 (O&M)
Date of decision : 01.05.2018

Harjinder Singh @ Harvinder Singh and others

...Appellants

Versus

Bholi and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Tarunveer Vashisht, Advocate for the appellants.

Mr. Damanjit Singh Sandhu, Advocate
for respondent Nos.1 and 2.

Mr. Rajesh Gupta, Advocate for respondent No.5.

ANIL KSHETARPAL, J. (ORAL)

The defendants-appellants are in the Regular Second Appeal against the judgment passed by the learned First Appellate Court reversing the judgment and decree passed by the learned trial Court.

Respondent Nos.1 and 2-plaintiffs filed a suit for declaration and permanent injunction claiming that they are entitled to succeed to the property of Late Sh. Lal Singh, their father and the Will dated 20.08.1997 set up by defendant Nos.1 to 3 and 7 is forged and,

therefore, the mutation of the land sanctioned on the basis of the aforesaid Will is also illegal. It may be noticed that Lal Singh left behind widow, three sons and five daughters. Two daughters challenged the Will and the mutation proceedings. Through the alleged Will, the property has been bequeathed in favour of three sons and widow, after noticing that all the daughters have already been married. Not only defendant Nos.1 to 3 and 7, the beneficiaries under the Will supported the Will but three other daughters namely Surjit Kaur, Gurmeet Kaur and Sarabjit Kaur, daughters of Late Sh. Lal Singh also admitted that the Will was executed by their late father Lal Singh. It was further contended in the written statement that all the sisters were present when the mutation proceedings were sanctioned on 11.07.2000 on the basis of the Will.

Learned trial Court recorded a finding that the execution of the Will is proved as attesting witness namely Sant Ram and scribe Kamal Kumar have been examined.

Learned trial Court also dismissed the suit on the ground that the plaintiffs have not sought the possession and, therefore, the suit was barred as per proviso of Section 34 of the Specific Relief Act, 1963. (However, the aforesaid reasoning is not correct as the plaintiffs in case of declaration having been granted, would at the most be entitled to the share in the property and, therefore, the relief of possession could not be sought for).

The plaintiffs filed the first appeal.

Learned First Appellate Court has chosen to reverse the finding of the learned trial Court while observing that the Will is surrounded by suspicious circumstances. The suspicious circumstances, noticed by the Court are:-

1. The original Will-testamentary document has not been produced.
2. The testamentary document is not scribed by a professional scribe.
3. The thumb impressions of the Executor and the attesting witnesses do not have any marking, whether such thumb impressions are of left hand or of right hand and the thumb impressions are super-imposed.
4. The Will is unregistered.
5. The evidence of the attesting witness i.e. Sant Ram, Lambardar of the Village is shaky inasmuch as he has stated that Lal Singh died 8-9 years after the execution of the Will and he was not present at the time of sanctioning of the mutation.

This is how, defendant Nos.1 to 4 are in the Regular Second Appeal.

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 photocopy of the record provided by the learned counsel for the parties, correctness whereof is not being disputed by the parties.

The following substantial questions of law arise in the present case for determination by this Court:-

- i) Whether the Courts are justified in treating the non-registration of the Will as a suspicious circumstance?
- ii) Whether the plaintiff who would not be entitled to delivery of actual physical possession of the property even if the suit is decreed, is required to seek further relief of possession which cannot be granted?

At the outset, it must be noticed that although original Will has not been produced but a reading of the judgment passed by the learned trial Court proves that an application for permission to produce the photocopy of the Will by way of secondary evidence was filed and the learned counsel for the plaintiffs had suffered a statement that he has no objection, if the application under Section 65 of the Evidence Act is allowed, subject to the proof of loss.

In view of the aforesaid, first reason assigned by the Court is clearly found erroneous.

Second reason that the Will is not scribed by a professional Document Writer also does not hold much water as the Will is a document which is to be executed as per the wishes of the testator. As per the law, the Will is not required to be got scribed from a professional scribe or it is not required to be registered. In the present case, photocopy of the Will has been produced. An application for secondary evidence was allowed. Photocopy of the Will is clear and the scribe, Kamal Kumar has been examined as DW3 who has stated that he is working as a Typist for quite some time in the Tehsil premises with

the permission of the Deputy Commissioner. The photocopy of the Will which has been produced on the file is typed in a local language i.e. Gurmukhi (Punjabi). The Will is thumb marked by the Executant and two attesting witnesses, one of them is Sant Ram, Lambardar of the Village. Lambardar of the Village has been produced in evidence to prove the execution of the Will in accordance with Section 68 of the Evidence Act. No doubt, Lambardar has stated that the Will was executed 8-9 years before the death but in the considered opinion of this Court, such slip of tongue, in cross-examination of attesting witness would be sufficient to doubt the validity of the Will which is otherwise proved.

Learned First Appellate Court has also erred in doubting the Will on the ground that the attesting witness did not attend the cremation of the testator. The attesting witness of the Will is examined to prove due execution of the Will with free will and volition. On entire reading of the evidence of Sh. Sant Ram, Lambardar of the Village, it is established that the evidence of Sant Ram could not be shaken by the plaintiffs and he complied with the requirement of Section 68 of the Evidence Act.

Another reason given by the Court is that it is not written on the thumb impression whether these are of left thumb or right thumb. The thumb impressions have been put below the place where the names of the attesting witnesses and the testator has been type-written. No evidence has been led to prove that these thumb impressions were not of

the testator or attesting witnesses. The plaintiffs had come to the Court doubting the legality of the Will. The plaintiffs have not led any evidence to prove that the Will was not executed by Lal Singh.

Still further, on careful examination of the order passed by the Assistant Collector dated 11.07.2000, it is established that the mutation was sanctioned in the presence of sisters. Coupled with this, the written statement of Surjit Kaur, Gurmeet Kaur and Sarabjit Kaur, the other sisters who had also stated that at the time of the mutation, sisters were present including the plaintiffs and had acknowledged to the genuineness of the Will and sanctioning of the mutation on the aforesaid basis.

In view of what has been discussed above, this Court is of the considered opinion that the judgment passed by the learned First Appellate Court is erroneous and is liable to be set aside, which is accordingly set aside. The present Regular Second Appeal is allowed and judgment and decree passed by the trial Court is restored.

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

01.05.2018

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No