

RSA No.1100 of 2012 (O & M)
RSA No.2578 of 2012 (O & M)

-1-

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

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RSA No.1100 of 2012 (O & M)
Date of Decision:10.10.2018

Karnail Singh

...Appellant

Versus

Mohinder Kaur and others

...Respondents

RSA No.2578 of 2012 (O & M)
Date of Decision:10.10.2018

Banta Singh

...Appellant

Versus

Mohinder Kaur and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Dr. Anmol Rattan Sidhu, Senior Advocate with
Mr. Nandan Jindal, Advocate
for the appellant in RSA-1100-2012.

Mr. H.R. Bhardwaj, Advocate
for the appellant in RSA-2578-2012.

Mr. Tejinder Pal Singh, Advocate
for the respondents.

ANIL KSHETARPAL, J.(Oral)

CM-2945-C-2012

Allowed as prayed for.

Main Case

Two defendants have separately filed these two appeals against

single judgment passed by the learned trial Court as well as the learned First

Appellate Court.

Following substantial questions of law arise for determination:-

“1. Whether prior permission of the Court is necessary before allowing finger print and hand writing expert to examine and take photographs of the Will particularly when the registered testament is not in the custody of the Court but in the custody of Registration Authority?

2. If the attesting witness had died before closure of the evidence of the propounder then whether the registered Will, can be permitted to be proved in accordance with provisions of Section 69 of the Evidence Act, 1872?”

Dispute in the present case is with respect to the estate of late Sh. Gurdev Singh, who was predecessor-in-interest of the parties i.e. father of the plaintiff and the defendants. Gurdev Singh had three sons and three daughters. One son namely Gurjant Singh died when unmarried. Thus, on the date of death of Gurdev Singh, he was having two sons namely Banta Singh and Karnail Sigh and three daughters Mohinder Kaur (plaintiff), Bholi and Manjit Kaur. Plaintiff claims the property on the basis of natural succession whereas defendants namely two sons claim the property on the basis of registered Will dated 06.11.1991. Initially learned trial Court decreed the suit, however, in first appeal learned Appellate Court framed an additional issue and permitted the parties to lead evidence and the learned trial Court was directed to re-decide the suit.

After the remand, defendants examined DW-5, a hand writing and finger print expert i.e. Dr. Inderjit Singh, who compared the thumb impression of the executant from the original Will in the custody of the Sub Registrar with the sale deed executed by Gurdev Singh during his life time. He has given a report that the thumb impressions existing on the Will and on the sale deed match with each other. DW-6-Dhana Singh son of Chaman Lal (attesting witness) was examined. Effort has been made to prove the Will in accordance with Section 69 of the Evidence Act. However, both the Courts even after the evidence which was led after the remand of the case have chosen to decree the suit filed by the plaintiff and return a finding that the Will has not been proved in accordance with Section 69 of the Evidence Act.

It may be mentioned here that both the Courts below have recorded a finding that Banta Singh, no doubt the son has been convicted in a criminal case for murder of his father. However, before the Court no evidence has been led and, therefore, Banta Singh in the absence of any evidence before the civil Court does not stand disqualified. This finding of the Courts has not been challenged before this Court.

Now let us examine with the issue of correctness of the Will. Whether it is proved on the Court file or not. In the present case, when the Will was got registered, two copies of the Will were prepared which were thumb marked and signed by the executant and the attesting witnesses as well as also by the Sub Registrar. A copy of the original Will, which was in the custody of the Sub Registrar was produced by the Registry Clerk, who has been examined as PW-1. He has specifically stated that he has brought

the original Will, which bears the thumb impression and signatures of the attesting witnesses as well as of the Sub Registrar. Such Will is a original and cannot be said to be only a copy, once two copies of the Will were prepared which bear the thumb impressions and signatures of the executant and the attesting witnesses. The copy of the Will in the office of the Sub Registrar is original. It is also not in dispute that in order to prove the Will, document and finger print expert and son of attesting witness have been examined. Learned First Appellate Court has held that since the attesting witness i.e. Chaman Lal was alive up to 11.10.1998 when evidence of the defendant was going on therefore it was incumbent on the defendant to examine the aforesaid attesting witness. It is not in dispute that the defendant evidence was closed on 31.01.2001 whereas Chaman Lal Nambardar died on 11.10.1998. In such circumstances, the reasoning of the Courts that Chaman Lal has not been examined is clearly erroneous. Learned First Appellate Court has further erred in recording a finding that the defendants have not availed the opportunity to prove the Will in accordance with Section 69 of the Evidence Act. There are two requirements of Section 69 of the Evidence Act, one the attestation by one attesting witness is to be proved and secondly signatures of the person executed the document is required proved to be in his hand writing.

In the present case, both the requirements have been fulfilled by the defendants as not only the official from the office of the Sub Registrar has been examined, son of the attesting witness as well as hand writing and finger print expert have also been examined to prove the thumb impression of the executant.

Learned First Appellate Court has further erred in overlooking the evidence of DW-6-Dhanna Singh, son of the attesting witness namely Chaman Lal. The Court has not noticed that Dhanna Singh has been examined as DW-6. Scribe of the Will i.e. Raj Kumar has also been examined.

Learned First Appellate Court has further erred in recording a finding that when the expert examined the Will, no prior permission of the Court was taken.

Learned counsel for the respondents could not draw attention of the Court to any provision which makes it mandatory for the expert to seek permission of the Court before examining the original Will even if it is not in the custody of the Court.

In the present case, the registered Will was in the custody of the Sub Registrar. Expert, who has appeared as DW-5, has specifically stated that he examined the Will in the Office of Sub Registrar after seeking permission and took photographs. For comparison, expert examined the original sale deed executed by Gurdev Singh during his life time. The aforesaid sale deed produced on file by DW-4, the purchaser-Gurjant Singh. The plaintiff has not examined any expert to rebut the opinion of expert produced by the defendants. It is not in dispute that both the attesting witnesses of the Will had died before closure of the evidence of the defendants. Hence, as per Section 69 of the Evidence Act, propounder was required to prove the Will in accordance with Section 69, which has discussed above, has been fulfilled.

In view of the discussion made above, both the questions of law

are answered in favour of the appellants.

In view thereof, the judgments passed by the Courts below cannot be sustained and, therefore, set aside. Both the appeals are allowed.

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

10.10.2018
sheetal

(ANIL KSHETARPAL)
JUDGE

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