

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

**RSA No. 1935 of 2015(O&M)
Date of decision : 26. 03.2018**

Daulat Ram and others

..... Appellants

versus

Gopal Krishan and others

..... Respondents

CORAM : HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr.R.K.Arya, Advocate for the appellants.

Mr.Vipin Mahajan, Advocate for the respondents.

AMIT RAWAL, J. (Oral)

Appellant-plaintiffs are in Regular Second Appeal against the judgment and decree dated 05.09.2014 whereby judgment and decree of trial Court dated 24.02.2011 decreeing the suit has been set aside in essence the suit has been dismissed by allowing the appeal of the respondent-defendants.

Facts emanating from the pleadings of the parties are that the plaintiff instituted the suit claiming declaration to the effect that one Sanjhi Ram was the owner of 1/4th of land duly detailed in the head note of the plaint (hereinafter referred to as the suit land). On 7.11.2005 he died intestate and survived by the plaintiffs and defendant No.1 as his legal heirs.

The alleged Will dated 7.11.2005 propounded by the defendant was illegal, forged and fabricated document much less had been obtained by way of impersonation. The Will did not bear the thumb impression of Sanjhi Ram nor Sanjhi Ram at any point of time lived with the defendant No.1 but in fact was living with the plaintiff who had been serving him during his life time. Even his last rites were also performed by the plaintiff. Defendant No.1 vide sale deed dated 16.1.2006 sold the land measuring 10 kanals 1 marla to defendants No. 2 to 5 which was also assailed. These defendants further sold 2 kanals 12 marlas land to defendants No. 6 and 7 vide sale deed dated 3.2.2006. Defendant No.6 is the wife of Tarsem Lal whereas defendant No.7 is the wife of Jeewan Kumar.

The defendants contested the aforementioned suit by taking various preliminary objections with regard to the maintainability of the suit, the suit being barred by law of limitation, locus standi. On merits, it was submitted that Sanjhi Ram had not died intestate but candidly stated that he had executed a will dated 7.11.2005 in a sound disposing mind and he died on 8.11.2005 at village Umarpur. Only defendant No.1 and plaintiff Vijay Kumar lived at that place. Since the parties were at variance, the trial Court framed the following issues:-

1. Whether on 7.11.2005 Sanjhi Ram executed a valid Will in favour of Shri Gopal Krishan, defendant No.1 and if so its effect?OPD
2. The plaintiffs are estopped from their act and conduct from filing the present suit/OPP
3. Whether the plaintiffs have locus standi to file the present suit/OPD
4. Whether the suit is maintainable?OPP
5. Whether the suit is within limitation/OPP

6. Whether the plaintiff has affixed the sufficient court fee and if not, its effect? Onus on the parties

7. Relief.

Both the parties examined witnesses in support of their aforementioned claims. The trial Court on the basis of the evidence brought on record found the Will executed by Sanjhi Ram being illegal, null and void for, he died on 7.11.2005 and not on 8.11.2005 despite the fact that the defendant had examined attesting witness i.e. Janak Raj as DW-1 and Surjit Lal, deed writer as DW-3 and decreed the suit. The Lower Appellate Court, in appeal laid by the respondent-defendants, set aside the judgment and decree of the trial Court and dismissed the suit of the appellant-plaintiffs.

Mr. R.K.Arya, learned counsel appearing for the appellants submitted that attesting DW1 Janak Raj has not proved the execution of the Will in terms of the provisions of Section 63 (c) of the Indian Succession Act though faint. The appellants, despite faint attempt, sufficed the requirement of the law by examining one of the attesting witness as per Section 68 of the Indian Evidence Act and as well as the scribe but in fact Sanjhi Ram had died on 7.11.2005 and not on 8.11.2005, therefore, he could not have executed the will on 7.11.2005. The alleged Will was forged and fabricated document. Defendant failed to prove on record death certificate of Sanjhi Ram to establish that he died on 8.11.2005. He submitted that the finding of the Additional District Judge/Lower Appellate Court is not sustainable in the eyes of law. The conduct of defendant No.1 was to defeat the interest of the plaintiff from the suit property in question after the death of testator by getting the mutation sanctioned in his favour and also created third party rights. The Will was

surrounded by suspicious circumstances as there was much difference between the last three lines of the will than the upper portion of the Will and urged this Court for setting aside the judgement and decree of the Lower Appellate Court.

Per contra, Mr Vipin Mahajan, Advocate, learned counsel appearing on behalf of the respondent-defendant submitted that the judgment and decree of the Lower Appellate Court is perfectly legal and justified and does not call for any interference, for both the witnesses DW1-Janak Raj and DW3-Surjit Lal, despite extensive cross examination, did not divulge anything contrary to what they stated in their examination-in-chief. In other words they proved the execution of the will and it was Sanjhi Ram, who had on his own volition, executed the will bequeathing his property in favour of defendant No.1. Defendant has complied with the requirement of law by examining the aforementioned witnesses. The will thus did not suffer from any suspicious circumstances. The onus was on the plaintiff to prove that Sanjhi Ram had died on 7.11.2005. In fact, he died on 8.11.2005 but failed to discharge the onus thus the judgement and decree of the trial court has rightly been set aside and urged this Court for dismissal of the appeal and that no substantial question of law arises in this case.

I have heard learned counsel for the parties and perused the paper book and am of the view that there is some force and merit in the submissions of Mr.Arya. On going through the Will Ex.D1 it is crystal clear that the same has been written on a blank paper bearing thumb impression of a person whose thumb impression had not been proved to be that of Sanjhi Ram. There is enough gap while signing but since the contents of the will could not be adjusted, there was reduction in the space while

concluding the will. This fact has totally escaped the notice of the Courts below. In my view there is a glaring illegality and perversity. The attesting witness Janak Raj did not state in his examination that he had appended thumb impression on the will on the direction of the testator which is a requirement of law. This view of mine is supported from the *ratio decidendi* culled out by the Hon'ble Supreme Court in **Janki Narayan Bhoir v. Narayan Mandeo Kadam 2003(10 RCR(Civil) 409** and as well as the decision dated 13.12.2016 of this Court rendered in **RSA No. 5252 of 2012** titled as **Kanwaljit Kaur v. Joginder Singh Badwal(deceased through LRs) and others.**

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. The compliance of the aforementioned provisions had been point of debate and consideration before the Hon'ble Supreme Court in ***Janki's case*** (supra) and before this Court in ***Kanwaljeet's case*** (supra), wherein it has been held that all the ingredients of Section 63(c) of the Indian Succession Act are required to be complied with. For the sake of brevity, the paragraph Nos.6 to 8 and 10 of ***Janki's case*** (supra) and the relevant portion of ***Kanwaljeet's case*** (supra), read thus:-

"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 its 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.”

Relevant portion of Kanwaljeet's case (supra)

I have heard the learned counsel for the parties and appraised the paper book and of the view that there is a merit and force in the submissions of Mr. Kanwaljit Singh, for, I cannot shut my eyes in not assuming the role of Expert by taking the aid of the provisions of Section 45 of the Indian Evidence Act. On bare glance of the Will (Ex.DW-1/1), Bhagwant Kaur had allegedly appended her signatures not above the typed name, but below. When the Will finishes, there is signature of someone which had scored off. It appears that it had been typed on blank paper. If actually Bhagwant Kaur had to sign the same, the defendant(s) should not have been circumspect, rather bold enough to get the same executed and registered, during her lifetime or even thereafter. I have also an occasion to examine the examination-in-chief of DW-1 Dr. Harsharan Singh, the attesting witness of the Will, who had not deposed in terms of the provisions of Section 63 (c) of the Indian Succession Act which reads thus:-

(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 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. There are two aspects of the matter that the Will has to be attested by two witnesses and signed by one of them and the witnesses must have been seen each other sign, but the expression on the "direction" of the testator is conspicuously wanting. The expression "desire" cannot be equated with the expression "direction" as per the plain and simple dictionary meaning, it does not in any way indicate that a person had actually intended a person to do it. "Desire" can be imaginary, but the "direction" has to be practical and specific. All these factors, in my view, have not been looked into, much less, seen from this angle, thus, there is a gross illegality and perversity."

The aforementioned fact has also not been taken care of by the Lower Appellate Court. The Lower Appellate Court being the last court is enjoined upon an obligation to examine all the evidence much less the law to form a different opinion than the one arrived at by the trial Court. Having failed to address the issue I am of the view that the judgment of the Lower Appellate Court not only suffers from a fallacy but an apparent misdirection.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the *ratio decidendi* culled out by five learned Judges of the Hon'ble Supreme Court in ***"Pankajakshi (dead) through LRs and others V/s. Chandrika and others AIR 2016 SC 1213"***, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in ***"Kulwant Kaur and others***

V/s. Gurdial Singh Mann (dead) by LRs and others” 2001(4) SCC 262, on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in *“Pankajakshi 's case* (supra) reads thus:-

“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)] cannot be sustained and is thus overruled.” [at paras 27 – 29]”

27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of

law while deciding the appeal, aforementioned.

Resultantly the judgment of the Lower Appellate Court is set aside and that of the trial Court is restored.

Appeal stands allowed.

(AMIT RAWAL)
JUDGE

26.03.2018
sunita

Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No