

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

**(1) RSA No.856 of 2016 (O&M)
Date of Order:26.09.2018**

Data Ram

..Appellant

Versus

Balwan Singh and another

..Respondents

(2) RSA No.3201 of 2017 (O&M)

Smt. Chhoti (since deceased) through LR Data @ Data Ram

...Appellant

Versus

Smt. Murti and another

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

**Present: Mr. Lokesh Sinhal, Advocate
for the appellant (in RSA NO.856 of 2016)**

**Mr. Aakash Singla, Advocate,
for the appellant(s) (in RSA NO.3201 of 2017)**

**Mr. Amit Jain, Advocate,
for respondent no.1(in RSA NO.856 of 2016)
for respondent no.2(in RSA NO.3201 of 2017)**

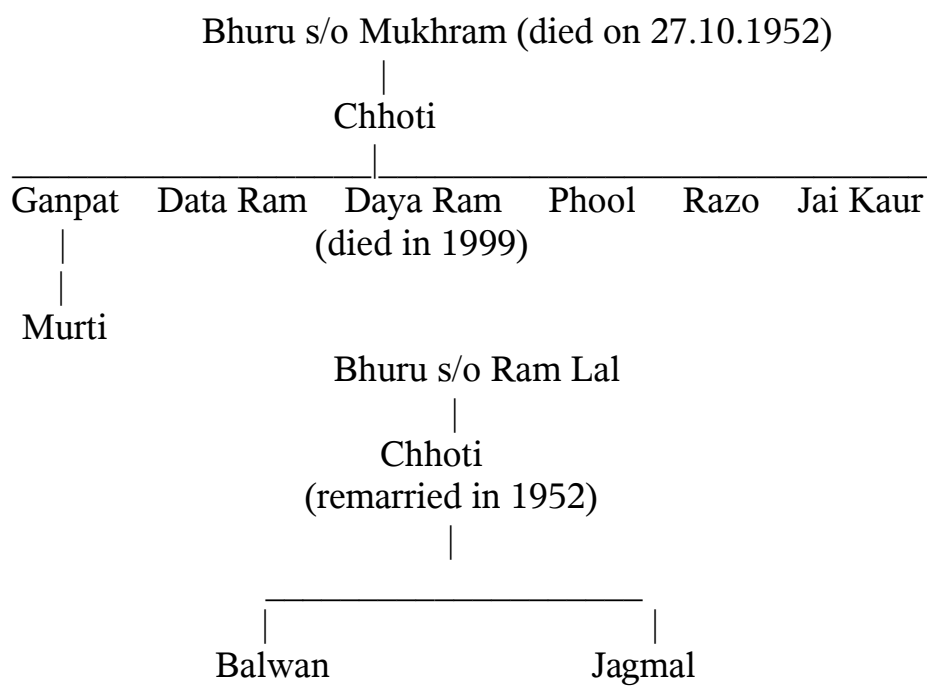
ANIL KSHETARPAL, J.

By this judgment, Regular Second Appeal Nos.856 of 2016 and 3201 of 2017 shall stand disposed of as both are connected and arise from the consolidated judgment passed by the learned first appellate court.

At the outset, it may be noticed that 4 appeals were filed against consolidated judgment passed by the learned first appellate court dated 19.10.2015 and two regular second appeals i.e. RSA No.2367 and RSA No.2396 of 2016 have already been decided by this court on 19.04.2018,

upholding the judgment of the first appellate court. However, learned counsel for the appellant has submitted that in the aforesaid two appeals filed by Murti Devi, only a limited issue was raised before this court, which has been decided and appellant wish to argue the appeal independent of the aforesaid decision.

To understand the dispute, it would be necessary to draw a pedigree table for appreciating the facts and evidence:-



As apparent from the pedigree table drawn above that Smt. Chhoti was initially married with Bhuru son of Mukhram. She had three sons, namely, Ganpat, Data Ram and Daya Ram and three daughters, namely, Phool, Razo and Jai Kaur. Bhuru son of Mukhram (hereinafter referred to as first husband as incidentally the name of second husband is also Bhuru) died on 27.10.1952. Smt. Chhoti, thereafter, re-married with Bhuru son of Ram Lal (hereinafter referred to as the second husband) and two sons were born, namely, Balwan and Jagmal.

First suit was filed by Smt. Chhoti claiming right in the property of Ganpat, her son from the first marriage who had died. This court has already decided the aforesaid appeal filed by Smt. Murti, widow

and it has been held that Smt. Chhoti would be entitled to ½ share in the property of her son late Sh. Ganpat.

Two other suits have been filed challenging a registered Will executed by Smt. Chhoti dated 28.08.2002, filed by Data Ram and Murti Devi in their individual capacity. Unfortunately, learned trial court did not consolidate all the cases. However, learned first appellate court has noticed the facts in detail and thereafter passed a consolidated judgment while deciding four first appeals.

Both the courts after appreciating the evidence have found that the registered Will executed by Smt. Chhoti has been proved on the file in favour of Balwan, her son from the second marriage.

Chhoti died on 10.04.2003, i.e., during the pendency of the suit filed by Chhoti titled as Chhoti vs. Murti. Two applications were filed, one by Data Ram, son from the first marriage and second by Balwan, son from second marriage for bringing them on record as legal heirs of late Smt. Chhoti. Application filed by Data Ram was allowed under Order 22 Rule 5 of the Code of Civil Procedure. The order was subject matter of challenge before the High Court and the Court while deciding Civil Revision No.6688 of 2010, ordered that individual rights of Data Ram and Balwan qua the property of Chhoti shall not be decided in the present suit. The order passed by this court on 18.04.2012 is extracted as under:-

“I have also considered the anticipation of counsel for the petitioner that Data Ram respondent no1, will collude with Murti being related to her and would cause prejudice to the rights of Chhoti who is now being represented by Balwan. It is again clarified that the

individual rights of Data Ram and Balwan qua the property of Chhoti are not to be adjudicated upon in the present suit. In case of any such collusion between Data Ram and Murti, it will be open to Balwan to contest the suit being LR of Chhoti.”

Similarly, another revision petition was filed by Smt. Murti, wherein this court while deciding Civil Revision No.46 of 2013, framed an issue on the validity of the Will and directed the trial court to decide the aforesaid issue vide order dated 25.07.2013, which is extracted as under:-

“The person, who propounds a Will, shall always taken upon himself the burden of proof. The Will obtains a relevance, for, without it, the person, who is impleaded, cannot claim the whole of the property of the mother. On the plaintiff's death, the widow of the pre-deceased son through the 1st husband will also be a legal heir. To that extent definitely, the genuineness of the Will is relevant to predicate the extent of interest for which a joint possession is sought in suit. I find from the issues framed, the Court has not framed a specific issue regarding the Will propounded by the party, who was impleaded as a legal representative of the mother. I direct the following issue to be framed:-

“Whether the Will said to have been executed by the mother-Chhoti is true, valid and executed in a sound state of Mind?”

3. On such an issue being framed, since it is contended that the plaintiff has already adduced evidence regarding the proof of the Will, the defendant/revision petitioner shall have a right rebuttal of evidence regarding the Will.”

At this stage, it would be appropriate to refer to the two suits filed by Murti Devi and Data Ram in their individual capacity.

Data Ram had filed a suit against Balwan, his step brother and also against Smt. Murti, his sister-in-law being widow of Ganpat, his real brother. In the aforesaid suit, Data Ram claimed that the property of Chhoti would be distributed amongst the natural heirs and, therefore, challenged the registered testament executed by her dated 28.08.2002. The testament was challenged on various grounds. In the second suit filed by Smt. Murti Devi against Balwan and Data Ram also challenged the same testament wherein it was pleaded that Chhoti was of unsound mind at the time of execution of the registration of the Will/testament. It would be relevant to point out that original testament of Smt. Chhoti was produced in the suit filed by Data Ram against Balwan. The registered Will was scribed by Mukesh Kumar Yadav, scribe, which has been examined as PW3. Testament executed by Chhoti was attested by two attesting witnesses Dalip Singh, Sarpanch of village Mau and Jaswant Singh.

Since, the trial court failed to consolidate the suits, although, identical issues had cropped up in all the three suits but the first appellate court has correctly taken on itself re-appreciation of the evidence and re-decide the suits.

It has come in evidence that Balwan prove to be a faithful son

who during the critical phase of life of her mother late Smt. Chhoti supported her. He not only supported the mother but also helped his step brother Ganpat to pay off loan of Gurugram Gramin Bank and also spent money on his medical expenses. It has come in evidence that Smt. Murti Devi left the place of her husband Ganpat and settled in her parental village i.e. Mohammadpur. This fact is proved on file by voluminous evidence.

It has also come in evidence that relationship between Ganpat with Smt. Murti Devi were not smooth and couple had parted their ways on account of break up in the relationship as no child was born to them. On careful reading of the Will, it is apparent that Chhoti while executing her Will has given in detail the service rendered by her son Balwan from the second marriage. It has further been stated in the Will that when she suffered fracture in her foot, it is Balwan who borne all expenses and used to serve her. Whereas she has stated that Smt. Murti Devi after the death of Ganpat (her husband) she came there to usurp all the land. Chhoti has also referred to the suit filed by her against Murti Devi, against which 2 second appeals have been decided by this court on 19.04.2018 referred to the above.

It has also come in evidence that Chhoti not only executed a registered testament in favour of Balwan but also executed a General Power of Attorney in his favour on 29.04.2002. Since, in the certified copy of the Will, page 3 of the Will was not having thumb impressions and signatures of the Sub-Registrar and the witnesses, therefore, Basti Ram, the then Sub-Registrar was examined as DW7 in civil suit as “Data Ram vs Balwan”, who clarified the discrepancy and explained details about the registration of the testament in the presence of two attesting witnesses, namely, Jaswant

Singh and Dalip. Sh. Basti Ram, who has clarified that Dalip Singh, Sarpanch was personally know to him. Dalip Singh was produced by the plaintiff to create a doubt about genuineness of the Will. He submitted in examination-in-chief that the Will was never read and explained to him and Chhoti never agreed to bequeathed her land in favour of Balwan. It has further been stated by Dalip Singh that Balwan procured his signatures on the excuse of identify Chhoti on the affidavit. However, in cross-examination when this witness was confronted with his signatures on the testament dated 28.08.2002 as well as on General Power of Attorney, Ex.D/2 dated 29.04.2002, he admitted his signatures on both the documents. The evidence of Dalip Singh, who made an effort to create doubt about the correctness of the Will was ignored by the first appellate court after giving detailed reasons in para 29 of the judgment, which need no further deliberation.

Other attesting witness, namely Jaswant Singh had appeared in the suit filed by Chhoti against Murti Devi in which Balwan, Murti Devi as well as Data Ram were party. Jaswant Singh supported the Will and proved its execution and registration in accordance with Section 68 of the Evidence Act. Jaswant Singh was cross-examined in detail by learned counsel representing Smt. Murti Devi.

No doubt, later on Data Ram also filed an application for permitting his counsel to cross-examine Jaswant Singh, which was allowed and thereafter effort was made to procure the presence of Jaswnat but the court was not successful. Initially, summons were sent to secure his presence but since he did not appear, a coercive process for procuring his presence was adopted by issuing warrants of arrest but even that attempt

was not successful. Head Constable Narpal Singh was deputed to arrest the witness and produced him before the court but these warrants were received back unexecuted as Jaswant Singh had gone to Ahmedabad for treatment. Hence, the court gave up its pursuit to bring him in the witness box by observing that impact of his non-appearance to be considered at the time of decision of the case.

Learned counsel for the appellant in both these appeals have argued that since Jaswant Singh has not appeared in evidence and opportunity has not been given to counsel for Data Ram to cross-examine Jaswant Singh, hence, evidence of Jaswant Singh, the attesting witness cannot be considered by the court while determining the validity of the testament.

This court does not find substance in the argument of learned counsel for the appellants as Jaswant Singh when appeared in evidence in the case titled as "Smt. Chhoti vs. Murti Devi", counsel representing Data Ram did not seek any opportunity to cross-examine Jaswant Singh. He was only cross-examined by learned counsel representing Smt. Murti Devi. Subsequently, an application was filed for permission to give his counsel opportunity to cross-examine Jaswant Singh. However, Jaswant Singh had appeared in evidence and was duly cross-examined by learned counsel appearing for Smt. Murti Devi. Stand of Smt. Murti Devi as well as Data Ram with respect to the testament dated 28.08.2002 is same. In these circumstances, it cannot be said that the evidence of Jaswant Singh, the attesting witness, cannot be read in evidence.

Balwan had discharged the onus of proving the Will by examining Mukesh Kumar, the scribe, Basti Ram, the then Sub-Registrar as

DW4 and Jaswant Singh, attesting witness. Once the aforesaid onus had been discharged, the onus shifted on Data Ram and Smt. Murti Devi who were challenging the testament. Data Ram is blowing hot and cold in the same breath. He on the one hand denies thumb impression of Chhoti on the testament dated 28.08.2002, however, on the other hand, he is alleging that thumb impression of Chhoti had been obtained fraudulently. No doubt, both the parties have produced private Handwriting and Finger Print Expert, however, not much credence have been given to the reports of the expert.

It has further come in evidence that in a criminal complaint, Data Ram had appeared as a witness on behalf of Murti Devi and had admitted that her mother was 85 years old and she had executed the Will in favour of Balwan. Of course, later on Data Ram tried to resile from his statement.

Keeping in view the aforesaid facts, this court does not find any substance in the argument of learned counsel for the appellant(s) in both the appeals that since Jaswant Singh has not subsequently appeared for cross-examination after having first being examined and duly cross-examined by counsel for the defendants. In the facts of the present case, the statement of the attesting witness cannot be kept out of consideration.

Mr. Lokesh Sinhal, Advocate, who has appeared in RSA No.856 of 2016 has submitted that in his suit, no attesting witness has been examined.

As noticed by this court, learned trial court failed to consolidate the suits which has created entire problem. However, keeping in view the fact that Data Ram was party in the suit filed by Smt. Chhoti and issue had been framed by this court vide order dated 25.07.2013 about the

validity of the Will, such finding in the aforesaid suit filed by Chhoti would bind Data Ram also.

In view of the aforesaid discussion, there is no good ground to interfere with the concurrent findings of fact arrived at by the courts below.

Both the regular second appeals are dismissed.

However, this court is of the considered view that the learned District & Sessions Judges, must device a method to consolidate interconnected suits in order to avoid any repetition in recording the evidence and any conflicting judgments. This court while deciding Regular Second Appeal No.2306 of 2008 has also made certain observations in this respect which should be followed.

Let a copy of the judgment be circulated to all the District & Sessions Judges in the districts of Punjab and Haryana, to device some method in this regard.

September 26, 2018
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned
Whether reportable

: Yes/No
: Yes/No