

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

Date of decision:2.5.2018

1.

RSA No.1803 of 2018(O&M)

Mohan Lal

.....Appellant

VERSUS

Jag Mohan and others

.....Respondents

2.

RSA No.1804 of 2018(O&M)

Mohan Lal

.....Appellant

VERSUS

Jag Mohan and others

.....Respondents

CORAM: **HON'BLE MRS. JUSTICE REKHA MITTAL**

Present: Mr. Sanjay Kaushal, Senior Advocate with
 Mr. Manish Mehta, Advocate for the appellant.

REKHA MITTAL, J.

This order will dispose of RSA No.1803 and 1804 of 2018 as identical questions of law and fact are involved for adjudication. For facility of reference, facts are taken from RSA No.1803 of 2018.

The present lis pertains to inheritance to the estate of deceased Jai Narain, father of plaintiffs/respondents No.1 to 9 and appellant/defendant being sons and daughters of late Sh. Jai Narain, resident of house No.2139, Mohalla Nai Basti, Rewari. Jagmohan and others, sons and daughters of Jai Narain filed the suit against Mohan Lal

son of Jai Narain for partition of property owned by Sh. Jai Narain. It is averred that Jai Narain died intestate on 17.11.2003. After his death, plaintiffs and defendant became owner in possession of the suit property. Mutation No.13663 was sanctioned in this regard. Jai Narain used to reside with respondents/plaintiffs Suresh, Jagmohan, Ramesh, Naresh, Pawan and Lakshmi Devi, his wife till his death in house No.2139, Mohalla Nai Basti, Rewari and he never resided with defendant at Mohalla Bhajan Ka Bagh, Rewari. There was no question of Jai Narain having executed Will in favour of the appellant/defendant who never helped Jai Narain in his business. The Wills dated 16.07.1999 and 21.01.2000 in favour of the appellant/defendant is not conscious act of Jai Narain rather these are forged and suspicious one. The appellant has never shown these Wills to any revenue officer. Lakshmi Devi, widow of Jai Narain died on 21.01.2010 and her share in the property was also divided between the parties. The respondents/plaintiffs have 9/10 shares in the suit property and appellant/defendant is having 1/10th share. The property shown in Annexure A with blue colour is in possession of the defendant and with yellow colour in possession of Jagmohan, Suresh, Ramesh, Rakesh and Pawan and Naresh jointly. The property mentioned in Annexure B to D is in possession of plaintiff.

The appellant/defendant filed the written statement raising certain preliminary objections inter alia maintainability of the suit, suit being bad for partial partition and respondents/plaintiffs being estopped by their act and conduct to file the suit. Jai Narain was not in possession of the entire property in his lifetime and appellant is in exclusive possession of the property mentioned in Annexure A since the lifetime of his father.

Jai Narain executed his first Will on 16.07.1999 vide which 25% of entire property movable and immovable was given to the appellant as he helped his father in his business and used to serve him. Subsequently, on 21.01.2000 Jai Narain executed another Will in favour of the appellant in sound disposing state of mind. He bequeathed entire property comprising rectangle No.184, killa Nos.18 and 23/1 in favour of the appellant. Killa No.18 is in possession of the appellant while killa No.23/1 is in illegal possession of warehouse. Killa No.19/2 is in possession of the appellant for the past more than 22 years as of right, peacefully, openly and without interruption and to the knowledge of respondents/plaintiffs as owner. Appellant has shifted his residence in Mohalla Bhajan Ka Bagh, Rewari after death of Jai Narain. Respondents/plaintiffs never served deceased Jai Narain and it was only the appellant who used to serve and help his father. Lakshmi died on 21.01.2010 but she had no share in the property in question.

Respondents/plaintiffs filed replication, reiterated their stand taken in the plaint and controverted the Wills propounded by appellant Mohan Lal.

The trial Court framed the following issues vide order dated 13.11.2010:-

1. Whether the plaintiffs have 9/10th share in the suit property detailed in para no.2 of the plaint? OPP
2. Whether the plaintiffs are entitled to partition of suit property by metes and bounds and to take possession of 9/10th share in the suit property as claimed? OPP.

3. Whether the suit is not maintainable in the present form?
OPD.
4. Whether the suit is bad for being partial partition? OPD
5. Whether the plaintiff is estopped from his own act and conduct to file the suit? OPD
6. Whether the plaintiff has concealed the true and material facts from the Court? OPD
7. Relief.

The parties were permitted to adduce evidence in support of their respective contentions. After having heard counsel for the parties in the light of materials on record, the trial Court answered issues No.1 and 2 in favour of the respondents/plaintiffs whereas the remaining issues were decided against the appellant/defendant and eventually, suit filed by the respondents/plaintiffs was decreed and a preliminary decree was prepared.

The appeal filed by the unsuccessful defendant did not find favour with Additional District Judge, Rewari whereby findings recorded by the trial Court rejecting claim of the appellant qua his entitlement to inherit to the estate of deceased Jai Narain on the basis of Wills in question were affirmed.

Still feeling aggrieved, the instant appeal has been filed by Mohan Lal son of Jai Narain.

Counsel for the appellant would argue that the respondents/plaintiffs have admitted the existence of registered Will dated 16.07.1999 and unregistered Will dated 21.01.2000 by raising a plea that the same are forged and suspicious one. It is argued with vehemence that

the respondents/plaintiffs did not adduce even an iota of evidence to substantiate their plea raised in the plaint or in the replication that the Wills are the result of forgery. According to counsel, as the respondents/plaintiffs failed to substantiate their plea that Wills are the result of forgery either while discharging onus of issues No.1 and 2 or even by way of rebuttal to evidence adduced by the appellant to prove the Wills in question, plea raised by the respondents/plaintiffs is liable to be rejected and claim of the appellant/defendant with regard to his entitlement to suit property on the basis of Wills is liable to be accepted.

It is further argued that the appellant examined Anil Kumar Gupta, Advocate, scribe of the Wills, Suresh Kumar an attesting witness of the registered Will dated 16.07.1999 and Rajesh Gupta, one of the attesting witnesses of the Will dated 21.01.2000 and discharged onus to prove the Wills being propounder thereof. It is strenuously argued that the circumstances taken into consideration by the Courts to hold the Wills being shrouded by suspicious circumstances clearly show that findings recorded by the Courts are not based upon correct appreciation of evidence as well as settled position in law. To bring home his contention, counsel has pointed out towards reasoning adopted by the Courts to reject the Wills. It has further been argued that Hon'ble the Supreme Court in **Leela Rajagopal and others Vs. Kamala Menon Cocharan and others, (2014) 15 SCC 570** has held in para 13, quoted thus:-

"13. A Will may have certain features and may have been executed in certain circumstances which may appear to be somewhat unnatural. Such unusual features appearing in a Will or the unnatural circumstances surrounding its execution will definitely justify a close scrutiny before the same can be

accepted. It is the overall assessment of the Court on the basis of such scrutiny; the cumulative effect of the unusual features and circumstances which would weigh with the Court in the determination required to be made by it. The judicial verdict, in the last resort, will be on the basis of a consideration of all the unusual features and suspicious circumstances put together and not on the impact of any single feature that may be found in a Will or a singular circumstance that may appear from the process leading to its execution or registration. This, is the essence of the repeated pronouncements made by this Court on the subject including the decisions referred to and relied upon before us."

Before advertng to the submissions made by counsel for the appellant, it is pertinent to note that in the Regular Second Appeal, the Court cannot re-appreciate the evidence to record a finding different from what has been consistently held by the Courts. Equally settled is that appeal must raise a question of law that needs determination after notice to the contesting party.

The trial Court, in paras 14 to 23, of the judgment has taken note of circumstances that creates doubt qua genuineness of the Wills propounded by the appellant, extracted hereunder for ready reference:-

- a) Second Will dated 21.01.2000 has been scribed by Sh. Anil Gupta who scribed the Will dated 16.07.1999 but in the second Will, there is no reference to the earlier Will.
- b) Anil Gupta has deposed that except the two documents in question, he had not prepared any document for Jai Narain but Mohan Lal – appellant deposed that Jai Narain used to get prepare his legal documents from Anil Gupta.

- c) Anil Gupta has deposed that he does not know Mohan whereas Mohan Lal has stated that he knew Anil Gupta for the past 5-10 years and always engaged him for drafting his documents. Suresh Kumar DW-2, an attesting witness of the Will lives in the neighbourhood of appellant/defendant in Bhajan Ka Bagh, Rewari. As Jai Narain was a resident of other mohalla, he would not have called Suresh Kumar from other Mohalla to attest the Will. R.S. Yadav, Advocate another attesting witness of the Will dated 16.07.1999 has been withheld and an adverse inference has to be made.
- d) Rakesh, attesting witness of the Will dated 21.01.2000 belongs to caste of Mohan Lal. He did not know about family of Jai Narain. It is strange that Jai Narain called a person from Tijara (father of Rakesh) for being attesting witness of the Will.
- e) Jai Narain had bequeathed his property in favour of his one sons ignoring his nine children. Wills do not make reference to the entire property owned by Jai Narain and members of his family. There is no reference to his wife and other sons and daughters in the Wills.
- f) The appellant has failed to explain as to why he did not disclose about the Wills to his brothers at the time of death of their father. His silence and inaction with respect to Wills raise doubt qua authenticity of the Wills.

- g) The appellant/defendant is admittedly residing separately from the respondents/plaintiffs and other brothers and sisters since 1998-99. He has not given any evidence that Jai Narain used to reside with him or he had taken care of Jai Narain. No person from the vicinity has been examined to prove this fact.
- h) On the back of the Will Ex.DW1/2 dated 21.01.2000, two thumb impressions are present. There is no explanation about these thumb impressions.
- i) No reason has been mentioned as to why Jai Narain excluded all other class I heirs.

As has been noticed hereinabove, the Appellate Court affirmed findings of the trial Court discarding the Wills. The Court has taken note of the following vital facts:-

- a) On demise of the testator, mutation No.13663 Ex.P28 dated 19.03.2004 was sanctioned in favour of all class I heirs of deceased including appellant Mohan Lal. The suit was filed in December 2008, to challenge Wills by the respondents/plaintiffs. Earlier suit for permanent injunction was filed by the respondents/plaintiffs on 01.06.2007 wherein there is no reference to the impugned Wills by the respondents. The appellant, for many years after death of his father, maintained stony silence with regard to the Wills in question till the written statement was filed in the suit for injunction in the year 2007.

- b) Both the Wills were drafted by Anil Gupta, Advocate DW1. He did not maintain any register or records of the documents drafted by him. He is not doing practice in the Court and rather drafts the documents as his father was a deed writer. Anil Gupta, Advocate, is involved in criminal cases/charges referred to in para 29 of the judgment. Suresh Kumar DW-2, attesting witness of the first Will supported the appellant in the inquiry conducted by DSP Headquarter qua the complaint filed by Manju wife of the appellant but as per report Ex.PW12/3 of S.P. Rewari dated 04.01.2011 Manju filed a false complaint in order to put pressure in civil case filed by Manju's husband against opponent as civil matters were pending between the family members. Suresh Kumar is the neighbour of appellant residing in Mohalla Bhajan ka Bagh.
- c) Appellant did not produce evidence to prove that he ever resided with his father. The plea of the appellant that he got the Wills from testator's room, after his death, is an afterthought.
- d) Radhey Sham, another attesting witness of the Will was also produced in the inquiry conducted by the DSP meaning thereby that the witnesses of the Will are at the beck and call of the appellant. In para 36 of the judgment, the Court has commented qua use of different ink for appending signatures on the second Will. Testimony of

Rajesh Gupta DW-7, an attesting witness of the second Will is stated to be not credible.

Eventually the Court has held that all the circumstances taken in totality gives a fair indication that Wills projected by the appellant are not genuine and do not represent last wish of the testator. There was no feud between the respondents and the testator impelling him to give more share to the appellant in preference to his other sons, daughters and wife.

The first question that calls for determination is whether the appellant has been able to prove the Wills in accordance with law.

Section 63 of the Indian Succession Act, 1925 (in short 'the Act') deals with necessary requirements of a Will to be executed by a testator. A relevant extract therefrom reads as follows:-

"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) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(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."

In the instant case, Wills propounded by the appellant were required to be proved in accordance with law. Section 68 of the Indian Evidence Act, 1872 deals with proof of execution of document required by law to be attested and a relevant extract therefrom is quoted thus:-

"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 that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

Indisputably, Will requires attestation by at least two witnesses. The appellant examined Suresh Kumar DW-2 to prove registered Will dated 16.07.1999. He tendered into evidence his affidavit Ex.DW2/A by way of examination in chief. A relevant extract from affidavit dated 23.10.2012 with regard to execution and attestation of the Will, in Hindi but translated in English reads as follows:-

"I have seen the original Will dated 16.07.1999 which was typed by Anil Kumar Gupta, Advocate on the instructions of Jai Narain. After typing, the aforesaid Advocate had read-over and made Jai Narain understand the Will and us, the witnesses. Jai Narain after hearing, understanding and accepting it correct signed the Will in our presence. I also signed the Will as a witness in the presence of Jai Narain. The person who typed the Will also signed in our and Jai Narain's presence. Thereafter, Jai Narain, he and other witness an Advocate appeared before the Sub Registrar Rewari. He also read over the Will to Jai Narain and the witnesses and made them understand the same. Jai Narain affixed his signature/thumb impressions in the presence of Registrar and us after accepting it correct. We also signed in the presence of Jai Narain and Registrar."

On careful reading of the aforesaid extract, it becomes evident that the witness has not stated that the second witness, an Advocate signed the Will in presence of Jai Narain or in presence of the witness or signed the same after necessary acknowledgement by the testator. Testimony of Suresh Kumar is not sufficient to prove attestation of the Will by second

witness. His testimony also does not make specific reference that the Will was signed by other attesting witness in the presence of Jai Narain and Registrar. In his cross examination, in the concluding line, he has deposed to the following effect:-

"I do not know who signed Ex.DW1/1 first of all."

The Courts failed to appreciate testimony of Suresh Kumar meticulously and thoroughly, therefore, failed to appreciate that testimony of Suresh Kumar is not sufficient to prove the registered Will in compliance with Section 63 of the Act read with Section 68 of the Evidence Act, 1872. As such, the appellant cannot derive any advantage to inherit on the basis of Will dated 16.07.1999.

Rajesh Gupta DW-7, is an attesting witness of the Will dated 21.01.2000. He filed his affidavit DW7/A in Hindi, by way of examination in chief. A relevant extract therefrom, translated in English, reads as follows:-

"This Will was typed by Anil Gupta, Advocate on instructions of Jai Narain in presence of the witnesses. The person who typed the Will read over and made Jai Narain to understand the Will. Jai Narain after accepting it correct signed on both the pages in presence of witnesses and typist. We also attested the Will in presence of Jai Narain. I have seen the original Will and it bears my signatures as a witness. The Will is Ex.DW1/2."

A plain reading of the aforesaid extract shows that though the witness has stated that 'we' attested the Will in presence of Jai Narain but he has not specifically stated that the other attesting witness signed or

thumb marked the Will in his presence. He has not identified signatures of the other attesting witness. In his cross examination, he would depose that he did not know, if the Will bears or does not bear signatures of Radhey Sham, stated to be other attesting witness of the Will.

A conjoint reading of the aforesaid extract and the facts brought-forth in his cross examination discussed hereinbefore, leaves no doubt that testimony of Rajesh Gupta DW-7 is not enough to prove attestation of the Will by the second witness. I would hasten to add that the appellant examined Sh. Anil Kumar Gupta, Advocate scribe of the Will but testimony of Sh. Anil Kumar Gupta cannot be construed to be that of an attesting witness. In this view of the matter, I have no hesitation to conclude that the appellant failed to prove the Wills in accordance with law, therefore, he cannot press his right to the property of Sh. Jai Narain, on the basis of testamentary succession.

This apart, on a detailed consideration of various facts brought on record, the Courts have consistently held that the Wills are shrouded by suspicious circumstances. I do not find any reason to interfere with the concurrent findings, in exercise of jurisdiction in Regular Second Appeal. In view of the above, the appellant cannot derive any advantage to his contentions from the referred authority.

To be fair to the appellant, counsel has made a submission that the respondents/plaintiffs failed to adduce evidence to prove that the Wills are the result of forgery/fabrication. As per the settled position, propounder of the Will is obligated in law not only to prove the Will in consonance with the relevant provisions but also to dispel the suspicious circumstances shrouding the Will. Counsel for the appellant has failed to

cite any precedent that in eventuality of respondents/plaintiffs having failed to substantiate their plea of forgery, the appellant can escape his obligation in law, discussed hereinbefore.

No other point has been raised.

For the foregoing reasons, the appeals fail and are accordingly dismissed in limine. No order as to costs.

MAY 2, 2018
'D. Gulati'

Whether speaking/reasoned : yes/no
Whether reportable : yes/no

(REKHA MITTAL)
JUDGE