

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.5208 of 2017(O&M)
Date of Decision-27.07.2018

Pal Singh ... Appellant
Versus
Ranjit Kaur and others ... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Ravinder Sharma, Advocate
for the appellant.

RAJ MOHAN SINGH, J.

[1]. Plaintiff is in regular second appeal against the concurrent judgments and decrees passed by the Courts below in a suit for declaration and permanent injunction.

[2]. Plaintiff set up a case on the basis of Will dated 17.01.1990 executed by Kehar Singh son of Wazir Singh. Plaintiff alleged that Kehar Singh was the owner in possession of land measuring 37 kanals 12 malras and to the extent of half share in land measuring 6 kanals and to the extent of 1/38th share in land measuring 1 kanal 11 marlas situated within the revenue estate of Sangrur. The land was claimed to be ancestral in which plaintiff was having right by birth. All sons of Kehar Singh were having right in the said land by birth as the land was ancestral in nature. Kehar Singh divided the said land orally between the rightful claimants in five equal shares i.e. four shares went to his sons and 1/5th share was kept by Kehar Singh for himself. The said

partition was not reflected in the revenue record, but the parties were put in separate possession on account of said family settlement. The part of land falling under Gurdaspura wala fell into the share of defendants and their predecessor-in-interest, whereas part of land known as Kartarpura wala was kept by Kehar Singh for himself as well as for the plaintiff. Defendants were given residential plots near the hospital whereas the house situated in Khalifa street was kept by Kehar Singh for himself. Kehar Singh was living in Khalifa street and plaintiff was residing with him. Kehar Singh executed a Will dated 17.01.1990 in favour of the plaintiff on account of love and affection in respect of services rendered by the plaintiff to him. Kehar Singh bequeathed his 1/5th share which was kept by him after notional partition in the aforesaid oral family partition.

[3]. Kehar Singh died on 04.12.2002. Due to busy schedule of the plaintiff in the municipal elections as well as in the marriage of his son in the year 2002, defendants took benefit of it and got the mutation of inheritance of Kehar Singh sanctioned. No notice of mutation was ever given to the plaintiff. On coming to know about the aforesaid act in June 2003, the plaintiff visited the Patwari and sought entering and sanctioning of mutation on the basis of Will dated 17.01.1990. Since the mutation on the basis of natural succession had already been sanctioned, the effort of the plaintiff went in vain and he filed an appeal before the Collector, Sub Division Sangrur against the order of mutation

dated 25.02.2003 passed by Assistant Collector, IInd Grade, Sangrur. The appeal was dismissed on account of delayed production of Will after the death of Kehar Singh. Will was found to be shrouded with suspicious circumstances. Plaintiff went to Divisional Commissioner, Division Patiala, but the effort was futile. The attempt made by the plaintiff before Financial Commissioner also yielded no result.

[4]. Plaintiff challenged all the aforesaid orders passed by the revenue authorities in hierarchy in the civil suit and claimed that he is entitled to succeed $1/5^{\text{th}}$ share of Kehar Singh on the basis of Will dated 17.01.1990 thereby making his entitlement to $2/5^{\text{th}}$ share out of the total land. Plaintiff also sought restraint qua alienation of the suit property.

[5]. The suit was contested by defendants No.1 to 5, 8 and 9. Defendants No.6, 7, 10 and 11 were proceeded against *ex parte*. The unregistered Will was denied being illegal and fabricated.

[6]. In order to prove his case, the plaintiff got examined Vikay Kumar Goyal, Deed Writer as PW 1, Jasvir Singh, Advocate scribe of the Will as PW 2. He got examined himself as PW 3 besides tendering copy of Will dated 17.01.1990 as Ex.P1, photocopy of extract of register of Vijay Kumar Goyal, Deed Writer, attested copy of extract of register of Jasvir Singh, Advocate and other documents.

[7]. Defendants failed to lead any evidence and the evidence of the defendants was closed by order of the Court on 19.11.2014.

[8]. Both the Courts below have found the Will to be shrouded with suspicious circumstances. Both the Courts below found that the marginal witnesses have died and the plaintiff has not made any attempt to prove the execution of Will with reference to attesting witnesses by resorting to Section 69 of the Evidence Act. Plaintiff has to stand on the strength of his own case and therefore, heavy onus was on the plaintiff himself to prove due execution of Will.

[9]. Learned counsel for the appellant very vehemently submitted that even if resort to Section 69 of the Evidence Act was not made by the plaintiff, but in case of **Ved Mitra Verma Vs. Dharam Deo Verma, 2014(4) RCR (Civil) 568**, the Hon'ble Apex Court has held that the examination of Sub Registrar in case of registered Will wherein circumstances were set out in which attesting witnesses as well as testator have signed the documents would suffice to meet the requirement of Section 69 of the Evidence Act for proving due execution of Will in question. In the present case, the Will is unregistered. No witness from the office of Sub Registrar has been examined in order to prove due execution of Will.

[10]. Learned counsel relied upon testimony of scribe/deed writer to contend that in view of **Ranjit Singh Vs. Mukhtiar Kaur and others, 2016(2) PLR 850**, the requirement of Section 63 (c) of Indian Succession Act and Section 69 of the Evidence Act would be satisfied even in case of death of both the attesting witnesses, if the scribe of the Will admits due execution of Will with reference to necessary requirement. The suit cannot be dismissed solely on the ground of non-compliance of Section 69 of the Evidence Act. In such situation, the evidence of the scribe is sufficient to comply with the provisions of Sections 68 and 69 of the evidence Act.

[11]. I have considered the submissions made by learned counsel for the appellant.

[12]. Plaintiff was required to discharge the onus to prove due execution of Will by removing all the suspicious circumstances. The expressions '*onus probandi*' and '*animo attestandi*' are the basic features in testamentary depositions. '*Onus probandi*' lies in every case upon the party propounding a Will, whereas '*animo attestandi*' means and implies animus to attest. In common parlance, it means intent to attest. The attesting witness must subscribe with the intent that the subscription of the signature made stands by way of a complete attestation of the testamentary

deposition. The person who had identified the testator at the time of registration of testamentary deposition and had appended his signature at the foot of the endorsement by the Sub-Registrar, was not attesting witness as his signature was not put '*animo attestandi*'. A person who had put his name under the word scribe was not an attesting witness as he had put his signature only for the purpose of authenticating that he was a scribe.

[13]. Similarly, legatee who had put his signature on the Will in token of his consent to its execution was not attesting witness. The word attested occurs as part of the definition itself. To attest is to bear witness to a fact. The essential conditions of valid attestation are that (i) two or more witnesses have seen the executant signed the instrument or have received from him a personal acknowledgment of his signature, (ii) with a view to attest or to bear witness to this fact each of them has signed the instrument in presence of the executant. It is essential that the witness should have put his signature '*animo attestandi*' i.e. for the purpose of attesting that he has seen the executant signing or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for any other purpose i.e. to certify that he is a scribe or an identifier or a registering officer, he cannot be treated to be an attesting witness. In this regard, reference can be made to

the observations made by the Hon'ble Apex Court in **N. Kamalam (dead) and another Vs. Ayyaswamy and another, AIR 2001 Supreme Court 2802.**

[14]. Even as per **Ranjit Singh's case (supra)**, the sole testimony of scribe has to satisfy that Will in question was free from any suspicious circumstance. Perusal of the record would show that as per requirement of Section 63 of the Indian Succession Act, the onus was on the scribe i.e. PW 1 Vijay Kumar Goyal to prove that the testator appended his signature in the presence of the witnesses and witnesses appended their signatures in the presence of the testator. The aforesaid ingredient is missing from the statement of PW 1 Vijay Kumar Goyal. His testimony is silent on the aforesaid fact that the testator had signed in the presence of the witness and vice-versa. The original unregistered Will was not produced on record and the said fact was admitted by the scribe Vijay Kumar Goyal (PW 1). A notarized copy of the Will was placed on record. No application for leading secondary evidence was made. Perusal of the Will and writing made in terms of note written on the Will further aggravates the situation inasmuch as that it was written that the "land in possession of Pal Singh earlier is part from the land subject matter of the Will." The aforesaid note was not signed by Kehar Singh. The discrepancy with regard to obtaining signature of Kehar Singh on each page of the Will

was further found to be discrepant when two signatures on each page of the Will were found. Plaintiff pleaded ignorance about the aforesaid fact of bearing one more signature of testator on each page of the Will. Even plaintiff stated that date '18.01.1990' below the signatures of Bant Singh was neither written by him, nor was written in his presence. Even he pleaded ignorance about the person who wrote the words 'LTI Bant Singh' and the date '18.01.1990' below it. There was further discrepancy with regard to words 'Kehar Singh' viz-a-viz word 'mikaar'. Plaintiff even admitted that the signatures Mark A and Mark B on Will dated 17.01.1990 were not obtained in his presence. He pleaded ignorance as to when they were obtained and who appended the same. Thumb impressions of Bant Singh reflected in Mark A and Mark B were not obtained in his presence. The manner in which the Will was written further created doubt.

[15]. As per cross examination of PW 1 Vijay Kumar Goyal, Deed Writer, the note on the second page of the Will was entered afterwards. PW 1 stated that it was not written in his presence and he pleaded ignorance as to who wrote the same. Many words, signatures have been pointed out to the witness to which he admitted that the same were not written by him. He could not explain as to who was the author of those words. Even if, the Will was not required to be compulsorily registered, but the execution of Will has to be

proved to be free from all suspicions. The Will dated 17.01.1990 was not sought to be registered till the death of Kehar Singh on 04.12.2002. The testimony of PW 2 Jasvir Singh, Advocate could not improve the case of the plaintiff by bringing out the same from the suspicious circumstances. When the execution of Will dated 17.01.1990 was not proved, the attestation by notary public carries no weight in the eyes of law.

[16]. The consideration of aforesaid facts would give rise to irresistible conclusion that the plaintiff has miserably failed to prove due execution of Will by removing suspicious circumstances to the hilt. No law point worth consideration is involved in the present appeal and the same is accordingly dismissed in limini.

(RAJ MOHAN SINGH)
JUDGE

27.07.2018
Prince

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