

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.2321 of 1997

Date of Decision: 09.08.2019

Amarjit Kaur and another

...Appellants

versus

Gurcharan Singh and others

...Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- (On the date that judgment was reserved):-

Mr. R.N. Moudgil, Advocate, for the appellants.

Mr. M.S. Bedi, Sr. Advocate, with
Ms. Irveen Kaur, Advocate,
for the respondents.

Amol Rattan Singh, J.

This is the second appeal of the plaintiffs, in a suit instituted by them against the three respondents herein, who are the half brothers of the 1st appellant-plaintiff, with the 2nd appellant-plaintiff being the mother of the 1st plaintiff.

Vide their suit, the plaintiffs sought possession of 212 kanals and 8 marlas of land, as described in the plaint, situated in village Phero Chechi, Tehsil and District Gurdaspur.

The contention of the plaintiffs in their suit was to the effect that the father of the 1st appellant (and husband of the 2nd appellant), i.e. Makhan Singh, was the owner of the said land, and after his death they are the owners thereof.

It was further averred that, during his life time, Makhan Singh had “brought another woman”, namely Bachan Kaur, from whose womb the three respondents herein (defendants in the suit) were born.

It was further contended that after Makhan Singh brought home the said Bachan Kaur, relations between her and the 2nd appellant herein became strained, as Bachan Kaur's behaviour towards appellant Sahib Kaur "was not good".

Consequently, Makhan Singh made "a separate arrangement" for Sahib Kaur, whose own relations with Makhan Singh however remained cordial, with him having also married off his daughter, i.e. the 1st appellant herein, with one Dhian Singh of village Udhawal.

Yet further, it was contended that Makhan Singh kept up relations with the appellant-plaintiffs right uptill his death and had been helping and supporting them regularly.

2. As regards the respondent-defendants, the contention of the appellant-plaintiffs was that they cannot be said to be the legal heirs of Makhan Singh, because he never divorced appellant no.2, Sahib Kaur, at any stage.

However, it was alleged that the respondents herein got sanctioned a mutation in their favour, qua the suit land, on the basis of a Will alleged to have been executed by Makhan Singh in their favour, which Will was wholly denied by the appellant-plaintiffs to be a genuine Will, with them further contending that even if it was proved to have been executed by Makhan Singh, it was not of his own free will.

3. The respondent-defendants however having refused to admit the claim of the appellants herein, the suit came to be instituted on 14.12.1987.

4. Upon notice issued, the defendants filed a written statement in which they denied the relationship of the plaintiffs with Makhan Singh, further contending that in fact the real name of plaintiff no.2, Sahib Kaur, was

Charan Kaur, who actually was the wife of one Bhagat Singh of village Gurala, Tehsil Ajnala, District Amritsar, with the 1st plaintiff being the daughter of the said Bhagat Singh.

It was further contended that Sahib Kaur (@ Charan Kaur) was earlier married at village Udhowal, Tehsil and District Gurdaspur, with her thereafter living at village Gurala alongwith her children, in her parents' house.

5. As regards their own mother, Bachan Kaur, the contention of the respondents herein, in their written statement, was that she was the legally wedded wife of Makhan Singh and they therefore were the progeny of a "lawful wedlock".

It was next pleaded that apart from the three defendants themselves, Makhan Singh had also left behind five daughters, and consequently, there was a mis-joinder and non-joinder of necessary parties.

As regards the Will of Makhan Singh, it was contended that it was a document registered in their favour on 04.11.1976 and hence they were fully entitled to succeed to Makhan Singhs' estate, on the basis of what had been bequeathed to them, by him.

6. It was next averred in the written statement that the plaintiffs had earlier set up a false and fabricated Will dated January 20, 1987, which they had presented during mutation proceedings, which however was rejected by the revenue authorities, after which the suit in the instant *lis* had been instituted.

7. A replication having been filed by the present appellants to that written statement, reiterating the contents of their plaint, the following issues were framed by the learned trial court:-

- “1) Whether the plaintiffs are entitled to the possession of the land as alleged? OPP
- 2) Whether the plaintiffs have no locus-standi to file the suit? OPD
- 3) Whether the suit is bad for non-joinder of necessary parties? OPD
- 3A) Whether Bachan Kaur is the legally wedded wife of Makhan Singh deceased? OPD
- 3B) Whether Makhan Singh executed a valid will dated 4.11.76 in favour of the defendants? OPD
- 4) Relief.”

8. To support their case, the appellants herein examined the following 10 witnesses:-

Sahib Kaur (plaintiff no.2)	PW1
Singh	PW2
Naranjan Singh	PW3
Amarjit Kaur (plaintiff no.1)	PW4
Dhian Singh	PW5
Darshan Singh s/o Harnam Singh	PW6
Pardip Kumar, Deed-Writer	PW7
Darshan Singh s/o Ranga Singh	PW8
Uttam Singh, Deed-Writer	PW9
Sadhu Singh	PW10

They also relied upon documentary evidence in the form of a *jamabandi* (record of rights) for the year 1981-82 as Ex.P1, a sale deed dated 06.08.1991 as Ex.P2, a copy of another *jamabandi* as Ex.P4, a birth certificate Ex.P5 and a divorce deed Ex.P6.

9. To support their contentions in defence, the respondents herein examined 5 witnesses as follows:-

Tarsem Masih, Deed-Writer	DW1
Gurcharan Singh (defendant no.1)	DW2
Chuni Lal	DW3
Jagir Singh	DW4
Gurbux Singh	DW5

They also relied upon documentary evidence in the shape of a Will dated 04.11.1976 as Ex.D1, certified copies of voter lists, as Exs.D2 to D4 and a copy of an order, Ex.D5.

10. Upon consideration of the pleadings, evidence and the arguments made before him, the learned Senior Sub-Judge, Gurdaspur, first noticed that documents had been led by way of evidence to prove that plaintiff no.1 Amarjit Kaur, was the daughter of Makhan Singh who belonged to village Chhina Railwala, which was his original village.

Ex.P4 was found to be a certified copy of a *jamabandi* (record of rights), showing that he owned agricultural land in that village.

PW3 was found to be the son-in-law of a cousin of Makhan Singhs' father, with PW5 being the previous husband of plaintiff Amarjit Kaur.

PW6 Darshan Singh, was found to be a vendee of a house sold to him in village Chhinna Railwala by the plaintiffs, vide a sale deed dated 06.08.1991 Ex.P2.

It had been argued before that court that the said house earlier belonged to Makhan Singh and on his death it came to the plaintiffs as his successors.

The scribe to and an attesting witness of the said document also testified in the present *lis* as PWs7 and 8 respectively.

11. On behalf of the respondent-defendants, it was argued before the trial court that even as per Ex.D5, which was a certified copy of an order passed by the District Revenue Officer, the Numberdar of the village, i.e. one Labh Singh, did not identify the plaintiffs as the daughter and widow of Makhan Singh.

On the other hand, as per voter lists exhibited as Exs. D2, D3 and D4, Charan Kaur (@ SahibKaur) was shown to be the wife of Bhagat Singh, and Amarjit Kaur the daughter of the said person, of village Ghorala, Tehsil Ajnala.

The genuineness of the divorce deed shown to have been executed by way of customary divorce, as regards the marriage of plaintiff Amarjit Kaur and PW5 Dhian Singh, was also contested by the respondent-defendants, alongwith the earlier mentioned sale deed, Ex.P2.

12. Having considered the matter, the learned trial court first recorded a finding that Makhan Singh had died on 04.03.1987, as admitted by both parties, with Sahib Kaur (@ Charan Kaur) having admitted that she had left Makhan Singh and gone to Ghorala about five years after he brought home Bachan Kaur.

It was also found that she had admitted that her daughter, i.e. plaintiff Amarjit Kaur, subsequently joined her after her relations with her own husband, Dhian Singh, became strained.

She was also found to have admitted in her testimony that in village Ghorala she was living in the house of the brother-in-law of her brother, i.e. in the house of Bhagat Singh.

13. On the aforesaid admission, that court came to the conclusion that Sahib Kaur and Amarjit Kaur had “almost severed their relations” with

Makhan Singh, with then not even able to give full particulars of the children born to Bachan Kaur and Makhan Singh.

The marriage of such children was also found to have been not attended by the appellants herein.

However, it was also recorded by that court that the divorce deed, Ex.P6 and sale deed Ex.P2, respectively showed that the plaintiffs were the daughter and widow of Makhan Singh.

14. It was further found by the learned Senior Sub Judge that Makhan Singh had land in village Chhinna Railwala, which was proved by a *jamabandi* for the year 1974-75 (Ex.P4), which made it clear that he also had a house there, which was sold to PW8 Darshan Singh, vide the aforesaid sale deed, by Sahib Kaur.

15. On the strength of the testimonies of PWs2, 3 and 5, even while observing that such testimonies was not exactly in terms of the Section 50 of the Indian Evidence Act, 1872, yet, seen with the documentary evidence also brought on record, the plaintiffs were held to have been actually proved to be the daughter and widow of Makhan Singh, with the widow later having changed her name from Sahib Kaur to Charan Kaur, she having left her matrimonial home after Bachan Kaur was brought into it.

16. Without specifically at that stage holding issues no.1 and 2 decided in favour of either of the parties, that court is seen to have then gone on to discuss issue no.3, on the suit being bad for non-joinder of essential parties.

On considering that, it was found that Makhan Singh and Bachan Kaur had indeed given birth to five daughters also, other than the defendants, i.e. 3 sons, which fact was eventually conceded by plaintiff Sahib Kaur

herself.

An argument made on behalf of the plaintiffs that the said daughters, being the offspring of a void marriage, are not entitled to succeed to the estate of Makhan Singh, was rejected on the ground that Section 16 of the Hindu Marriage Act, 1955, provides for legitimacy of children of void and voidable marriages, with sub-section (3) thereof stipulating entitlement of a child born from such a marriage to succeed to the properties of his parents “at least” (as held by the Senior Sub Judge).

Consequently, issue no.3 was decided in favour of the defendants, holding the suit to be bad for non-joinder of necessary parties, i.e. the sisters of the defendants.

17. On the issue of Bachan Kaur, i.e. the mother of the respondent-defendants, being the legally wedded wife of Makhan Singh (or not), it was held that with no divorce deed proved qua the marriage between plaintiff Sahib Kaur and Makhan Singh, no marriage entered into by him with Bachan Kaur could be considered to be valid in terms of Section 5 of the Hindu Marriage Act.

That issue was accordingly decided in favour of the appellant-plaintiffs.

18. As regards the validity of the Will dated 04.11.1976, Ex.D1, the trial court found that the deed-writer as also the two attesting witnesses thereto, i.e. Chuni Lal and Jagir Singh (the deed-writer being one Tarsem Masih), had all testified to its authenticity, Chuni Lal being the Sarpanch of village Phero Chechi and Jagir Singh being a close relation to Makhan Singh.

19. The argument on behalf of the appellants (plaintiffs) to the effect that there being no explanation in the Will as to why they had been dis-

inherited, and therefore the Will should be seen to be executed in suspicious circumstances, was an argument rejected by that court, on the ground that with the plaintiffs having gone out of the house of Makhan Singh and he having continued to reside with Bachan Kaur and her children, the Will could not be stated to be one that was the result of undue influence or fraud exercised upon Makhan Singh.

It was reiterated by that court no evidence was brought to support the contention that he continued to retain cordial relations with the plaintiffs; and further, it being a registered document and he having died more than 10 years after the execution thereof, no fraud/misrepresentation etc. could be inferred as regards the validity of the document.

20. On the aforesaid findings, i.e. essentially on the finding recorded with regard to the authenticity of the Will, the suit of the appellant-plaintiffs was dismissed by the trial court.

21. That judgment having been appealed against, the learned District Judge, Gurdaspur, dismissed the appeal essentially on the same grounds, even while observing that Amarjit Kaur could not be said to be the daughter of Bhagat Singh simply because she was shown to be so in the voter lists, after she and her mother started residing in his house.

In other words, it was held that appellant-plaintiff Amarjit Kaur was in fact the daughter of Makhan Singh.

22. A contention raised that Makhan Singh being 70 years of age at the time of execution of the Will, he was therefore not of a sound disposing mind, was also rejected in the absence of any evidence led to that effect.

As regards another argument raised before the first appellate court, that no reference to even the 5 daughters of Makhan Singh being

born from Bachan Kaur had been made in the Will and therefore it must be treated to be one executed in suspicious circumstances, was again an argument rejected by that court, on the ground that those daughters had in fact appeared before the revenue officials and had admitted to the genuineness of the Will.

23. Another argument is seen to have been raised before that court, to the effect that as the land belonging to Makhan Singh in village Chhina Railwala (sold by appellant-plaintiff Amarjit Kaur), does not find any mention in the Will, it cannot be seen without suspicion. That was again an argument rejected by the lower appellate court, on the ground that the testator obviously only wanted to bequeath his property at village Phero Chechi and consequently, non-mentioning of his land in village Chhina Railwala would also not make the document to be one surrounded by suspicious circumstances.

24. That appeal having been thus dismissed, the present second appeal came to be filed before this court in the year 1997, with it having been admitted to regular hearing on 10.11.1997.

When the appeal finally came up for hearing, Mr. Moudgil, learned counsel for the appellants, at the outset had raised the same argument as had been raised before the 1st appellate court, to the effect that with neither the present appellants nor the other 5 daughters of Makhan Singh having been referred to in the Will, it needed to be looked at as one not free from doubt.

He further submitted that this would be even more so when another house belonging to Makhan Singh was sold by the appellants after his death, with no protest raised by the respondent-defendants, despite the fact that the Will itself stated that the deceased was bequeathing his entire property to the respondents.

On query to learned counsel specifically, he could not, naturally, deny that the house sold was in a different village to the property shown to be bequeathed in the Will.

He also could not deny that the suit property was not shown to be ancestral property in the hands of Makhan Singh and was his self-acquired property.

25. *Per contra*, Mr. Bedi, learned senior counsel appearing for the respondents, reiterated that simply because the daughters of Makhan Singh, including appellant no.1, and his wife Sahib Kaur (@ Charan Kaur), have not been mentioned in the Will, that does not take away the authenticity thereof, because it was not proved in any manner that Makhan Singh was not of sound disposing mind at the time of execution of the document, with him having died about 10 to 12 years thereafter.

Mr. Bedi further submitted that the Will being a registered document, which fact is also not specifically denied, though an unsuccessful attempt was made before the trial court to deny its existence, the judgments of the courts below do not deserve to be interfered with.

26. On the issue of the manner in which the authenticity of a Will is to be established, in terms of Section 63 of the Indian Succession Act, 1925, and Section 68 of the Indian Evidence Act, 1872, learned senior counsel cited the following judgments:-

1. **Rur Singh (D) through LRs and otheers v. Bachan Kaur** 2009(2) RCR (Civil) 511;
2. **Surjit Singh v. Sukhbir Kaur** 2015 (44) RCR (Civil) 799
;
3. **Arun Kumar Singh and others v. Smt. Shyam Kumari and others** 2006 (26) RCR (Civil) 425; and
4. **Kashmir Singh v. Harnam Singh and another** 2008 (2)

RCR (Civil) 688.

27. Having considered the arguments made by learned counsel for the parties before this court, as also the judgments of both the courts below, I see no ground to interfere with the findings recorded by those courts.

28. As regards the authenticity of the Will, it is to be proved in the manner provided in Section 68 of the Indian Evidence Act, 1872, on the parameters laid down in Section 63 of the Indian succession Act, 1925.

Both the said provisions read as follows:-

Section 68 of the Indian Evidence Act, 1872

“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.]

Section 63 of the Indian Succession Act, 1925

“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.”

29. Thus, as per Section 63 of the Act of 1925, a valid Will (not being a privileged Will executed by any soldier, airman or mariner employed in warfare or employed at sea), must:-

- (i) be signed/marked by the testator or by a person in his presence and on his direction;
- (ii) such signature or mark would be at a place close enough to the contents written on it, so as to show that the contents were intended to be written by the testator;
- (iii) that it would be attested by at least two (or more) witnesses, with both the witnesses having seen either the testator affixing his signature/mark on the document or having seen some other person sign the document in the presence and on the direction of the testator;
- (iv) be signed by each of the witnesses in the presence of testator, even if both the witnesses do not sign it at the same time but at different times.

Next, as per Section 68 of the Evidence Act, a document that is 'required by law to be attested' (as in the case of a Will in terms of Section 63 of the Act of 1925), such document would not be accepted as evidence till one of the persons who had attested thereto (by way of his signature)

testifies to the effect that he/she had so attested it.

Though the proviso to the aforesaid Section 68 postulates that a registered document need not be proved by calling an attesting witness thereof to testify as regards his attestation, yet, in the case of even a registered Will, one of the attesting witnesses to such Will must be called on to testify and prove the authenticity thereof.

Of course, if neither none of the attesting witnesses to the Will is found, then, as per Section 69 of the Evidence Act, the signature of at least one witness must be proved to his/her signature.

30. In the present case, both the learned courts below have held that both the attesting witnesses to the Will, Ex.D1, i.e. Chuni Lal, Sarpanch of village Phero Chechi and Jagir Singh of village Bhani Mian Khan, testified in court to the effect that they had indeed seen Makhan Singh executing the Will, of which the scribe was Tarsem Masih, who wrote it at the instance of Makhan Singh, Makhan Singh having also signed it in the presence of both these witnesses (DWs3 and 4).

Hence, as regards the factum of the Will having been executed and proved in terms of Section 63 of the Act of 1925 and Section 68 of the Act of 1872 respectively, I see no reason to differ with the findings of the learned courts below, to the effect that the Will was validly executed.

31. Coming then to the argument of Mr. Moudgil that with neither the appellant-plaintiffs, nor the five sisters of the respondent-defendants, having been even mentioned in the Will, it must be looked on with suspicion circumstances, I find myself unable to agree with learned counsel, for the reasons already given by the learned trial court and the 1st appellate court, though otherwise it could be a 'suspicious circumstance', as suggested by Mr.

Moudgil.

However, I fully agree with the reasoning given by those courts, for the simple logic contained in such reasoning, to the effect that, firstly Makhan Singh not referring to his wife, Sahib Kaur, was obviously because he was living with the mother of the respondents, Bachan Kaur, for long years.

In this context, it is also to be seen that, very obviously, the appellants were not living with Makhan Singh ever since he brought in Bachan Kaur into his house, or at least for a period since 3 to 5 years thereafter. That would be obvious from the cross-examination of appellant Sahib Kaur (as referred to by the learned courts below), who admitted that she left home three years after Bachan Kaur came to reside with Makhan Singh, which was about 4-5 years after the partition of the country.

Thus, with the Will having been executed in 1976 and Makhan Singh having died in 1987, very obviously the appellant-plaintiffs did not have any contact with him for about 30 to 40 years, Sahib Kaur also having admitted that she was thereafter residing in village Gharala, Tehsil Ajnala, in the house of Bhagat Singh, since about 18 years prior to the date of her testimony, i.e. 05.09.1989.

32. Makhan Singh therefore obviously intended that his property in village Phero Chechi, should be equally divided amongst only his sons.

Though otherwise even non-mentioning of daughters by a testator, also raises a suspicion on a Will, however, that cannot be held to be a universal rule to be applied under all circumstances, with each Will to be seen in the context of its own contents and circumstances.

Undoubtedly, the Will in the present case is seen to be a registered Will which Mr. Moudgil could not deny, even though none from the office of the Registrar is seen to have testified with regard to the registration thereof; however, the stamps of the Sub-Registrar of Gurdaspur on the document were not shown to be forged or fabricated in any manner, before the learned courts below.

Further, with the attesting witnesses of and the scribe to the Will having duly testified to its execution at the instance of the testator, Makhan Singh, again there would be no reason to doubt that testimony, with nothing 'adverse' shown from such testimonies, so as to discredit them.

33. In such circumstances, I would not hold the Will to be executed in any suspicious circumstances, even though appellant Sahib Kaur continued to be the legally wedded wife of Makhan Singh after she left her matrimonial home upon entrance of Bachan Kaur therein, but she not having looked back thereafter, contrary to what she contended in her plaint (to the effect that she still had cordial relations with her husband).

She having taken up residence with another man and her daughter also having thereafter come to live with her upon her estrangement from her own husband/divorce from him, there would be no bar on Makhan Singh wanting to bequeath his landed property in one village at least to his five sons.

34. This is to be further seen with two facts; firstly, that the learned lower appellate court specifically recorded a finding that the daughters of Makhan Singh and Bachan Kaur, i.e. the sisters of the respondents herein, made a statement before the revenue authorities that they did not doubt the Will of their father (and obviously therefore they had raised no claim to his

property in village Phero Chechi).

Secondly, even as regards the argument that a house belonging to Makhan Singh in village Chhina Railwala had been sold by the appellant-plaintiffs after Makhan Singhs' death, with that house not finding any mention in the Will, and therefore the Will has still to be looked at suspiciously, it would not be an argument acceptable in the circumstances of the case, because the Will, Ex.D1, very clearly states that he was bequeathing his property in village Phero Chechi, to his five sons.

Consequently, he was obviously aware that any other property of his, would either go by natural succession, or that at least he did not object to the appellants being in possession thereof.

Equally obviously, the respondent defendants and the other daughtgers of Makhan Singh also accepted that their father only bequeathed his property in village Phero Chechi to them, they therefore not having laid any claim to the property sold by the appellants (by way of any suit brought to notice in this *lis.*).

35. Hence, in view of the discussion hereinabove, I find no reason to interfere with the judgments of the learned courts below.

Consequently, this appeal is dismissed, with costs throughout.

August 09, 2019
dinesh

(AMOL RATTAN SINGH)
JUDGE

1. Whether speaking/reasoned?	Yes
2. Whether reportable?	Yes