

In the High Court of Punjab and Haryana at Chandigarh

RSA- 2444 of 2012(O&M)

Date of Decision:23.4.2019

Harbhajan Kaur and others

---Appellants

versus

Jit Singh and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

**Present: Ms. Neha Jain, Advocate
for the appellants**

**Mr. Sandeep Bansal, Advocate,
for respondent No. 1**

Rekha Mittal, J.

The present appeal directs challenge against concurrent findings recorded by the Courts whereby suit for declaration and joint possession filed by Jit Singh respondent No. 1 was decreed by the trial court vide judgment and decree dated 2.8.2005 to the following effect:-

“Suit of the plaintiff is decreed to the effect that plaintiff is owner in possession of land detailed in head note of the plaint by virtue of Will dated 3.10.1975 executed by Thola Singh and the other defendants have no right or connection with the same and the revenue entries to the contrary are illegal and ineffective as against the rights of the plaintiff.”

The appeal preferred by defendant No. 13 Gurmail Singh (since deceased represented by his legal representatives) did not find favour with

the Additional District Judge, Hoshiarpur as the appellate court affirmed findings of the trial court without variance.

The present litigation pertains to estate left behind by Thola Singh. Jit Singh respondent-plaintiff is the grandson of said Thola Singh being the son of Jagat Singh one of the sons of Thola Singh. Defendants No. 1 to 3 are the sons of Sh. Thola Singh and some other defendants are the daughters or successors-in-interest of sons/daughters of said Thola Singh whereas defendants No. 4 to 9 alleged themselves to be purchasers of land. Gurmail Singh contesting defendant and predecessor-in-interest of the appellants is the son of Smt. Gurjaro daughter of Thola Singh.

The respondent-plaintiff claimed right in the suit property on the basis of Will dated 3.10.1975 purported to be executed by deceased Thola Singh. The courts have consistently accepted the aforesaid Will by deciding issue No. 1 in favour of the respondent-plaintiff, reads thus:-

“Whether the plaintiff is entitled for declaration to the effect that the plaintiff and defendants No. 1 to 3 and 10 to 13 are owners in possession of the land as described in the head note of the land as described in the head note of the plaint, by virtue of Will dated 3.10.1975? OPP

Indisputably, the original Will dated 3.10.1975 has not been produced. The respondent-plaintiff filed an application before the trial court seeking permission to prove the Will by way of secondary evidence and the same was allowed vide order dated 16.5.2002 with the observations that the plaintiff is allowed to prove certified copy of the alleged Will by way of secondary evidence. It is also not in dispute that neither the scribe nor the attesting witnesses of the Will could be examined as they were

stated to be no more. The respondent-plaintiff examined Gurjinder Mohan Singh Bedi, Deed Writer son of Sh. Baba Ram Nath Singh, scribe of the Will who brought the Deed Writer register from 1.1.1975 to 31.12.1975 and proved entry at Sr. No. 653 dated 03.10.1975 in the said register and photocopy thereof is marked as Ex. P1. Balwant Singh PW2 was examined to prove signatures of his father Ranjit Singh, alleged attesting witness of the Will on entry Ex. P1. Similarly, Gurbachan Singh PW3 was examined to prove signatures of Ishar Dass Sarpanch another attesting witness on entry at Sr. No. 653 of the register produced by Gurjinder Mohan Singh Bedi.

Counsel for the appellants would argue that the courts have committed a serious error rather illegality by relying upon certified copy of the Will as they failed to appreciate that the Will has not been proved, in accordance with law. It is argued with vehemence that even if it is accepted that both the attesting witnesses of the Will were not available for examination in the court, respondent No. 1 was required to prove the Will in consonance with the provisions of Section 69 of the Evidence Act, 1872. It is further argued that there is not even an iota of evidence to prove that the Will in question was thumb marked by Sh. Thola Singh much less that Sh. Thola Singh was physically and mentally fit at the time of execution of alleged Will.

Counsel representing the respondent-plaintiff has supported concurrent findings of fact with the submission that the same cannot be interfered in second appeal unless it is proved that the same suffer from perversity. It is vehemently argued that respondent tried his best to bring on record material evidence to establish his plea that registered Will dated

3.10.1975, certified copy whereof is Ex. P3, was executed by Sh. Thola Singh who passed away in the year 1978. It is further argued that in the year 1975, office of Sub Registrar had not been maintaining duplicate copy of the Will with thumb impression/signatures of the testator and attesting witnesses etc. In the given circumstances, the respondent has proved transcribed copy of the Will by examining one of the officials from the office of Sub Registrar concerned. It is further argued that in the document Ex. P3, it has been clearly recorded that the Will was thumb marked by Thola Singh and as such the respondent has discharged onus of issue No. 1 in complete consonance with the provisions of Section 69 of the Evidence Act as he examined son of Deed Writer/scribe of the Will and proved relevant entry in the register maintained by the scribe as well as signatures of both the attesting witnesses on entry at Sr. No. 653 dated 3.10.1975 Ex. P1, in the register maintained by the Deed Writer.

I have heard counsel for the parties, perused the paper book and records.

The primary question that falls for consideration is, whether the respondent has proved the Will, in consonance with the provisions of Section 69 of the Evidence Act.

Before advertng to the submissions made by counsel for the parties, it is appropriate to recapitulate the provisions of Section 69 of the Evidence Act, quoted thus:-

“Proof where no attesting witness found.—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting,

and that the signature of the person executing the document is in the handwriting of that person.”

Perusal of the aforesaid extract makes it evident that if no attesting witness can be found, document required by law to be attested can be proved by leading evidence that attestation of one of the attesting witnesses is in his handwriting and signature of the person executing the document is in the handwriting of that person.

In the case at hand, the certified copy of the Will does not bear signature/thumb impression of the executant or attestation of the witnesses. The respondent examined the witnesses to prove signatures of alleged attesting witnesses on entry at Sr. No. 653 made in the register of Deed Writer/Scribe of the Will. Perusal of the entry at Sr. No. 653 would reveal that the same bears one thumb impression and Thola Singh written in Punjabi, may be signatures of said Thola Singh. The respondent did not examine a witness to prove that the purported thumb impression or signatures are that of Thola Singh, alleged executant of the Will in question. Both the courts did not bother to examine that since in the present case, none of the attesting witnesses was available for examination in the court, the plaintiff was required to prove thumb impression of testator. As the respondents did not examine a witness to prove that the Will in question bears thumb impression of alleged executant, the same remains unproved as per Section 69 of the Evidence Act. No sooner the respondent-plaintiff failed to prove the Will either according to Section 68 or 69, claim of respondent on the basis of testamentary succession is liable to be rejected. Both the courts despite noticing that provisions of Section 69 are attracted in the instant case failed to consider that the respondent has failed to lead

evidence in compliance thereof. That being so, findings of the courts on issue No. 1 suffer from gross error rather perversity and ordered to be set aside. Accordingly, issue No. 1 is answered against the respondent-plaintiff and in favour of the appellant-defendant No. 13. As a natural consequence, the property in question left behind by the deceased shall be inherited by his class-I heirs on the basis of natural succession, in accordance with the provisions of Hindu Succession Act, 1956.

In view of what has been discussed hereinbefore, the appeal is allowed. Judgments and decrees passed by the courts are set aside. The suit filed by the plaintiff is dismissed with costs throughout.

(Rekha Mittal)
Judge

23.4.2019

PARAMJIT

Whether speaking/reasoned : Yes

Whether reportable : Yes/No