

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

**Regular Second Appeal No.4059 of 2013 (O&M)
Date of Decision: February 28, 2019.**

Kusum

.....APPELLANT(s).

VERSUS

Partap and others

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Rakesh Dhiman, Advocate
for the appellant (s).

Mr. Amit Jain, Advocate
for the respondents.

SURINDER GUPTA, J.

Appellant Kusum filed suit for declaration that she is co-owner in joint possession of the suit property left by her father Parbhu Singh and challenged the Will dated 08.12.2003 and mutation No.2988 entered on the basis of above Will in favour of defendants No.1 to 3 namely Partap, Pawan grand sons of Parbhu Singh and Son Dei, his wife.

Parbhu Singh left behind his wife Son Dei, two sons Om Parkash, Tej Pal and four daughters namely Saroj, Yashoda, Guddal and Kusum (plaintiff). Vide registered Will dated 08.12.2003, challenged by the plaintiff-appellant as illegal and result of fraud, manipulation and impersonation, Parbhu Singh had bequeathed his entire movable and immovable property in favour of his wife Son Dei to the extent of 1/2 share

and grand sons Partap and Pawan sons of Tej Pal to the extent of remaining 1/2 in equal shares. Both the Courts below held the Will Ex.P2 as duly proved.

On appraisal of evidence produced by the defendants to prove the Will, learned Civil Judge (Junior Division), Gurgaon observed in para 31 of the judgment as follows:-

“Thus the oral depositions of DW-1 and DW-3 clearly established that, **Firstly**, the Will was scribed by Sh. Jagdish Sharma on 08.12.2003 at the instance of Sh. Parbhu Singh. **Secondly**, the contents of the Will were read over and explained to Sh. Parbhu Singh, who accepted the same to be correct in presence of the scribe Sh. Jagdish Sharma as well as in the presence of the witnesses namely, Sh. Rajinder Singh, Nambardar and Sh. Vinod. **Thirdly**, thereafter Sh. Parbhu Singh had signed the Will and subsequently, it was attested by the witnesses Sh. Rajinder Singh, Nambardar and Sh. Vinod, in the presence of Sh. Parbhu Singh and the scribe Sh. Jagdish Sharma. This apart, it is also established that said Sh. Parbhu Singh was of sound mind at the time of execution of the alleged will Ex.P-2 (Ex.D-1) dated 08.12.2003. Even otherwise, the court is of the view that the alleged Will is a registered document, thus, the registration would give rise to presumption of its genuineness. **Thus, in the result the execution of Will was duly proved by the defendants, and accordingly, the onus to prove the fraud, fabrication and manipulation, on part of the defendants is shifted on the plaintiff.**”

It was held that appellant-plaintiff has failed to prove any

cogent and convincing evidence to prove fraud, fabrication or manipulation

on the part of beneficiaries under the Will.

Appeal filed by appellant-plaintiff was also dismissed by learned Additional District Judge, Gurgaon with the observation that the execution of Will by Parbhu Singh is duly proved while the appellant-plaintiff has failed to produce the evidence that wife and grand sons of Parbhu Singh have played any fraud in getting the Will executed.

Learned counsel for the appellant-plaintiff has drawn my attention towards the statement of Vinod DW1, who appeared as marginal witness of the Will and stated in his cross-examination that it is not the same Will, which was executed by Parbhu Singh. He has argued that the above testimony of Vinod proves that the registered Will produced on file as Ex.P2(Ex.D1) is a fabricated document.

The above submission of learned counsel for the appellant-plaintiff has no merits as the statement of Vinod is to be read as a whole instead of referring one line in his cross-examination. In his affidavit Ex.DW1/A, tendered in his examination-in-chief, he has stated about the Will as follows:-

- “1) That I have seen the Will Vasika No.472 dated 8.12.2003 which is Ex.P-2. The Will was executed by Prabhu Singh s/o Har Narain in favour of his grand sons Pratap, Pawan sons of the Pal and Smt. Sona Dei Wd/o Prabhu Singh.
- 2) That the Will was executed by Prabhu Singh S/o Har Narain with free will and consent without any undue pressure. The Will was written by Jagdish Sharma, Vasika Nawis, Gurgaon and the contents of the Will were read over to Prabhu Singh S/o Har Narain and he signed the Will in my presence

and in the presence of other witness Rajender Singh, Namberdar, Begampur Khatola. I and Rajender Singh, Namberdar signed the Will as witnesses in the presence and at the instance of Prabhu Singh S/o Har Narain. Prabhu Singh after execution presented the same before Sub Registrar, Gurgaon. There also it was read over and explained to him and admitted the Will he signed in presence of Sub Registrar. Myself and Rajender witness also signed the Will before Sub Registrar as an attesting witness. Rajender, Namberdar, Village Begampur Khatola has died.”

The original Will has not been produced on file and there is every possibility that on seeing certified copy of the Will Ex.P-2, he has stated that it is not the same Will, which was executed by Parbhu Singh. He has repeatedly stated that Parbhu Singh executed Will in favour of his wife and grand sons.

Learned counsel for the appellant has further argued that the statement of DW1 Vinod, marginal witness of the Will, could not be relied upon as he was a tenant in the house of Tej Pal son of Parbhu Singh. He has stated that Parbhu Singh only thumb marked the Will while the Will is having thumb impressions as well as signatures of Parbhu Singh. All the three signatures of Parbhu Singh do not tally with each other. The application filed by the appellant-plaintiff to examine Hand-writing and Finger Prints Expert had not been decided by the trial Court and this has caused great prejudice to the appellant-plaintiff.

The above arguments of learned counsel for the appellant have no merits as DW-1 Vinod appears to be a natural witness of the Will. In

case, he is an interested witness, he would not have stated that Will Ex.P2 is not the same, which was executed by Parbhu Singh. Even otherwise, a person while selecting the witness of his Will, chose the persons on whom he has confidence. Nothing has come on file that Vinod DW-1 was either way interested in deposing in favour of defendants, who happened to be wife and grand sons of Parbhu Singh. Another factor which invite my attention is that other three daughters and one son of Parbhu Singh, who were not given any share in his property, have not come forward to support the contention of appellant or have claimed that Will Ex.P2 is a false and frivolous document. The minor discrepancies in the statement of DW1 Vinod are to be ignored particularly when the scribe of the Will and the witness from the office of Sub Registrar have also proved the Will.

So far as the application filed by appellant-plaintiff to examine Hand-writing and Finger Prints Expert is concerned, the same appears to have not been pressed by her counsel. This application was moved on 24.08.2012 and notice of this application was given to counsel for the respondents-defendants for the date fixed in the suit, which was 28.08.2012. On 28.08.2012, learned counsel for the appellant-plaintiff closed the evidence with statement as follows:-

“Stated that I close the evidence in affirmative.”

Learned counsel for the appellant-plaintiff got recorded his statement fully knowing that he had moved the application for appointment of Hand-writing and Finger Prints Expert in which notice has been issued for 28.08.2012. This reflects that he opted to close the evidence as he was not interested in pursuing this application.

Another factor, which reflects the intention of the appellant-plaintiff in not pressing this application is the grounds of appeal, wherein she had not taken any plea challenging the judgment and decree passed by the trial Court on the ground that her application for appointment of Hand-writing and Finger Prints Expert has not been decided by the trial Court. Learned counsel for the appellant-plaintiff when asked to refer to any plea taken by the appellant before the first Appellate court admitted that no such plea was taken. However, arguments were raised to this effect. A plea which has not been raised before the first Appellate Court, cannot be raised in second appeal.

Learned counsel for the appellant-plaintiff has argued that second witness of the Will has not been examined and no evidence has been produced regarding his death as alleged by DW-1 Vinod.

This argument of learned counsel for the appellant-plaintiff has no merits as firstly, the Will can be proved by examining one of the marginal witness of the Will. Even otherwise, the statement of Vinod that the other witness namely Rajender Singh Lamberdar has died, is unrebutted.

Learned counsel for the appellant has further argued that the original Will was not produced and secondary evidence to prove Will Ex.P2 was not admissible.

This argument again is not even available to the appellant-plaintiff because the certified copy of the Will was produced and proved by the plaintiff herself. She examined concerned official from Office of Sub Registrar, who had produced the original record, where the second copy of the Will bearing the original signatures and thumb impressions of the

testator, scribe and marginal witnesses, was attached. That copy was not a secondary evidence but was a primary evidence. From the primary evidence, certified copy of the Will was proved on record as Ex.P2. This argument of learned counsel that loss of Will Ex.P2 was not duly proved to make secondary evidence admissible has no merits. Firstly, the Will has been proved by leading primary evidence and secondly, Partap Singh DW2 has stated that original Will was lost and his statement could not be disbelieved.

Learned counsel for the appellant-plaintiff has relied on the observations of Hon'ble Apex Court in case of ***B. Venkatamuni Vs. C.J. Ayodhya Ram Singh and others 2006(13) SCC 449; Janki Narayan Bhoir Vs. Narayan Namdeo Kadam 2003(2) SCC 91*** and ***Shreenath Vs. Rajesh 1998(4) SCC 543*** in support of his argument that the propounder of the Will has to prove the due execution of the same by testator and to remove the suspicious circumstances.

The law as laid down in the above citation has not been disputed by learned counsel for the respondents. He has argued that the Will in question is duly proved in accordance with law. Even in the citation referred by learned counsel for the appellant-plaintiff in case of ***Janki Narayan Bhoir Vs. Narayan Namdeo Kadam(supra)***, it was observed by Hon'ble Apex Court that execution of the Will can be proved by examining only one witness as per Section 68 of Indian Evidence Act. The deceased was an old man. He had not only affixed his signatures on the Will but had also thumb marked the same. Very cautiously, he executed the Will in favour of his wife and grand sons, giving the reasons for exclusion of his

daughters and sons. The deposition in the Will is quite natural and there are no suspicious circumstances surrounding the execution of the Will, which are required to be explained by the respondents-defendants No.1 to 3. Grand sons of deceased were minor at the time of execution of the Will. One of the grand son was of the age of 10 years and other was 7 years old. The deposition of the Will suggests that Parbhu Singh bequeathed his entire property to his wife and grand sons as he intended to protect the interest of his wife after his death and had love and affection for his grand sons. His other legal heirs except the appellant-plaintiff have felt satisfied with the wish of Parbhu Singh and have not come forward to challenge the Will or to support the plaintiff.

Keeping in view the above facts and circumstances and on perusal of the judgments of the Courts below, I find no legal or factual infirmity therein calling for any interference.

No substantial question of law requiring determination arises in this appeal, which has no merits.

Dismissed.

February 28, 2019.
Sachin M.

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned: ***Yes/No***

Whether Reportable: ***Yes/No***