

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

RSA No.3464 of 2017 (O&M)

Date of decision:11.01.2019

Devi Dayal Sharma

... Appellant

Vs.

Sham Sunder Avashti and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. M.S.Sachdev, Advocate
for the appellant.

AMIT RAWAL J. (Oral)

The present Regular Second Appeal is directed against the judgment and decree of the Lower Appellate Court, whereby, suit of the appellant-plaintiff decreed by the trial Court, has been dismissed.

The plaintiff sought the mandatory injunction directing the defendants to vacant the premises i.e. residential and commercial, rendition of accounts regarding collection of the rent from various tenants and restraining the defendants from alienating the suit property. It was stated that he was son of late Shiv Parsad Sharma son of Durga Dass. Mangat Ram son of Durga Dass was his brother. He died issueless leaving behind his wife Krishna Wanti Sharma also known as Krishna Sharma. Krishna Sharma expired on 08.12.2003. Mangat Ram, husband of Krishna Sharma expired on 02.09.1979. During his life time, he had purchased a house bearing no.245, Adarsh Nagar, Jalandhar City from Improvement Trust and also one commercial property i.e. EL-270, Attari Bazar, Jalandhar which was rented out to various tenants. Since they did not have any issue, the

plaintiff had been serving them and they shifted to Canada. Owing to their absence, defendants propounded the Will and got the property in their name. Even the certain tenants and licensees were also inducted.

Defendants no.1 and 2 opposed the suit and denied the plaintiff to be owner in possession of the suit property and stated that they have become the owners by virtue of registered Will dated 27.03.2002.

Since the parties were at variance, the trial Court framed the following issues:-

- “1. Whether the plaintiff is entitled to the relief of mandatory injunction, as prayed for ?OPP*
- 2. Whether the plaintiff is entitled to the relief of rendition of accounts from defendant no.1 with regard to the collection of rent from the tenants of the property no.EL-270, Attari Bazar, Jalandhar?OPP*
- 3. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?OPP*
- 4. Whether the plaintiff has no locus standi to file the present suit?OPD*
- 5. Whether the suit is not file by a competent person?OPD*
- 6. Whether defendant no.2 has inherited the entire suit property on the basis of registered Will dated 27.03.2002 executed in his favour by late Krishna Sharma?OPD*
- 7. Relief.”*

The plaintiff, in support of the aforementioned pleadings,

examined Sanjeev Kumar, Draftsman as PW1, Bhupinder Singh, General Power of Attorney of plaintiff as PW2, himself as PW3, Krishan Kumar as PW4 and tendered into evidence Ex.P1 and Ex.P2, much less General Power of Attorney, death certificates of Mangat Ram Sharma and Krishna Sharma as Ex.P4 and Ex.P5.

On the other hand, defendants examined the following witnesses and brought on record Ex.D1 to Ex.D7.:-

DW1 - Sham Sunder

DW2 - Sachin Avasthi

DW3 - Jagdish Chander, record keeper

DW4 - Krishan Lal, deed writer

DW5 - Chanan Singh Lambardar

DW6- Vijay Kumar Salwan (wrongly mentioned as DW5)

The trial Court on preponderance of the evidence, holding the Will to be suffering from suspicious circumstances decreed the suit by discarding the Will. However, the Lower Appellate Court, as noticed above, reversed the findings.

Mr. M.S.Sachdev, learned counsel appearing on behalf of the appellant-plaintiffs in support of the memorandum of appeal, has raised the following submissions:-

i) Chanan Singh, lambardar and Vijay Kumar Salwan, were the two attesting witnesses. Only Vijay Kumar Salwan, has been examined. There was no compliance of the provisions of Section 63(c) of Indian Succession Act, 1925 (for short “1925 Act”) and Section 68 of Indian

Evidence Act, 1872 (for short “1872 Act”).

ii) It is not a case where only provisions of Section 68 of Indian Evidence Act, have to be complied with. The aforementioned statutory provisions of the Act, have to be complied with in conjunction.

In support of the aforementioned submissions, relied upon para 8 of the judgment rendered by the Hon'ble Supreme Court in **Lalitaben Jayantilal Popat Vs. Pragnaben Jamnadas Kataria and others 2009 (1) RCR (Civil) 715** as none of the witnesses stated that testator had signed and fixed thumb mark in their presence and they appended the signatures on her direction.

iii) In order to buttress the arguments, it was further submitted that at the time of attestation of the Will, only one of witnesses was present and another was not and therefore, compliance of provisions was lacking.

iv) Reliance was also laid to paragraph 10 of the judgment rendered by the Hon'ble Supreme Court in **Daulat Ram Vs. Sodha 2004(4) RCR (Civil) 841**. In such circumstances, examination of the scribe and registration clerk would pale into insignificance. Even the beneficiary Sachin Awasthi-DW2 participated in execution of the Will and this was the strong suspicious circumstance where the Will was required to be discarded.

v) The Lower Appellate Court being the last Court of fact and law has abdicated in not noticing the aforementioned facts and erroneously reversed the well reasoned judgment of the trial Court. It has also come in cross-examination of DW2 that testator before six month to her

death was confined to the bed and this is one of the strong reasons to discard the Will.

I am afraid the aforementioned arguments are not sustainable, for, for the sake of brevity, provisions of Section 63(c) of 1925 Act and Section 68 of 1872 Act, are extracted herein below:-

Section 63(c) in The Indian Succession Act, 1925

“(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 acknowledgment 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.”

Section 68 of 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: 1[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.]

On plain and simple reading of the aforementioned provisions, it is evident that no doubt, Will has to be attested by two or more witnesses, each of whom had seen the testator to sign in their presence and by the direction of the testator or had received the personal acknowledgment from the testator but **it shall not be necessary that more than one witness shall be present at the same time.**

The aforementioned caveat does not support the argument of Mr. Sachdev that both the witnesses were required to be present at the time of attestation as one of the witnesses would be sufficient. This is in tandem with the provisions of Section 68 of Indian Evidence Act and as well as the findings arrived at by the Lower Appellate Court in paragraph 16 read thus:-

16. In order to prove the due execution and registration of the Will in question, appellants-defendants no.1 and 2 have examined one of the attesting witness of the Will namely Vijay Kumar Salwan as DW5. This witness has tendered his affidavit Ex.DW5/A stating that Krishna Sharma was known to him. Sachin Avasthi son of Sham Sunder is sister's son of Krishna Sharma. Krishna Sharma, during her life time, executed valid and registered Will dated 27.03.2002 in favour of defendant no.2-Sachin Avasthi in her sound disposing mind in lieu of the

services rendered by him and he is the attesting witness of the Will, executed in favour of Sachin Avasthi, defendant no.2. It has been stated by this witness that the Will was got scribed by Krishna Lal Sharma at Jalandhar. This Will was scribed at the instance of Krishna Sharma, who thumb marked the Will after admitting the contents of the same as true and correct. Each every word of the Will was explained to Krishna Sharma in his presence and in the presence of Chanan Singh, Lambardar and thereafter, Krishna Sharma thumb marked the Will in their presence. The original Will is Ex.D6. This witness has further stated that Will in question was presented before the Sub Registrar, Jalandhar, for registration purposes. The Sub-Registrar, Jalandhar also explained and read over the contents of the Will to Krishna Sharma in his presence and in the presence of Lambardar, who thumb marked the Will as well as endorsement in their presence and after that, he and Chanan Singh witnessed the Will in presence of Krishna Sharma and Sub-Registrar, Jalandhar. The endorsement of Sub-Registrar, Jalandhar is Ex.D7.

Krishna Lal, deed writer, while appearing in the witness box as DW4, has also corroborated the version of DW5-Vijay Kumar Salwan. This witness has brought and summoned record pertaining to Will dated 27.3.2002 and the Will has been shown to be entered at serial no.131 of deed writer register. This

witness has deposed that the Will was scribed at the instance of Krishna Sharma and thereafter, it was read and explained to the executant in the presence of the witnesses and thereafter, Krishna Sharma signed the same in the presence of witnesses. Similarly, witnesses signed the Will the presence of Krishna Sharma. This witness has proved extract of his register as Ex.DW4/A and stated that the original Will Ex.DDW4/B was scribed by him at the instance of Krishna Sharma and it is with his hand. DW3-Jagdish Chander, Record Keeper has also brought the summoned record and deposed that Will, executed by Krishna Sharma in favour of Sachin Avasthi, has been entered at document no.1049 dated 27.3.2002 in bahi no.35. This witness has further stated that he has seen the original Will in the Court and same is correct according to their record maintained in the office of Sub-Registrar, Jalandhar.

Sachin Avasthi, defendant no.2 while appearing in the witness box as DW2 has deposed that Krishna Sharma was the sister of his mother. He was rendering services to Krishna Sharma during her life time and in lieu of the services rendered by him, Krishna Sharma executed a valid registered Will dated 27.03.2002 in his favour in her sound disposing mind. The Will bears the thumb impression of Krishna Sharma and it was attested by witnesses. This witness has further stated that the Will was got registered by Krishna Sharma in the office of Sub-

Registrar, Jalandhar and on the basis of that Will, he became exclusive owner in possession over the entire suit property. DW1-Sham Sunder has also deposed about the execution and registration of Will dated 27.3.2002 by Krishna Sharma in favour of Sachin Avasthi in her sound disposing mind in lieu of the services rendered by Sachin Avasthi to Krishna Sharma during her life time. Thus, from the testimonies of above said witnesses, the execution of registered Will Ex.D6/Ex.DW4/B by Krishna Sharma in favour of Sachin Avasthi stands duly established on record.”

On cumulative reading of the provisions of Section 68 of 1872 Act and findings of the Lower Appellate Court, much less cross-examination of DW6-Vijay Kumar Salwan, it has been proved on record that testator independently approached for execution of the Will and attested and both the witnesses were present and he had taken her for registration of the Will in the office of Registrar. One line here and here cannot be a ground to discard the Will as it is settled law that examination and cross-examination have to be read in conjunction. The Will was executed on 27.03.2002 and six months prior to death would be September 2002, therefore, the plaintiff failed to lead any contrary evidence to prove ailment or incompetence of testator to execute the Will. All these factors have been looked into by the Lower Appellate Court.

The nature of the suit was mandatory injunction that plaintiff could not have been granted the relief, as sought for, in the absence of

Declaration, as the defendants emphatically denied the title of the plaintiff.

The aforementioned view of mine is derived from the ratio decidendi culled out by the Hon'ble Supreme Court in **Anathula Sudhakar Vs. P. Buchi Reddy (D) by LRs and others 2008(2) RCR (Civil) 879.**

In view of above, arguments of Mr. Sachdev do not able to bring the case within the realm of illegality and perversity. No ground for interference is made out.

Resultantly, the appeal is dismissed.

(AMIT RAWAL)
JUDGE

January 11, 2019
savita
Whether Speaking/Reasoned
Whether Reportable

Yes/No
Yes/No