

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

RSA No.4701 of 2014 (O&M)
Date of Decision:05.02.2019

Ashok Kumar

...Appellant(s)

Versus

Lichhma and others

...Respondent(s)

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Ms.Aashma Gill, Advocate for
Mr.Aman Pal, Advocate for the appellant.

Mr.Babbar Bhan, Advocate for the respondents.

ANIL KSHETARPAL, J.

CM-10997-98-C-2014

For the reasons stated in the applications, which are supported by affidavits, delay of 69 days in refiling as well as delay of 9 days in filing the appeal is condoned.

Both the applications stand disposed of.

Main appeal

The plaintiff-appellant is in the regular second appeal against the concurrent findings of fact arrived at by the courts below.

The dispute in the present case is succession to the estate left by Maru Ram. The plaintiff set up a registered Will dated 22.02.1999 allegedly executed by Maru Ram in favour of the plaintiff-appellant. It was claimed that Maru Ram was a child less bachelor. It was further claimed that Lichhma Devi-defendant is not daughter of Maru Ram rather she is daughter of Noza and Jhabar.

The defendant pleaded that the Will dated 22.02.1999 has been cancelled by a registered document dated 12.5.1999. The defendant also propounded the Will dated 10.10.2001, which has not been proved.

Both the courts, after appreciating the evidence, have found that the Will dated 22.02.1999 has duly been cancelled through a registered document dated 12.05.1999. The attesting witness to the aforesaid cancellation deed namely Budh Ram has been examined as DW-2.

Learned counsel appearing for the appellant has submitted that the cancellation deed 12.5.1999 has not been proved in accordance with Section 68 of the Evidence Act. The attesting witness Budh Ram has not stated that the testator/executant had signed in his presence and he had signed in the presence of the attestator. She has further added that the second attesting witness Ram Rattan, Numberdar, has been examined by the plaintiff, who has denied execution and attestation of such document.

This Court has analysed the arguments.

No doubt, in the first blush, the arguments appear to be attractive, however, on close scrutiny, the same do not hold water. Budh Ram when appeared in the evidence has stated that Maru Ram had executed the document with his free will and volition in his presence. The cancellation deed bears the photograph of the executant. The cancellation deed is a registered document. Still further, no suggestion has been given to Budh Ram, the attesting witness, that the photograph of some other person has been affixed in place of Maru Ram.

No doubt, the argument of learned counsel if tested on the strength of Section 68 of the Evidence Act, there may be some substance.

However, proviso to Section 68 clearly makes a distinction. Proviso

provides that it shall not be necessary to call an attesting witness in proof of execution of any document not being the Will. In the proviso, cancellation deed has not been included. Still further, once Budh Ram has stated that the cancellation deed was executed by Maru Ram in his presence and in his sight, the obvious inference is that Maru Ram had thumb marked on the cancellation deed in the presence of Budh Ram.

As regards the statement of Ram Rattan, the second attesting witness, it may be noted that Ram Rattan has denied his signatures and attestation of the document. But in the present case, luckily for the defendant, the photograph of the executant has been affixed on the deed of cancellation and there is no evidence that the photograph does not belong to the executant.

Section 71 of the Evidence Act deals with the situation where attesting witness denies attestation of a document. Section 71 itself provides that execution may be proved by other evidence. In the present case, other evidence has been produced, as Budh Ram-attesting witness has been examined.

In view of the above, there is no ground to interfere. Hence, Regular Second Appeal is dismissed. Pending application(s), if any, shall also stand disposed of, in terms thereof.

05.02.2019
mks

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No