

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

**RSA No.426 of 2012(O&M)
Date of Decision:14.07.2021**

Tulsi Ram**...Appellant****Versus****Shera and others****...Respondents****CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL**

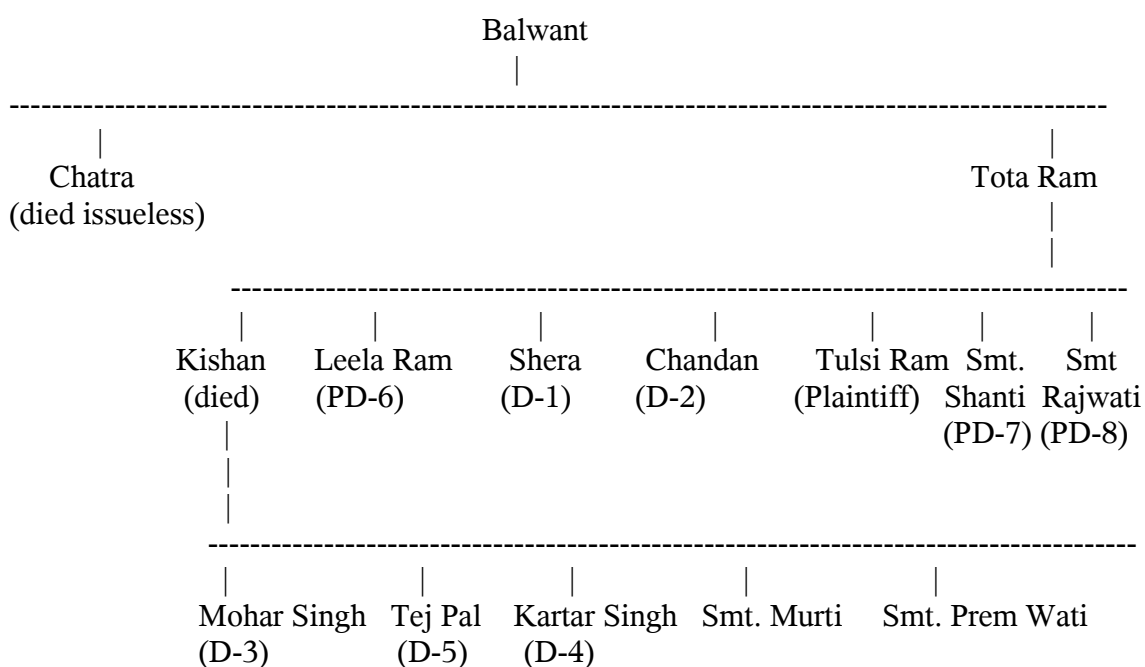
**Present: Mr. Anil Rathee, Advocate,
for the appellant.**

**Mr. Keshav Partap Singh, Advocate
for the respondents**

ANIL KSHETARPAL, J.

The plaintiff-appellant assails the correctness of the judgments and decrees passed by the Courts below. He prays for a decree of declaration to the effect that he is also the owner along with defendants in equal share in the property of late Sh. Chatra.

In order to understand the inter-se relationship between the parties, it would be appropriate to extract genealogy of the family:-



Tota Ram and Chatra were owners to the extent of equal share

in the land measuring 130 kanals and 10 marlas. Sh. Tota Ram died in the

year 1990 and his share in the property was inherited by the parties to the suit. Late Sh. Chatra was issueless. His wife had pre-deceased him. The plaintiff claims that late Sh. Chatra died intestate on 16.10.1992, therefore, his property is inherited by the plaintiff and the defendants. The plaintiff also claims that the contesting defendants have, in collusion with the revenue officials, got entered the mutation No.295 on the basis of a forged Will dated 25.09.1992.

Defendants No.1 to 5 contested the suit. It was pleaded that late Sh. Chatra, during his life time, executed a Will on 25.09.1992, bequeathing his estate in favour of the answering defendants. After the death of late Sh. Chatra, the revenue authorities sanctioned the mutation in favour of the answering defendants on 17.01.1993, on verifying the execution and attestation of the Will by the witnesses.

The plaintiff did not file any replication to the written statement.

The trial Court framed the following issues:-

- “1. *Whether Sh. Chatra died intestate on 16.10.92?OPP*
2. *Whether the mutation No.1295 of inheritance of late Chatra in favour of defendants is illegal, null and void?OPP*
3. *Whether late Chatra never executed any Will dated 25.09.1992?OPP*
4. *Whether the Will dated 25.09.1992 in favour of defendant no.1 to 5 is illegal and void?OPP*
5. *Whether the plaintiff is entitled to the decree of declaration as prayed for ?OPP*
6. *Whether the plaintiff is entitled to the injunction, as prayed for ?OPP*
7. *Whether the suit is time barred?OPD*
8. *Whether the suit is not maintainable in the present*

form?OPD

9. *Whether the plaintiff has no cause of action and no locus standi to file the present suit?OPD*

10. *Relief.”*

The plaintiff in order to prove his case, appeared as PW1. He also examined Smt. Rajwati, proforma defendant no.8 as PW2. The plaintiff produced a copy of the jamabandi for the year 1989-1990 and copies of certain mutations.

On the other hand, the defendants examined the scribe of the Will Sh. D.R.Saini as DW1. Both the attesting witnesses of the Will were also examined, Lila Ram (proforma defendant No.6) as DW2 and Sh. Sohan Lal, Lambardar, as DW3. Mohar Singh, defendant no.3 appeared as DW4. The defendants produced a copy of the Will dated 25.09.1992. On an application for permission to lead secondary evidence, the defendants were permitted to prove the Will vide order dated 08.02.2010. The defendants also produced copies of certain mutation entries.

As noticed above, both the courts after recording a finding of fact that the defendants have successfully proved the execution of the Will dated 25.09.1992, dismissed the suit.

During the pendency of the appeal, the plaintiff has filed two applications for permission to lead additional evidence. In the first application, he wants to produce medical certificate dated 09.12.2011 and the evidence regarding the correct date of death of late Sh. Chatra. In the second application, the plaintiff prays for permission to produce a copy of the mortgage deed dated 19.03.1981. He further prays for permission to get the thumb impression of late Sh. Chatra on the mortgage deed dated 19.03.1981, compared with the thumb impression of late Sh. Chatra on the

Will dated 25.09.1992 and the register (Note book) of the scribe.

On 02.02.2017, the appeal was admitted on the following questions of law:-

- “(i). Whether the Will dated 25.9.92 is a fraudulent document?*
- (ii). Whether the respondents are bound to prove the genuineness of the Will dated 25.9.92?*
- (iii). Whether there is any limitation for challenging a fraudulent document?*
- (iv) Whether the deceased Chatra was died intestate on 25.9.92?*
- (v) Whether defendants are bound to produce original Will and non production of original Will amounts to concealment of documents?*
- (vi) Whether the judgments and decrees passed by learned Courts below dated 29.4.10 and 30.9.11 are based on conjectures and surmises?*

Heard learned counsel for the parties at length and with their able assistance perused the paper book as well as the record requisitioned from the courts below.

Learned counsel representing the appellant, while taking a plea that late Sh. Chatra used to sign in English and never thumb marked the said documents, contends that the plaintiff was under a wrong impression. Now the plaintiff-appellant has come to know that late Sh. Chatra had thumb marked the mortgage deed 19.03.1981 while taking loan from the Punjab National Bank. The appellant wants to produce its copy and get the thumb impressions on the alleged Will and the mortgage deed compared. He further contends that late Sh. Chatra had died on 10.10.1992 and not on 16.10.1992, as has been projected by the defendants. He, hence, contends that the application for permission to lead additional evidence should be

allowed.

The learned counsel for the appellant has further submitted that the original Will has not been produced. He further submits that no Will was executed by late Sh. Chatra and therefore, both the courts have erred in dismissing the suit. In the written arguments learned counsel has projected the following arguments:-

- i) *The Will is surrounded by suspicious circumstances as there are discrepancies in the statements of DW1, DW2 and DW3.*
- (ii) *The property is ancestral and, therefore, it could not be bequeathed through the Will by late Sh. Chatra.*
- (iii) *The will is not registered.*
- (iv) *The defendant did not examine any witness to prove that the original Will was handed over to the revenue authorities at the time of mutation and therefore, the defendant failed to prove that the Will was lost. In fact, late Sh. Chatra died in the intervening night of 24/25.09.1992.*

On the other hand, learned counsel representing the defendants contends that the suit filed by the plaintiff is beyond time. He submits that late Sh. Chatra died in the month of October, 1992 and the mutation on the basis of Will was sanctioned on 17.01.1993, whereas the suit has been filed on 26.09.2005 i.e. after a period of more than 13 years. The plaintiff has himself admitted in his deposition that he came to know of the mutation on the basis of Will in the year 1998. Hence, he contends that the suit is clearly beyond the period prescribed. He further contends that the execution of the Will has been proved by examining both the contesting witnesses, namely, Leela Ram and Sohan Lal as DW2 and DW3, respectively. The scribe of the Will has been examined as DW1 Sh. D.R.Saini, who has produced his register/note book containing the original thumb impression of late Sh. Chatra. He, hence, submits that the execution of the Will has been proved in accordance with Section 68 of the Indian Evidence Act, 1872. He further

submits that the additional evidence sought to be produced cannot be permitted at a belated stage. The plaintiff has been taking contradictory stands and therefore, the courts have correctly refused to believe him.

Before this Bench proceeds to analyze the arguments of learned counsel for the parties, it would be appropriate to note that the plaintiff has asserted in the plaint that he recently gained knowledge of the impugned Will and the mutation when he contacted the patwari of the village. In paragraph 8, the plaintiff has pleaded that the cause of action to file the suit arose when the defendants finally refused to acknowledge his claim on or about 20.09.2005. However, when the plaintiff entered the witness box as PW1, he categorically admitted that on 16.05.1998, when the children of Shera abused him, he got issued a copy of the jamabandi and came to know that he has not been given share in the property of late Sh. Chatra. He further admits that he did not take any action for a period of 6 years i.e., the years between 1998 to 2004. Thus, the stand taken by the plaintiff in the suit with respect to cause of action in the year 2005 stands falsified. As per Article 58, a suit for declaration is required to be filed within a period of 3 years from the date on which the cause of action arose for the first time. In the present case, even if it is assumed that the appellant came to know of the change of record in the month of May, 1998, the cause of action to file the suit arose. The mutation of inheritance of late Sh. Chatra was sanctioned on the basis of a Will and the plaintiff as per his own admission had applied for a copy of the jamabandi in the year 1998 itself. Thus, the plaintiff was required to file the suit within a period of 3 years atleast from May, 1998. However, he filed the suit on 26.09.2005. Thus, both the courts have correctly held that the suit filed by the plaintiff was beyond

time. No doubt, an entry in the revenue record does not necessarily give rise to a cause of action. However, in the facts of the present case, the cause of action to file the suit had arisen, particularly when in the revenue record, the entry had already been changed on the basis of a Will and the plaintiff came to know of the same but never chose to question the same.

Next argument of learned counsel representing the appellant is with regard to non-production of original Will by the defendants.

In this regard, it may be noted that the mutation of inheritance of late Sh. Chatra was produced as Ex.P4. It was sanctioned by the Assistant Collector Ist Grade on 17.01.1993. In the remarks column of the mutation, it is recorded that the mutation has been entered and sanctioned on the basis of a Will executed by late Sh. Chatra on 25.09.1992. The defendants in order to produce the Will, summoned the Patwari. Sh. Om Parkash, Mohrir Patwari, made a statement on 14.05.2008 to the effect that the required document is likely to be in the office of Sadar Kanungo. The defendants, thereafter, summoned the official from the office of Sadar Kanungo. The mohrir Patwari posted in the office of Sadar Kanungo appeared before the Court on 08.04.2009 and informed the Court that in spite of sufficient efforts, the record could not be traced. It was, thereafter, that the defendants filed an application for permission to lead secondary evidence. It was pleaded in the application that the original Will was produced before the revenue authorities at the time of sanction of the mutation and the same was attached with the file which has now been destroyed due to long passage of time. In these circumstances, learned trial court vide an order dated 08.02.2010, permitted the defendants to prove the Will by leading secondary evidence.

Still further, Sh. D.R.Saini, scribe of the Will appeared as DW1. He had brought the original register/note book maintained by him. A copy of the register is exhibited on the file. On careful reading of the aforesaid entry, it is apparent that the gist of the Will has been recorded in the register which bears the thumb impression of late Sh. Chatra. It is specifically recorded in the gist that late Sh. Chatra has willed away his estate in favour of defendants no.1 to 5. Even inter-se shares between defendants no.1 to 5 have been specified in the entry itself. Thus, the defendants have successfully proved the execution of the Will. Still further, it is not in dispute that late Sh. Chatra had died issueless. His wife had also pre-deceased him. Thus, at the time of his death plaintiff and the defendants were his Class-2 heirs. It is also not in dispute that the plaintiff Tulsi Ram has been residing in Chandigarh for more than 30 years, whereas the remaining defendants are residing in the village. The plaintiff while appearing in evidence admitted that it is the defendants who used to provide food to late Sh. Chatra. In these circumstances, both the courts have correctly held that the defendants have successfully proved the execution of Will by late Sh. Chatra. Still further, the plaintiff has himself admitted that he did not come to the village on the death of late Sh. Chatra immediately as he came to know of the same after a period of one month. Thus, it is obvious that the plaintiff was not in regular contact with his uncle late Sh. Chatra.

As regards argument of learned counsel representing the appellant that the Will is surrounded by suspicious circumstances, it may be noticed that the plaintiff filed a suit after a period of more than 13 years.

The witnesses deposed about the manner in which it was executed after a

period of more than 15 years. Human has failing memory. One cannot expect that after such a long period, one would have photographic description of the events that happened 15 years back. The minor discrepancies in recollection of the events while executing the Will cannot be used to discard the registered testamentary disposition.

The next argument of learned counsel representing the appellant is to be noticed and rejected because the plaintiff has not produced any evidence to prove that the property was ancestral. In any case, late Sh. Chatra died issueless, therefore, he being only owner of the property was entitled to dispose of through a testamentary disposition. The Will is not required to be registered. In this case, both the attesting witnesses have been examined to prove the Will. The Will cannot be discarded only on the ground that the Will is not registered.

The next argument of learned counsel is also to be noticed and rejected because it was for the plaintiff to prove that the defendants did not produce the Will before the revenue authorities at the time of sanction of the mutation. It is apparent from the reading of the entry in the remarks column of the mutation that the mutation was sanctioned on the basis of the Will. The plaintiff never took a plea in this regard before the courts below. Thus, the plaintiff cannot be permitted to address the argument on this aspect.

Last argument of learned counsel representing the appellant as noticed above is also without substance as the plaintiff himself is not certain as to when late Sh. Chatra died. The plaintiff has not produced any evidence to prove that late Sh. Chatra died on the intervening night of 24/25.09.1992. On the one hand the plaintiff has filed an application for permission to evidence to prove that late Sh. Chatra died on 10.10.1992,

whereas in the written arguments, the counsel asserts that late Sh. Chatra died in the month of September. Hence, the argument is not acceptable.

Now let's examine the various applications for permission to lead additional evidence. Through the first application, the appellant wishes to produce on record the death certificate of late Sh. Chatra. It is alleged that late Sh. Chatra had died on 10.10.1992 and not on 16.10.1992. In the considered view of this Court, even if the aforesaid application is allowed, it would not make any difference to the result of the case. Whether late Sh. Chatra died on 10.10.1992 or 16.10.1992, does not make any difference.

Through the next application, the appellant wishes to produce a copy of the mortgage deed allegedly executed by late Sh. Chatra in favour of the bank on 19.03.1981. The plaintiff also prays for permission to compare the thumb impression of late Sh. Chatra on the mortgage deed and the Will and the entry in the register of the scribe.

It may be noted here that in the plaint the plaintiff had taken a categorical stand that late Sh. Chatra never used to thumb mark the documents. Now the plaintiff wants to take a stand that late Sh. Chatra used to thumb mark. In the considered view of this Court, it is too late a stage to allow the appellant to change his stand and produce the mortgage deed in additional evidence. In any case, the plaintiff has failed to make out a case for permission to lead additional evidence. While appearing in evidence, the plaintiff has asserted that someone had impersonated late Sh. Chatra and put his thumb impression on the Will as well as the register (notebook) of the scribe. Now the plaintiff wants to compare those thumb impressions. It is not possible to compare the thumb impressions with a photocopy. The scribe had brought the original register when he appeared in evidence.

After his deposition, a photocopy thereof retained on the record. Thus, in the absence of original document bearing the thumb impression of late Sh. Chatra, it will not be appropriate to get the same compared. Still further, the handwriting and finger print expert can only give his opinion which is not binding on the Court. In the present case, both the attesting witness as well as the scribe have supported the case of the defendants while proving the execution of the Will. It may be noted here that Leela Ram is one of the Class-II heir of late Sh. Chatra. He had deposed in support of the Will although he himself stands deprived of his share in the estate of late Sh. Chatra. The second attesting witness is Sohan Lal, who is Lambardar (headman of the village). Thus, he is also a respectable resident of the village.

Keeping in view the aforesaid facts, this Bench is of the considered view that there is no substance either in the applications for additional evidence or in the appeal, respectively.

Let's examine the questions of law framed on 02.02.2017.

The execution of the Will has been proved in view of the judgments passed by both the courts below which has been affirmed by this Bench. Therefore, the Will dated 25.09.1992 is not found to be a fraudulent document.

As regards the second question, it may be noted that the defendants have proved the Will by examining its scribe as well as both the attesting witnesses. As regards question No.(iii), the same is dependent upon question No.(i) which stands answered against the appellant. Therefore, question no.(iii) does not arise. The question No.(iv) has already stands answered. As regards question No.(v), it may be noted that

ordinarily the propounder of the Will is required to produce the original Will, however, in the facts of the case, particularly, when the plaintiff remained silent for a period of more than 13 years and even after coming to know of the sanction of the mutation on the basis of the Will, he did not take any action for such a long time, it will not be appropriate to deny the benefit because the original Will was destroyed by the revenue authorities due to the long passage of time. As regards the next question, it may be noted that the judgments passed by the courts below do not suffer from conjectures and surmises.

Hence, the appeal is dismissed.

All the pending miscellaneous applications, if any, are also disposed of.

14th July, 2021
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned : YES/NO
Whether reportable : YES/NO