

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

RSA-173-1990 (O&M)

Reserved on : 17.11.2022

Date of Decision : 30.11.2022

Jagat Singh and Others

....Appellants

VERSUS

Gurbux Singh & Others

....Respondents

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Aalok Jagga, Advocate for the appellants.

Mr. Ankush Singla, Advocate for the respondents.

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ALKA SARIN, J.

The present regular second appeal has been preferred by the plaintiff-appellants against the judgment and decree dated 20.09.1989 passed by the Additional District Judge, Faridkot reversing the judgment and decree dated 03.09.1986 passed by the Trial Court.

The brief facts relevant to the present lis are that the plaintiff-appellants filed a suit for partition of 2/5th share of plot/house measuring 7 marlas on the allegation that the property in dispute was the property of Hakam Singh who was the father of the plaintiff-appellants and defendant-respondent Nos.1, 2 and 3. It was averred in the plaint that Hakam Singh died intestate without executing any Will and that the property was Hindu Joint Family Property and that Hakam Singh was not even authorized to make a Will. It was further averred that the plaintiff-appellants had inherited

2/5th share and when they asked the defendant-respondents to handover the possession, they refused and hence the suit.

The suit was contested by the defendant-respondent Nos.1 and 2 taking preliminary objection regarding maintainability. It was further the stand that mutation had already been sanctioned by the revenue officials in favour of defendant-respondent No.1 in accordance with the Will dated 29.07.1966 executed by Hakam Singh. On merits it was admitted that the property was owned by Hakam Singh and that he was the father of the parties. However, it was alleged that Hakam Singh had executed a Will dated 29.07.1996 in a sound disposing mind and that the plaintiff-appellants and defendant-respondent No.2 were living separately from Hakam Singh and that defendant-respondent No.3 was married.

On the basis of the pleadings of the parties the following issues were framed :

1. Whether Hakam Singh executed a valid Will dated 19th July, 1966, in favour of defendant Gurbax Singh ? OPD
2. Whether the suit is not maintainable in the present form ? OPD
3. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction ? OPP
4. Whether the suit properly is not partible ? OPD
- 4A. Whether the suit is not within limitation ? OPD
5. Relief.

The Trial Court, on the basis of the pleadings and the evidence on the record, decreed the suit and passed a preliminary decree for

possession by partition of 2/5th share of the plot/house measuring 7 marlas. The Will as set up by the defendant-respondents was not held to be a validly executed Will. Aggrieved by the said judgment and decree an appeal was preferred by defendant-respondent No.1. Vide the impugned judgment and decree passed by the lower Appellate Court, the appeal was allowed and the judgment and decree passed by the Trial Court was reversed. Hence, the present appeal by the plaintiff-appellants.

Learned counsel for the plaintiff-appellants has contended that there is no compliance of Section 63-C of the Indian Succession Act, 1925. It is further the contention that the attesting witness of the Will, Jyot Ram, was declared hostile and that there was no evidence on the record on the basis of which the Will could have been said to have been validly executed. Learned counsel would further contend that the Will itself was shrouded by suspicious circumstances primarily because of the active participation of the propounder of the Will. In support of his contentions, learned counsel for the plaintiff-appellants has placed reliance upon the following judgments :

1. Jamuna Devi Vs. Sarbati Devi (died) through LRs. [2004 (3) RCR (Civil) 497]
2. Balwinder Singh Vs. Mohinder Singh [2004 (4) RCR (Civil) 652]
3. Niranjana Umeshchandra Joshi Vs. Mrudula Jyoti Rao & Ors. [AIR 2007 SC 614]
4. Janki Narayan Bhoir Vs. Narayan Namdeo Kadam [2003 (1) RCR (Civil) 409]

Per contra, learned counsel for the defendant-respondents has contended that there are no pleadings enlisting the suspicious circumstances

shrouding the Will. It is further the contention that there is due compliance of Section 63-C of the Indian Succession Act, 1925. It is also argued that the Will was upheld by the Revenue Authorities. It is further the contention that the Will is a registered document and hence could not be fabricated.

Heard.

As per the law laid down by the Constitution Bench of the Supreme Court **Pankajakshi (dead) through LR's & Ors. Vs. Chandrika & Ors. [(2016) 6 SCC 157]**, there is no requirement for framing of substantial questions of law.

Section 63 of the Indian Succession Act, 1925 reads as under :

“63. Execution of unprivileged Wills : Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules :

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(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 acknowledgement 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.”

The Supreme Court in the case of Janki Narayan Bhoir (supra) has held as under :

“8. To say will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e., (a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the

testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.

10. xxx

But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will

then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.”

In the present case one attesting witness namely, Jyot Ram, appeared as DW-3. In his statement the said attesting witness has clearly stated that he did not know who the second attesting witness was. He further stated that he did not think the Will was read-over to the testator. He further stated that the second attesting witness did not sign in his presence. The advocate for the defendant-respondents made a request that the witnesses were suppressing the truth and he be allowed to cross-examine. In his cross-examination, his attention was drawn to his statement Ex.D2. He however stated that what he had stated today was corrected.

In the present case only one attesting witness of the Will appeared in the witness box i.e. DW-3 since the second attesting witness is stated to have died. In order to prove the execution of the Will the witness had to satisfy the attestation of the Will by him and the other attesting witness in order to prove that there was due execution of the Will. In the present case the said witness while appearing as DW-3 woefully fell short to satisfy the requirement of attestation of the Will by the other witnesses.

Learned counsel for the defendant-respondents had contended that in terms of Section 71 of the Evidence Act, 1872 the propounder of the

Will can prove the Will by any other evidence. Section 71 of the Evidence Act reads as under:-

“71. Proof when attesting witness denies the execution : If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence”

The provisions of Section 71 of the Evidence Act, 1872 would come into play once the attesting witness has denied his signatures on the document or does not recollect the execution of the document itself. In the present case the attesting witness has not denied his signature rather has categorically stated that the testator had signed in his presence. However the said witness stated that the second attesting witness was not present at the time of signing of document by DW-3 and that he was not aware of the second attesting witness. In view of this fact the provisions of Section 71 of the Evidence Act, 1872 cannot come to the aid of the defendant-respondents. Reliance in this regard is placed on Balwinder Singh (supra), wherein it has been held as under :

“12. In Janki Narayan Bhoir's case (supra), Hon'ble Supreme Court has discussed the law of proof of Will and held that the Will is required to be executed in terms of Section 63 of the Indian Succession Act, 1925. It can be proved on the basis of testimony of one of the attesting witnesses. However, if both the attesting witness does not support the execution of the Will then it will be the case of deficiency of meeting the requirement of Section 68 of the Indian Evidence Act.

In the above case, Hon'ble Supreme Court has considered Section 71 of the Evidence Act which contemplates that if the attesting witnesses denies or does not recollect the execution of the document, its execution may be proved by other evidence. In the present case, the attesting witnesses have deposed that they have signed the Will but not at the same time and in the presence of the testator. Such statements of the witnesses does not prove the execution of the Will. It is only if the witness denied his own signatures or denied the signatures of the testator or having not recalled as to the execution of the document, Section 71 of the Evidence Act could be used by the propounder but not in a case where the attesting witnesses have given a positive statement that they have signed the Will not at the time, the testator signed the said Will. In fact, a Division Bench of Bombay High Court in the case reported as Vishnu Ramkrishna and Ors. v. Nathu Vithal and Ors., A.L.R. 1949 Bombay 266, has held that Section 71 of the Evidence Act can be requisitioned when the attesting witnesses failed to prove the execution of the Will by reason of either denying their own signatures or denying the signature of the testator. It was held to the following effect:-

"In this connection our attention was drawn to S.71, Evidence Act. It provides that if the attesting

witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. This is a sort of a safeguard introduced by the legislature to the mandatory provisions of S.68, where it is not possible to prove the execution of the Will by calling attesting witnesses, though alive. Section 71 can only be requisitioned when the attesting witnesses who have been called fail to prove the execution of the Will by reason of either their denying their own signatures, or denying the signature of the testatory, or having no recollection as to the execution of the document. Section 71, in our opinion, has no application when one attesting witness has failed to prove the execution of the Will and other attesting witnesses are available who could prove the execution if they were called..."

13. In the present case, the attesting witnesses have neither denied their signatures or signature of the testator. What is stated by them is that they have not signed the Will in the presence of the testator and in the presence of each other. Section 71 of the Evidence Act enable the propounder of the Will to prove the Will by other evidence only if the attesting witness has denied his signatures on the document itself. When there is a

positive statement of the "attesting witness" that the Will was not signed in his presence, the propounder of the Will cannot lead evidence to prove such Will in terms of Section 71 of the Evidence Act."

In view of the above and in view of the fact that the execution of the Will has not been proved on the record, the judgment and decree passed by the lower Appellate Court cannot be sustained. The present appeal is accordingly allowed and the judgement and decree passed by the Trial Court is restored. Pending applications, if any, also stand disposed off.

30.11.2022
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(ALKA SARIN)
JUDGE

NOTE : Whether speaking/non-speaking : Speaking
Whether reportable : YES/NO