

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR-2459-2022

DATE OF DECISION: JULY 20, 2022

SHARDA RANI & OTHERS

...PETITIONERS

VERSUS

AMARJEET LAL SHARMA & OTHERS

...RESPONDENTS

CORAM: HON'BLE MR. JUSTICE MANOJ BAJAJ.

PRESENT: MR. RAMAN MOHINDER SINGH, ADVOCATE
FOR THE PETITIONERS.

MANOJ BAJAJ, J.(ORAL)

The petitioner-plaintiffs have preferred this revision petition to challenge the order dated 31.5.2022 (Annexure P-9) passed by the Civil Judge(Sr.Divn.), Fatehgarh Sahib, whereby application filed by the respondents-defendants for leading secondary evidence to prove Will dated 22.8.2009 was allowed.

Briefly, the facts of the case are that the petitioners-plaintiffs filed a suit for declaration claiming joint ownership with respondents-defendants No.1 to 4 to the extent of 1/7th share each in the suit property left behind by their father Late Raghwar Dayal, and further sought declaration that the unregistered Will dated 22.8.2009 and mutation No.863 dated 29.4.2011 sanctioned in favour of the respondents-defendants be declared illegal, null & void. It is claimed that the Will relied upon by the defendants is a result of fraud and cheating in order to grab the entire property of Raghwar Dayal by excluding the rights of the plaintiffs. Alongwith the decree of declaration, a decree for permanent injunction has also been

prayed to restrain the defendants from alienating the suit property. The copy of the plaint is Annexure P-1.

The suit is being contested by the defendants by filing a joint written statement (Annexure P-2) wherein preliminary objections relating to the maintainability of the suit, *locus standi* of the plaintiffs, etc. have been raised, and on merits, it has been pleaded that Raghwar Dayal died on 14.1.2011, who had executed a Will dated 22.8.2009 and denied that he died *intestate*. According to respondents-defendants, by virtue of Will dated 22.8.2009 executed by their father and propounded by them, the entire movable and immovable property was bequeathed in their favour and on the basis of the Will, mutation No.863 dated 29.4.2011 was also validly sanctioned. While denying the rest of the averments, it was prayed that the suit be dismissed.

After completion of evidence of the plaintiffs, the respondents-defendants were called to adduce their evidence and at that stage an application (Annexure P-3) was moved seeking leave of the Court to prove the Will dated 22.8.2009, by way of secondary evidence, as the original Will was submitted before the revenue authorities for sanction of mutation, which is not in possession of the defendants. The application was opposed by the petitioners raising an objection that neither the original Will has been produced by the defendants nor it was attached with the written statement, so they prayed for dismissal of the application.

The Civil Judge(Sr.Divn.), Fatehgarh Sahib vide impugned order dated 31.5.2022 (Annexure P-9) accepted the application and granted permission to the respondents-defendants to prove the Will dated 22.8.2009

by way of secondary evidence.

Learned counsel for the petitioners has drawn the attention of the Court to the order dated 14.5.2018 (Annexure P-5) wherein it is noticed that the defendants despite directions have failed to produce the copy of the Will, and submitted that the photocopy of the Will produced after the evidence of the petitioners-plaintiffs is over cannot be proved by way of secondary evidence, and if the respondents-defendants are allowed to adduce secondary evidence at this stage, it would cause prejudice to the petitioners-plaintiffs. He submits that the Court has exceeded its jurisdiction in accepting the application filed by the defendants. In support of his submission, he has relied upon a judgement of the Hon'ble Supreme Court in **Smt. J. Yasoda vs. Smt. K. Shobha Rani, 2007(2) RCR(Civil) 840.** He prays that the impugned order be set aside.

During the course of hearing, it is not disputed by learned counsel that the Will already stands acted upon by the revenue authorities while sanctioning mutation No.863 dated 29.4.2011 and the plaintiff has challenged both these documents in the suit. This alone is sufficient to *prima facie* show that there existed a Will executed by the Testator, but the original is missing. Further, a perusal of the impugned order reveals that the Kanungo (DW1) Mohan Singh appeared before the Court and suffered a statement that mutation dated 29.4.2011 was sanctioned on the basis of Will dated 22.8.2009, and after preparation of new jamabandi, it was destroyed by the Department. Thus, it is sufficient explanation for non-production of original, and the respondents-defendants are left with no option, but to prove the document by way of secondary evidence.

Section 63 Indian Evidence Act, 1872 defines secondary evidence, whereas Section 65 of the Indian Evidence Act, 1872 contains various circumstances when a party can produce secondary evidence. The explanation by the respondents-defendants that Will is unattainable is justified, therefore, the Civil Judge(Sr.Divn.), Fatehgarh Sahib has rightly allowed the respondents-defendants to prove the Will through secondary evidence. The judgement in **J. Yasoda's case** (supra) referred is not applicable as in the said case, as in the said case, the leave to lead secondary evidence was declined because explanation required under Section 65 of the Indian Evidence Act, 1872 was missing.

Resultantly, it is held that the impugned order (Annexure P-9) does not suffer from any illegality or impropriety.

Petition is dismissed.

July 20, 2022
Gulati

(MANOJ BAJAJ)
JUDGE

Whether Reportable : Yes/No

Whether Speaking/Reasoned : Yes/No