

In the High Court of Punjab and Haryana, at Chandigarh

Regular Second Appeal No. 5036 of 2011 (O&M)

Date of Decision: 05.04.2022

Smt. Manjit Kaur and Others

... Appellant(s)

Versus

Smt. Paramjit Kaur alias Gurmej Kaur and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Ashish Aggarwal, Senior Advocate
with Ms. Aashna Aggarwal, Advocate
for the appellant(s).

Mr. Sandeep Kumar Sharma, Advocate
for the respondent No.1.

Anil Kshetarpal, J.

1. The defendant No.1 to 3, in a suit for grant of decree of declaration to the effect that the plaintiff is a co-sharer in the joint possession of the suit land, assail the correctness of the judgments and decrees passed by both the courts below.

2. After having heard the learned counsel representing the parties, at sufficient length, this Court is of the considered view that the following question arises for consideration:-

“Whether the alleged Will dated 04.11.1996 has been proved in accordance with Section 68 and 69 of the Indian Evidence Act, 1872 (hereinafter referred to as “the 1872 Act”)?

3. Some facts are required to be noticed. Late Sh. Mohan Singh was unmarried. He died on 01.12.1996. He had five siblings, namely,

Sh.Sohan Singh and four sisters including Smt.Paramjit Kaur (the plaintiff). When Sh.Mohan Singh died, his mother Smt. Pritam Kaur inherited his property as per natural succession. Smt.Pritam Kaur, hereinafter, bequeathed the property in favour of Sh.Kulwant Singh son of Sh. Sohan Singh vide a registered Will dated 23.07.1997. Smt. Paramjit Kaur alias Gurmej Kaur filed a suit on 22.02.2001 alleging that late Sh. Mohan Singh had bequeathed the entire property in her favour through an unregistered Will dated 04.11.1996.

4. The plaintiff, in order to prove the Will, has examined PW.3 Sh.Pardeep Kumar Sharma, Scribe, PW.4 Sh.Jarnail Singh son of late Sh.Mohan Singh (the alleged attesting witness) and PW.5 Sh.Rabinder Singh (Sh.Rabinder Singh is not a signatory of the alleged Will). A translated copy of the Will has been produced and it is evident that Sh.Jaswinder Singh and Sh.Avtar Singh have signed the Will as the attesting witnesses, Sh.Mohan Singh and Sh.Harminder Singh have also signed the Will.

5. The trial Court decreed the suit while observing that the Will dated 04.11.1996 has been proved by examining the scribe as well as Sh.Jarnail Singh, son of the attesting witness. The trial Court, however, observed that the registered Will, executed by Smt. Pritam Kaur in favour of Sh.Kulwant Singh, has not been proved. However, in the later part of the judgment, the trial Court has held that there is no requirement of giving findings on the aforesaid Will as the Will dated 04.11.1996 has been proved.

6. The First Appellate Court has dismissed the appeal.

7. Heard the learned counsel representing the parties, at length and with their able assistance, perused the judgments passed by both the Courts

below as well the records, which was requisitioned.

8. The learned senior counsel representing the appellants contends that the Will has not been proved in accordance with either Section 68 or 69 of the 1872 Act. He submits that there is no evidence to prove that Sh.Jaswinder Singh, Sh.Avtar Singh and Sh.Harminder Singh are not alive or not available. He further contends that the Will has not been proved even in accordance with the provisions of Section 69 of the 1872 Act as the signatures of the executant (testator) have not been identified by independent evidence. He submits that at the most, Sh.Jarnail Singh has identified the signatures of his father Sh.Mohan Singh, Sarpanch (one of the attesting witness).

9. Per contra, the learned counsel representing the respondent No.1 contends that the Will has been proved on examination of the scribe as well as Sh.Jarnail Singh.

10. It is noted here that the First Appellate Court has not recorded any conclusive finding with regard to the validity of the registered Will dated 23.07.1997, executed by Smt. Pritam Kaur in favour of Sh.Kulwant Singh.

11. At this stage, it is considered appropriate to extract Section 68 and 69 of the 1872, which read as under:-

“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:

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.

69. Proof where no attesting witness found.— *If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the hand writing of that person”.*

12. It is evident that Section 68 of the 1872 Act provides that if a document required by law to be attested, is produced in evidence, it shall not be used in 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.

13. Section 69 of the 1872 Act provides that if no attesting witness can be found, then it must be proved that the attestation of one attesting witness, at least, is in his handwriting and that the signature of the person, executing the document is in the hand writing of that person. Thus, for invoking Section 69 of the 1872 Act, the propounder is required to prove, at the first instance, that the attesting witness cannot be found. In the present case, the plaintiff did not lead any evidence to prove that the remaining

witnesses of the Will, except late Sh. Mohan Singh, were not found. Furthermore, Section 69 of the 1872 Act casts an obligation on the propounder to fulfill two requirements. Firstly, the identification of the signatures of one of the attesting witness, secondly, the signatures of the person executing the document is in his handwriting. In other words, a Will can be said to have been proved in accordance with Section 69 of the 1872 o Act, only when the propounder proves both the things. Both the requirements are mandatory in nature. It is not the case of the plaintiff that Sh.Pardeep Kumar Sharma is the attesting witness. Hence, the Bench is left only with the statement of Sh.Jarnail Singh son of late Sh. Mohan Singh. He has just proved the signatures of his father late Sh.Mohan Singh as one of the attesting witnesses. No evidence has been produced to prove the signatures of the executant-late Sh.Mohan Singh. It would be noted here that the executant as well as one witness of the Will have identical names.

14. Keeping in view the aforesaid facts, the finding, arrived at by both the Courts below to the effect that the will dated 04.11.1996 has been proved, is erroneous.

15. After reading the judgments, passed by the trial Court as well as the First Appellate Court, it is evident that both the Courts below have not recorded any definite/final finding with regard to the validity of the registered Will, executed by Smt.Pritam Kaur in favour of Sh.Kulwant Singh, on 23.07.1997.

16. Hence, for adjudication of the aforesaid issue, the matter is remitted back to the trial Court. The parties, through their respective learned counsel, are directed to appear before the trial Court on 22.04.2022.

17. With the observations made above, the present appeal is disposed of.

18. The miscellaneous application(s) pending, if any, shall also stand disposed of.

(Anil Kshetarpal)
Judge

April 05, 2022
“DK”

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No