

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA No.939 of 1985(O&M)

Reserved On: 06.09.2023

Date of Order:19.09.2023

Bhartha (deceased) through LRs and another

.Appellants

Versus

Satbir (deceased) through LRs and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.Amit Jain, Sr. Advocate, with
Mr. Anupam Mathur, Advocate, for the appellants.

Mr. Atul Gaur, Advocate, for the respondents.

ANIL KSHETARPAL, J

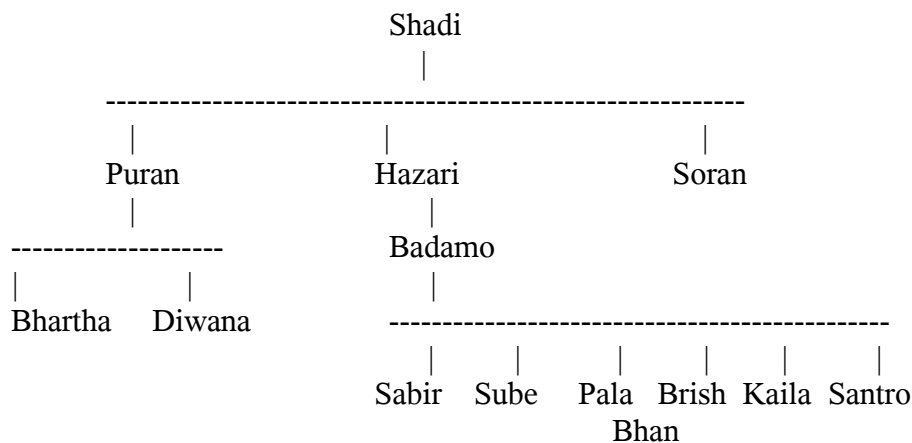
1. This regular second appeal has been filed by the plaintiffs to assail the correctness of the judgment passed by the First Appellate Court. The Regular Second Appeals in this Court are regulated by Section 41 of the Punjab Courts Act, 1914. The scope of interference under Section 41 of the Punjab Courts Act, 1914, has been explained by the Supreme Court in **Pankajakshi (Dead) through LRs vs. Chandrika and others, (2016) 6 SCC 157.**

2. The court of the first instance decreed the plaintiffs' suit for grant of decree of declaration that they are owners to the extent of 3/8th share in the suit land which in appeal has been reversed by the First Appellate Court.

3. In substance, the dispute in the present is with regard to the inheritance of the property left behind by late Shri Hazari son of Sh. Shadi.

A small pedigree table is illustrated to explain the inter-se relationship

between the parties:-



4. The plaintiffs Sh. Bhartha and Sh. Diwana are sons of Sh. Puran. Sh. Shadi had four sons, namely, Sh. Puran, Sh. Hazari, Sh. Soran and Another, whose name has not come on record. Sh. Bhartha and Sh. Diwana claim succession to the property left behind by Sh. Hazari on the basis of Will dated 26.06.1971.
5. On the other hand, children of Smt. Badamo, who was daughter of Sh. Hazari claims the property on the basis of the Will dated 20.07.1971. Even otherwise, alternatively they are Class-I heirs of late Sh. Hazari.
6. This Bench has heard the learned counsel representing the parties at length and with their able assistance perused the paper book along with the requisitioned record. The learned counsel representing the parties have also filed the respective short note of their submissions.
7. The First Appellate Court has reversed the judgement of the court of first instance on the ground that the propounder of the Will dated 26.06.1971, have failed to dispel the suspicious circumstances surrounding the aforesaid Will. It may be noted here that the learned counsel representing the respondents did not address any argument to challenge the correctness of finding of facts arrived at by the trial court with respect to the Will dated 20.07.1971, which was propounded by the defendants. It was held that the

defendants failed to dispel the suspicious circumstances surrounding the Will dated 20.07.1971.

8. The attested copy of the Will dated 26.06.1971 allegedly executed by late Sh. Hazari has been produced. In the aforesaid Will (Ex.P1), it is allegedly stated by late Sh. Hazari that neither he has any child nor he has his wife. He also states that I am being taken care by Sh. Bhartha and Sh. Diwana sons of Sh. Puran, who are his nephews and apart from the aforesaid persons there is no one who can take care of him. Thereafter, he states that he does not have any other near relative apart from Sh. Bhartha and Sh. Diwana and therefore, he is bequeathing his movable as well as immovable property in favour of Sh. Bhartha and Sh. Diwana sons of Sh. Puran. A perusal of the certified attested copy shows that the aforesaid Will was attested by Sh. Bhartha (plaintiff no.1), Sh. Neki son of Sh. Mydia, Sh. Jai Lal son of Sh. Gumani. It is scribed by Sh. Shyam Saroop, whereas notarized by Sh. Shamsher Chand Rana, the Notary Public.

9. In this suit, in the oral examination the plaintiffs have examined Sh. Bhartha (Lambardar, plaintiff no.1), Sh. Shyam Saroop and Sh. Shamsher Chand Singh. Sh. Jai Lal, one of the attesting witness was not examined on the ground that he has been won over by the other side. Apart therefrom, the plaintiff's have also produced the statement of the witnesses recorded in mutation proceedings.

10. In his written note of submissions, the learned senior counsel representing the appellants has reiterated his oral submissions which read as under:-

“That the appellants have led sufficient evidence to prove due execution of will in terms of section 69 of the

Act. (Reliance is placed on RSA-287 of 1991 "Jarnail Singh &anr Vs Pal Singh &ors" decided on 14/02/2018)

Admittedly Hazari (testator) was not having male issue and only daughter Badamo had pre-deceased him. Further it is an admitted position that the respondents were residing in another village and there is no evidence that respondents were rendering any service to the testator. Thus in view of the factual position that Hazari was joint in residence and mess with the nephews/appellants, mere disinheritance of the daughter's children cannot be treated as a suspicious circumstance. Still further the recital in the will that Hazari had no child is to been in the context that he had no male issue and the only daughter had passed away when the will was executed.

Mere active participation of the beneficiary again would not be a suspicious circumstance as the appellant was residing with the testator and was the Lambardar of the village and had been asked by testator to call the scribe and the notary.

Respondents have failed to prove any medical illness or mental or physical incapacity of the testator as alleged. All the plaintiff witnesses had categorically deposed that the will was executed by free will of the testator who was 70 years old and he was in sound deposing mind. Moreso the fact that the respondents have pleaded a subsequent will dated 21/7/1971 with a specific plea in the written statement that the testator was "Healthy and firm and was of good mind." Clearly establishes the false plea taken by the respondents in this regard.

The onus to prove undue influence was on the defendants. No independent evidence has come on record that the testator was under influence of the plaintiffs. The

very stand of the respondents in setting up a contrary will which was proved to be forged and fabricated clearly shows false pleas being taken by the respondents. Both the witnesses examined by defendant in support of will Ex D-1 were interested and inimical towards the appellants and was rightly rejected by the learned trial court. This finding on issue no. 4 has not been assailed by the respondents before the first appellate court.

The will which is otherwise proved to be duly executed cannot be discarded on mere suspicion when there is nothing on record to show that testator was either incapacitated or suffering from mental infirmity which rendered him incapable of executing the will.”

11. On the other hand, the learned counsel representing the respondents in his written note of submissions, has submitted as under:-

“1. There are two attesting witnesses on Will in question dated 26.06.1971 (Ex. P1) named Neki and Jai Lal. None of the attesting witnesses has been examined by the plaintiff to prove the execution of the Will. One of the witnesses Neki expired during the pendency of suit and the second witness Jai Lal was given up as having been won over the defendants.

2. PW 1 Bhartha (Plaintiff no.1) signed the Will as Lambardar of Village. That from the statement of Bhartha as PW 1 and his cross examination, it proves that at the time of execution of Will he was present there and the Will has been scribed on the direction of the Bhartha who is one of the beneficiary also. Therefore, the Will is surrounded by the suspicious circumstances.

3. PW 1 Bhartha admitted in his statement that he brought the scribe and notary public Advocate Rana from Jind on three wheeler and he also brought the Jai Lal and Neki who are the attesting witnesses which proves

that the Bhartha being propounder/beneficiary of the Will played a very active role in execution of the Will and was in a position to dominate the will as Lambardar of Village.

4. No reason given in Will (Ex P1) to disinherit the natural heirs. rather it is specified that Hazari has no any issue /child nor he has been survived with any nearest heirs. It is pertinent to here mention that there is concealment of true facts in Will as the defendants /respondents herein are the only natural heirs of Hazari being sons and daughters of predeceased daughter (Badamo) of Hazari who died just prior one month of the execution of Will.

5. It is admitted by the Bhartha PW1 that Badamo daughter of testator has expired two month prior to the death of testator in the house of testator which proves that the testator Hazari was being served and taken care of by his daughter only. 5. It is admitted by the PW 1 that at the time of scribing the Will Hazari was resting in Cot and was not in a position to move about and testator died within one month of scribing of the will. The date of death testator Hazari was on 24.07.1971. It is pertinent to mention here that the testator was old and illiterate, the propounder of the will is Lambardar of the Village and in a position to dominate the will of testator.

6. That onus to prove the execution of the will is upon the plaintiffs/ appellants herein. The appellants failed to explain the suspicious circumstances surrounded the will

7. That the Bhartha admitted that age of Hazari at the time of execution of the will is near about 75-80 and he also admitted that he has been told by the scribed that the land writes down in your name in the will and further stated that first of all Neki put his thumb impression on

the will as (first witness) thereafter Bhartha himself put his thumb impression and after that Jai Lal (second witness) put his thumb impression. Meaning thereby that he was very well aware about the contents of the will even prior to the execution of the will which proves that the will has been scribed on the direction of Bhartha himself.”

12. On a perusal of the judgment passed by the First Appellate Court, it is evident that the court has held that the Will dated 26.06.1971, is surrounded by the following suspicious circumstances which the plaintiffs failed to dispel:-

- (i) In the Will the testator has not disclosed the name of his daughter, though, admittedly, Smt. Badamo was daughter of Sh. Hazari, who was living with him at the time of her death. In this case late Smt. Badamo daughter of Sh. Hazari died around one and half month before the death of her father while she was staying in the same house with Sh. Hazari.
- (ii) Sh. Bhartha, Lambardar (plaintiff no.1) arranged everything for the execution of the Will including calling the scribe and notary and the witnesses.
- (iii) In the mutation proceedings, the propounder of the Will (Sh. Bhartha) denied that defendants are grand children of Sh. Hazari, but subsequently in the civil suit he changed his stand because overwhelming evidence to prove that the defendants are grand children was produced..
- (iv) It has come on record that the testator was sitting on the

cot throughout and died within one month of the date of execution of the alleged Will.

13. This Court has analyzed the submissions of the learned counsel representing the parties. It may be noted here that the learned counsel representing the respondents does not submit that the execution of the Will has not been proved by the plaintiffs. Hence, the first argument is not required to be dealt with.

14. The next argument of the learned counsel representing the appellants is erroneous. Admittedly, late Smt. Badamo was the only daughter of Sh. Hazari. She died while residing with Sh. Hazari just one and half month before his death. Late Smt. Badamo has left behind four sons and two daughters. Thus, the recitals in the alleged Will (Ex.P1) are factually incorrect. It has been stated in the Will that the testator has no children and there are no other near relatives besides Sh. Bhartha and Sh. Diwana. Once it is not in dispute that defendants(respondents herein) are grand children of Sh. Hazari, there was no occasion for the testator to write that he does not have any other near relative. While executing a Will, the testator is not expected to make factually incorrect statements. In this case, in the Will Ex.P1, the statement of facts is not correct. In these circumstances, the first reason assigned by the First Appellate Court with regard to recitals is correct. No doubt, mere active participation of the beneficiary itself may not be a strong suspicious circumstance, however, in the peculiar facts of the case, the abovesaid circumstance combined with the first reason becomes a suspicious circumstance. As per the case of the plaintiffs themselves, Sh. Hazari was old man of 70 years when the Will was scribed at his residence as plaintiff no.1 requested the Notary Public and the

testator to come to the village for execution of the Will. He himself signed as the attesting witness to the Will. It has come on record that he as well as his father are the headman of the village. Sh. Hazari was sitting on the cot throughout. Moreover, Sh. Shyam Saroop while appearing in evidence has admitted that aging has weak Sh. Hazari. In such circumstances, the chances of free Will of Sh. Hazari having been influenced by the plaintiffs cannot be ruled out. While proving the Will the propounder is required to dispel all the suspicious circumstances surrounding the document, however, the plaintiffs have failed to do so.

15. It may be noted here that Sh. Jai Pal, another attesting witness, who was also a resident of the same village had been given up on the ground that he has been won over. Moreover, Sh. Maha Singh son of Sh. Soran has stated that Smt. Badamo was residing with Sh. Hazari for the last 4-5 years. The correctness of the aforesaid statement remained unchallenged in the cross-examination.

16. As regard the next argument, it may be noted that the statement of Sh. Shyam Saroop read with the statement of Sh. Sher Chand Rana proves that the testator was of ill health. He died within a period of less than one month from the date of execution of the Will.

17. As regards the next argument, it may be noted that in case of proving the validity of Will, the propounder is bound to dispel suspicious circumstances surrounding its execution. Though the defendants have failed to prove the use of undue influence, however, there are certain grounds which cumulatively lead to the conclusion that the plaintiffs have failed to explain the suspicious circumstances surrounding the execution of Will.

18. Moreover, the First Appellate Court has recorded a finding of

fact which in absence of a substantive error is not amenable to inference merely because another view is possible.

19. Keeping in view the aforesaid facts and discussion, no ground to interfere is made out.

20. Dismissed, accordingly.

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

19th September, 2023
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned
Whether reportable

:YES/NO
:YES/NO