

IN THE HIGH COURT OF PUNAJB AND HARYANA
AT CHANDIGARH

RSA No.844 of 1992(O&M)
Reserved on: 28.09.2022.
Date of Order:05.01.2023

Vir Singh and another

...Appellants

Versus

Pritam Singh (deceased) through his LRS and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. J.S.Brar, Advocate,
for the appellants.

Mr. Harkaran Singh, Advocate,
for Mr. B.S.Bhalla, Advocate
for the respondents.

ANIL KSHETARPAL

1. The Regular Second Appeal in the States of Punjab, Haryana and Union Territory, Chandigarh, is governed by Section 41 of the Punjab Courts Act, 1918 and not by Section 100 of the Code of Civil Procedure, 1908, as held by a five Judge Bench of the Supreme Court in **Pankajakshi (Dead) through LRs vs. Chandrika and others, (2016) 6 SCC 157.**

2. While assailing the concurrent findings of fact arrived at by the courts below, this second appeal has been filed by the defendants in a suit for grant of decree of possession.

3. In my considered view, the following substantial question of law arises for adjudication:-

(1) *If both the attesting witnesses to a Will have already died or they are not subject to the process of the court or have become*

incapable of giving evidence, is it necessary to lead evidence to prove that the signatures/thumb impressions of the testator and at least one of the attesting witnesses on the Will are in their respective handwriting in accordance with Section 69 of the Indian Evidence Act, 1872, in order to establish the authenticity of the Will?

4. The relevant facts, in brief, are as under:-

The dispute is with regard to estate of late Smt. Bachan Kaur, who died issueless on 03.01.1986. Her husband Sh. Nazar Singh died much before the death of late Smt. Bachan Kaur. The plaintiff (Sh. Pritam Singh) claims to be the son of the sister of late Smt. Bachan Kaur, whereas, the defendants are the nephews of her husband Sh.Nazar Singh (the defendants are Sh. Nazar Singh's brothers children). The dispute is with regard to the agricultural land measuring 30 kanals and 12 marlas located in village Padduwal, tehsil Zira. The plaintiff (Sh. Pritam Singh) claims succession on the basis of a registered will dated 18.06.1969 allegedly executed by late Smt. Bachan Kaur, whereas, the defendants claim succession to the property on her alleged Will dated 05.10.1985.

5. The plaintiff has sought possession of the property by filing the suit.

6. The registered Will dated 18.06.1969 is sought to be proved by examining PW1-Harbans Lal, the scribe, PW2-Sh. Harnam Singh, the former Sub-Registrar and PW3-Pritam Singh, the plaintiff.

7. On the other hand, the Will dated 05.10.1985 is sought to be proved by examining DW1-Bhagwan Singh, the scribe, DW2-Harneek Singh, the attesting witness, DW3-Raj Singh, the second attesting witness.

8. Both the courts have held that since both the attesting witnesses of the Will dated 18.06.1969 have died, therefore, the Will has been successfully proved by examining the scribe and the sub-registrar. Whereas, the Will dated 05.10.1985 has been held to be surrounded by suspicious circumstances because one of the beneficiary participated in its execution and the register/note book of the scribe was neither produced nor proved.

9. This Bench has heard the learned counsels representing the parties at length and with their able assistance perused the paper book alongwith the requisitioned record.

10. On the one hand, the learned counsel representing the defendants has contended that the registered Will dated 18.06.1969 has not been proved in accordance with Section 68 or 69 of the Indian Evidence Act, 1872 (hereinafter referred to as 'the 1872 Act'). He contends that both the courts have erred while concluding that the Will dated 18.06.1969 has been proved. He further submits that the defendants have successfully dispelled the alleged suspicious circumstances surrounding the Will. He submits that there is no concrete suspicious circumstance which may compel the court to doubt the correctness of the Will.

11. On the other hand, the learned counsel representing the plaintiff, while defending the judgments passed by the courts below contends that no substantial question of law is involved in the present case, therefore, the court should not interfere. It has been submitted that PW1-Harbans Lal has proved that late Smt. Bachan Kaur executed the Will as she had thumb marked the Will in his presence. While referring to the statement of PW2-Harnam Singh, retired District Revenue Officer, he submits that the Will was read over to the testator and she thumb

marked the same after admitting the correctness thereof. Hence, he submits that the Will has been duly proved.

12. This court has evaluated the arguments of the learned counsels representing the parties while carefully reading the requisitioned record.

13. Before this Court proceeds to analyze the arguments, it is important to examine the statutory requirements for proving a Will. As per Section 63 (c) of the Indian Succession Act, 1925, an unprivileged Will is required to be attested by two attesting witnesses. Section 68 of the 1872 Act requires that if a document is required by law to be attested, then it shall not be used in evidence until one attesting witness has been examined for the purpose of proving its execution, if an attesting witness is alive, capable of giving evidence and subject to the process of the court. Section 69 of the 1872 Act opens another window to the propounder of the Will, if no such attesting witness can be found. Section 68 and 69 of the 1872 Act are extracted 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: 1[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.”*

14. On a careful reading of Section 69 of the 1872 Act, it is evident that if no such attesting witness can be found, the Will is required to be proved by proving 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 handwriting of that person. In other words, both the conditions are coinciding and the propounder is required to simultaneously prove that the attestation by one attesting witness is at least in his handwriting and the signatures of the testator appended on the Will are in his handwriting. It is discernible from the words and expressions used in the statute that proving the Will in the aforesaid manner in the absence of attesting witnesses is the mandatory requirement under the Act. The statute has clearly used the expression that ‘it must be proved’, thus no discretion in this regard has been given to the court or the party.

15. In **Babu Singh and others vs. Ram Sahai @ Ram Singh,(2008) 14 SCC 754** the Supreme Court has examined the requirement of second part of Section 69 of the 1872 Act, in the following manner:-

“14. It would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the Will may be proved in the manner indicated in [Section 69](#), i.e., by examining

witnesses who were able to prove the handwriting of the testator or executant. The burden of proof then may be shifted to others.

15. Whereas, however, a Will ordinarily must be proved keeping in view the provisions of [Section 63](#) of the Indian Succession Act and [Section 68](#) of the Act, in the event the ingredients thereof, as noticed hereinbefore, are brought on record, strict proof of execution and attestation stands relaxed. However, signature and handwriting, as contemplated in [Section 69](#), must be proved.”

16. In the present case, both the courts have held that none of the attesting witness of the registered Will Ex.PW2/B dated 18.06.1969 is alive. In such eventuality, Section 69 of the 1872 Act becomes applicable. The propounder was required to prove that the signatures/thumb impressions of the testator are in his handwriting and the attestation of one attesting witness at least is in his handwriting. The propounder has failed to fulfil both the requirements.

17. At this stage, it would be appropriate to carefully read the deposition of PW1-Harbans Lal, the scribe. He has stated that neither late Smt. Bachan Kaur nor he knew the attesting witnesses personally. He cannot say if late Smt. Bachan Kaur, vendee of Ex.P1, was the same lady at whose instance he scribed the Will. He also does not state that late Smt. Bachan Kaur, the executant, thumb marked the Will in his presence. Similarly, PW2-Harnam Singh, retired District Revenue Officer has admitted that the Will was neither scribed in his presence nor late Smt. Bachan Kaur or the attesting witnesses attested the Will in his presence. He has admitted that except for putting his signatures on the endorsement, he has not written anything else on the document by his hand. He did not know late Smt.

Bachan Kaur personally. He only knew Lumbrdar Sohan Singh, one of the attesting witness.

18. Moreover, both the courts have overlooked the fact that the execution of the Will and its attestation are distinct from its registration. The Will may have been scribed in the office/seat of the scribe where the executant as well as the attesting witnesses appended their signatures/thumb impressions. Thereafter, the Will is presented in the office of the Registrar for its registration. At that time, the signatures/thumb impressions of the testator and one of the attesting witnesses are taken on the endorsement which is an acknowledgement of the execution of the Will. However, the endorsement of the registration is not equivalent to the signatures of the testator and attestation by two witnesses which is a mandatory requirement for proper execution of the Will. In these circumstances, the plaintiff has failed to prove the Will dated 18.06.1969.

19. There is another Will propounded by the defendants allegedly executed by late Smt. Bachan Kaur on 05.10.1985. The execution and attestation of the Will has been proved by examining both the attesting witnesses, namely, DW2-Sh. Harnek Singh and DW3-Sh. Lal Singh, Lambardar DW1-Sh. Bhagwan Singh, the scribe of the Will has also been examined. Both the courts have held that the defendants have failed to dispel the following suspicious circumstances.

- (1) The Will was executed at Dharamkot where the sub-Registrar has its office but it was not registered.
- (2) Sh. Vir Singh, one of the beneficiary, was present at the time of execution and attestation of the Will.
- (3) The scribe has failed to produce his diary, therefore, an adverse inference is liable to be drawn.

- (4) The defendants have failed to prove that the Will bears the thumb impression of the testator.
- (5) The attesting witnesses of the Will were just chance witness.
- (6) The attesting witnesses differed with regard to the paper used for scribing the Will.

20. As per the Registration Act, 1908, there is no requirement for compulsory registration of the Will. In other words, registration of the Will is neither mandatory nor compulsory. Both the courts have given undue importance to the fact that since late Smt. Bachan Kaur had got her first Will dated 18.06.1969 registered, therefore, in normal circumstances, she should have got the Will dated 05.10.1985 registered as well. There is an obvious error in the aforesaid reasoning. First of all, the law does not require compulsory registration of the Will. Secondly, though the Will dated 05.10.1985 was scribed, executed and attested at Dharamkot, however, that day being Saturday was not a working day for the office of the sub-Registrar. Hence, the first suspicious circumstance has no legs to stand.

21. As regard the second suspicious circumstance, it may be noticed that though, one of the attesting witness had admitted that Sh. Vir Singh was present at the time of the execution of the Will, however, there is no evidence to prove that he influenced the testator. It is important to note that late Smt. Bachan Kaur by Will dated 05.10.1985 has bequeathed her property in favour of Sh. Vir Singh (son of Sh. Buta Singh and Sh. Darshan Singh (son of Sh. Saudagar Singh) in equal share. In such circumstances, chances of Sh. Vir Singh having influenced the mind of the testator are remote particularly when she bequeathed the property in favour of two nephews of her husband in equal share. It is not the case of the parties that Sh.Darshan Singh was also present.

22. As regard the next reasoning of the courts below that the scribe failed to produce its diary where entry no.533 was made, it may be noticed that Sh. Bhagwan Singh had stated that the diary was lost on 10.10.1985 and he had reported the police in this regard. In these circumstances, particularly when the scribe has disclosed that the Will was entered at Sr. No.533, it would not be appropriate to draw an adverse inference particularly when Sh. Bhagwan Singh is a licenced scribe working regularly in tehsil Dharamkot.

23. The next reason assigned to hold that the Will is surrounded by suspicious circumstances is that both the attesting witnesses are chance witnesses. The Court has made this observation while noticing that Sh. Harnek Singh has stated that he was present at the bus stand of Dharamkot, from where he was called by late Smt. Bachan Kaur. Similarly, Sh. Lal Singh, the other witness has stated that he was present in Dharamkot when late Smt. Bachan Kaur asked him to witness the Will. Sh. Harnek Singh was resident of village Baduwala where the property is situated. Sh. Harnek Singh is also resident of the same place. Sh. Lal Singh is the Lambardar of village Baduwala. Smt. Bachan Kaur had called both the witnesses to attest her Will. In such circumstances, it was not appropriate for the Court to observe that both the attesting witnesses were mere chance witnesses.

24. The last suspicious circumstance observed by the Courts is with regard to the different statements made by the attesting witness about the paper used for scribing the Will. From a bare look at the Will Ex.D1, it is evident that it has been scribed on a plain paper with non-judicial stamp of 10 paise affixed on top of the page. This practice is adopted when non-judicial stamp paper of the denomination of 10 paise is not available. On a careful reading of deposition of DW1-Sh. Bhagwan Singh, it is evident that he has stated that the Will was scribed on a plain paper with a stamp of 10 paise affixed thereon as the non-judicial stamp

paper of 10 paise was not available. Sh. Harnek Singh, the other attesting witness, stated that the Will has been scribed on non-judicial paper and a stamp was affixed on the stamp paper. Sh. Lal Singh Lambardar (DW3) has stated that the Will was scribed on a non-judicial stamp paper of Rs.2.25 with a ticket affixed thereon. In the considered view of this Court, this in itself is not a sufficient reason to discard the Will which has been duly proved by examining both the attesting witnesses and with the scribe. The witnesses were deposing after a period of four years, since the execution and attestation of the Will. It is not possible to recollect the exact events in the same chronology as they happened.

25. There is also no dispute that it is the defendants who are cultivating the land. In the Will dated 05.10.1985, Smt. Bachan Kaur has revoked the previous Will. In such circumstances, the courts have erred in discarding the Will dated 05.10.1985. The First Appellate Court has also erred in observing that the thumb impression of late Smt. Bachan Kaur has not been proved by the defendants. In fact, the thumb impression of late Smt. Bachan Kaur has been proved by examining both the attesting witnesses as well as the scribe. It is not necessary for the propounder to prove the thumb impression by examining a handwriting and fingerprint expert. In fact, since the plaintiff had challenged the correctness of the later Will dated 05.10.1985, hence, the onus was on the plaintiff to prove that late Smt. Bachan Kaur did not append her thumb impression on the Will after the Will has been proved by the propounder. The thumb impression of late Smt. Bachan Kaur were available on sale deed Ex.P1. However, no effort was made by the plaintiff to prove that late Smt. Bachan Kaur did not execute the Will. Once, direct evidence of two attesting witnesses along with the scribe has been led, then the First Appellate Court erred in observing that thumb impression of late Smt. Bachan Kaur has not been proved.

26. For the foregoing reasons, the appeal succeeds and is accordingly allowed. No order as to costs.

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

05th January, 2023
nt

(ANIL SKEHTARPAL)
JUDGE

Whether speaking/reasoned :YES/NO

Whether reportable :YES/NO