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

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Date of Decision: 25.05.2023

Rakesh Prashar and another

..... Appellants

Versus

Smt. Usha Prashar (since deceased) and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present : Mr. Rajeev Anand, Advocate, and
Mr. Kanwal Goyal, Advocate,
for the appellants.

RAJBIR SEHRAWAT, J. (ORAL)

1. This regular second appeal has been filed by the defendants of the original suit; challenging the concurrent judgments and decrees passed by the Trial Court and the lower Appellate Court, whereby the suit filed by the respondents/plaintiffs for declaration qua the Will dated 13.09.1994 as illegal; has been decreed; and the said Will has been held to be invalid.

2. Notice of motion.

3. On the asking of the Court, Ms. Aarushi Garg, assisting counsel of Mr. R.S.Bains, Senior Advocate, accepts notice on behalf of respondents No.1 and 2 and Ms. Malika Sobti, Advocate appearing for Mr. Rakesh Sobti, Advocate, accepts notice on behalf of respondent No.5.

4. Respective counsels have agreed to address the arguments for final disposal of the appeal. The parties are being referred to as they were

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described in the original suit.

5. The brief facts, as involved in the present appeal, are that the plaintiffs/respondents filed a suit challenging the Will dated 04.10.1994; allegedly executed by their father in favour of the appellants/defendants No.1 and 2, besides challenging the consequent mutation entered by the Estate Office, Chandigarh, as illegal. It was asserted by the plaintiffs that plaintiff No.1-Usha Prashar is the wife of Satkam Prashar, who died on 14.11.1997. The deceased-Satkam Prashar left behind his wife/plaintiff No.1, a daughter/plaintiff No.4 and three sons, namely, Pawan Kumar Prashar/plaintiff No.2, Dinesh Kumar Prashar/plaintiff No.3 and Rakesh Prashar/defendant No.1, who is the appellant No.1 herein. Plaintiff No.1, along with her two sons i.e. plaintiffs No.2 and 3; is residing in House No.737, Sector 22-A, Chandigarh, and the defendant No.1 is residing in House No.1030, Sector 37-B, Chandigarh, separately. The deceased-Satkam Prashar was owner of Booth No.3025 D, Sector 22-D, Chandigarh. In the month of October/November, 1993, deceased-Satkam Prashar divided his properties amongst his three sons on account of his illness. In dis-regard of the said distribution of the properties, Defendant No.1/appellant herein, claimed the General Power of Attorney dated 24.11.1993 and a Will allegedly executed by his father-Satkam Prashar. On the basis of those documents, defendant No.1 had earlier filed a suit claiming himself to be exclusive owner of Booth No.3025-D, Sector 22-D, Chandigarh. However, he had lost in the suit. Subsequently, he had filed an appeal before the lower Appellate Court. During the pendency of the said appeal, defendant No.1

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claimed second Will dated 13.09.1994, which is the subject matter of the present suit as well. However, even the said appeal filed in the earlier suit was dismissed as withdrawn. When defendant No.1 started claiming the Will dated 13.09.1994, then the plaintiffs, who are the wife, one daughter and two sons of the deceased-Satkam Prashar, filed the present suit challenging the validity of that Will and the consequent action taken by the Estate Office, Chandigarh.

6. At the stage of the evidence, the parties led their respective evidence. To prove the genuineness and true execution of the Will, appellant/defendant No.1 examined the attesting witness Raghbir Singh as DW2 in examination-in-chief. However, he was not produced for cross-examination. Instead of producing the said witness before the Court for cross-examination, defendant No.1 filed an application for issuing commission for recording of the cross-examination of the said witness. However, in the said attempt, defendant No.1 had lost right upon the High Court. Thereafter, defendant No.1 moved another application before the Trial Court for examining another alleged attesting witness of the Will, namely, R.K.Verma. Even in that attempt, he lost upto the Hon'ble Supreme Court.

7. After considering the respective assertions and the evidence led by the parties, the Trial Court decreed the suit in favour of the plaintiffs. Challenging the said judgment and decree dated 12.01.2017 passed by the Trial Court, defendant No.1/appellant filed an appeal before the lower Appellate Court. However, even the said appeal has been dismissed vide

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judgment and decree dated 23.02.2023. It is challenging the said judgments and decrees passed by both the Courts below, that the present appeal has been filed. However, another aspect which deserves to be noticed is that during the pendency of the appeal before the lower Appellate Court, defendant No.1/appellant had again filed an application for examining the second alleged attesting witness, namely, R.K.Verma. However, that application was declined by the lower Appellate Court, and also by this Court. Therefore, the defendant No.1/appellant had taken the matter to the Hon'ble Supreme Court. But since the lower Appellate Court itself had passed the final judgment and decree on the matter, therefore, the Hon'ble Supreme Court has dismissed the SLP filed by the appellants/defendants No.1 and 2 as infructuous, while permitting them to raise all such points which may be available to them under the law; in the regular second appeal, if they so filed.

8. Arguing the case, learned counsel for the appellants/defendants No.1 and 2 has submitted that both the Courts below have gone wrong in law in declaring the Will in favour of appellants/defendants No.1 and 2 to be invalid. The respondents being plaintiffs in the suit, it was incumbent upon them to prove that the alleged Will was not validly executed. The Will was duly registered, therefore, the presumption was attached to the same. However, no evidence was led to prove the invalidity of the Will. Learned counsel has further submitted that even as per the issue framed by the Trial Court, the burden of proof of invalidity of the Will was upon the plaintiffs alone. Therefore, the fact that the appellants/defendants No.1 and 2 had not

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examined the attesting witness of the Will, as such, cannot be taken as a ground sufficient to hold that the Will was invalid. Learned counsel has further submitted that the findings recorded by both the Courts below that the attesting witness Raghbir Singh was not produced by the appellants/defendants No.1 and 2 are not fairly recorded. Rather, the said witness could not be produced for cross-examination only because of the ill health and his inability to come to the Court. Accordingly, the application was moved for appointing a Commission for recording his cross-examination. Therefore, the appellants could not have been faulted on account of non-examination of the said attesting witness. Learned counsel has further submitted that although the plaintiffs claimed fraud and forgery in execution of the Will, however, on the same facts an FIR No.198 dated 26.05.2005 under Section 420, 193 read with Section 120-B of the Indian Penal Code had also been registered at Police Station Central Sector 17, Chandigarh, at the instance of the plaintiffs. The appellants/defendants No.1 and 2 already stand acquitted in that criminal case. Therefore, the findings of any forgery in the execution of the Will is rendered irrelevant. Learned counsel has also submitted that the Courts below have wrongly relied upon the documents relating to the earlier litigation because the said litigation happened to be of the time prior to the surfacing of the Will involved in the present case. Therefore, the inferences drawn by the Courts below are not sustainable, being devoid of any basis. Carrying forward the argument, learned counsel for the appellants has further submitted that the application moved by the appellants under Order 41 Rule 27 of the Code of Civil

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Procedure before the lower Appellate Court, for leading additional evidence by examination of R.K.Verma, the other attesting witness of the Will, has wrongly been declined by the Court below. The appellants should have been granted an opportunity to examine the said witness to discharge their burden of proof. Learned counsel has also reiterated the fact that the findings recorded by the Courts below are based upon the circumstantial evidence led by the plaintiffs. Therefore, to rebut the same, the appellants/defendants No.1 and 2 should be granted an opportunity to lead the direct evidence on the factum of the Will by permitting examination of the attesting witness R.K.Verma. Hence, it is submitted that the judgments and decree passed by the Courts below deserves to be set aside and the appeal deserves to be allowed.

9. On the other hand, learned Senior counsel for the respondents/ plaintiffs has submitted that both the Courts below have rightly recorded the findings based upon the evidence produced before the Courts below. The High Court is not required to interfere against the concurrent findings recorded by the Courts below only because a different opinion is possible to be framed by re-appreciation of the evidence on file. Qua the merits of the case, learned Senior counsel for the respondents/plaintiffs has submitted that the plaintiffs have led the evidence to show that there was no Will ever executed by Satkam Prashar. The entire circumstances showing the conduct of the plaintiffs and creating suspicious circumstances around the Will and showing fraud of the appellants/defendants No.1 and 2 was duly brought on record by the documents led in evidence. Therefore, the said material has

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rightly been relied upon by the Courts below. So far as the proof of the Will is concerned, since the appellants/defendants No.1 and 2 had relied upon the Will, therefore, it was for them to prove the valid execution of the Will; as such. In their attempt, the plaintiffs even examined one witness in examination-in-chief. However, the said witness was not produced for cross-examination. Therefore, the said statement of the attesting witness cannot be read in evidence. So far as the prayer of the learned counsel for the appellants/defendants No.1 and 2 qua additional evidence is concerned, the learned Senior counsel for the respondents/plaintiffs has submitted that the said request already stands rejected right upto the Hon'ble Supreme Court at the earlier stage of proceedings. Once, the appellants/defendants No.1 and 2 had approached by way of a separate application and the matter having reached upto the Hon'ble Supreme Court, the said prayer was finally declined vide order dated 03.01.2017. Therefore, there was no further scope for permitting any additional evidence to the appellants/defendants No.1 and 2. Not only that, the appellants/defendants No.1 and 2 had filed an application under Order 41 Rule 27 CPC even before the first appellate court in the present proceedings. However, the lower Appellate Court has rightly dismissed the application filed by the appellants. There is nothing on record to show that the appellants had exercised due diligence and despite that they could not lead the evidence. The order passed by the lower Appellate Court was also challenged before this Court through CR-726-2023. However, this Court had also finally rejected the prayer of the appellants vide a detailed order dated 06.02.2023. Learned Senior counsel has further submitted that

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although in the last order dated 06.02.2023, the Supreme Court has left it open to the appellants to raise the issues before this Court, however, neither the order earlier passed by this Court has been set aside nor any specific permission as such has been granted to the appellants to raise this issue again.

10. Qua the findings recorded by the lower Appellate Court, referring to the observations made by the Courts below, learned Senior counsel for the respondents has submitted that the original of the Will was never produced before the Courts below. Otherwise three copies of the Will were produced before the Courts below, which were having different particulars regarding the attesting witnesses and having different types of signatures and stamping on the said Will. Learned counsel has referred to the record showing that the father-Satkam Prashar had, in fact, cancelled the earlier alleged Will and all other documents; and also had disowned the appellant/defendant No.1 by declaring that from that day onwards the appellant/defendant No.1 shall not be entitled to anything in the booth involved in the present suit. Therefore, it is submitted that father had never executed the Will and he was not even aware of existence of any such Will; otherwise he would have; specifically; cancelled the alleged Will dated 13.09.1994 as well. Hence, it is obvious that the Will is fabricated and, in any case, the alleged executant had made it clear that the appellant/defendant No.1 would not have any interest in the booth as such.

11. Having heard learned counsel for the parties and having perused the case file, this Court does not find any substance in the arguments raised

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by the learned counsel for the appellants. Although, the learned counsel for the appellants has submitted that the onus of proving the fraud and fabrication in the Will was upon the respondents/plaintiffs even as per issue framed by the Court below; and they have not led any evidence to show the fraud in the execution of the Will, however, this argument is not supported by the evidence on record. Needless to say that the execution of the Will is a 'fact' and the plaintiffs were claiming that the Will was never executed. On the other hand, the appellants/defendants No.1 and 2 were asserting that a valid Will was executed. Therefore, the plaintiffs could not have proved the 'negative' of the fact. They could have only shown the suspicious circumstances surrounding the Will or qua the process of execution of the Will or the subsequent conduct of the testator to show that the Will was not executed by him or that Will was not validly executed. The said burden has duly been discharged by the plaintiffs by leading all the evidence on record, including the assertion of the testator made in the year 1995 under which he had said that he was cancelling all the other documents in favour of the appellants and from that date onwards the appellants would not be having any interest in the suit property involved in the present case. Thereafter, the burden shifted upon the appellants/defendants No.1 and 2 to prove the 'positive' of the fact of execution of the Will; as per the requirement of Section 68 of the Indian Evidence Act, 1872. To discharge that burden, the appellants/defendants No.1 and 2, in fact, started with the examination of one of the attesting witnesses, namely, Raghbir Singh. However, after examining him in examination-in-chief, he was never produced for further

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cross-examination. Therefore, the testimony of the said witness cannot be read in evidence qua the execution of the Will.

12. Although, learned counsel for the appellants has also submitted that appellants made every best effort to ensure the cross-examination of the said witness by filing application for sending commission for recording of the cross-examination and/or in alternative, to permit them to examine the other attesting witness, namely, R.K.Verma, however, that fact also is of no help to the appellants because the said process ended finally against the appellants vide the order passed by the High Court qua the witness, namely, Raghbir Singh and at the level of the Hon'ble Supreme Court qua the examination of the other attesting witness, namely, R.K.Verma. Hence, it is obvious that the appellants have not proved the execution of the Will as per the requirement of the law. All other arguments being raised by the learned counsel for the appellants are only of ancillary nature, which may not have much effect upon the core controversy involved in the matter.

13. Learned counsel for the appellants has stressed upon the fact that the appellants had moved an application before the lower Appellate Court for leading additional evidence by examining the attesting witness, namely, R.K.Verma but the same has wrongly been declined by the lower Appellate Court, however, even on this aspect, the appellants are bound to fail. Needless to say that even against the order passed by the lower Appellate Court qua additional evidence, the appellants had gone upto the Hon'ble Supreme Court and the said effort of the appellants had failed with no favourable orders for them. The High Court had passed the order

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upholding the order passed by the lower Appellate Court. Although, the Hon'ble Supreme Court has dismissed the appeal against the order of the High Court as infructuous; on account of the first appeal itself having been finally decided; and have left the issue of raising the point in RSA by the appellants, however, even that cannot come to help of the appellants. The issue regarding additional evidence having been finally and separately decided by the High Court, cannot now be reviewed by the High Court while deciding RSA. The Hon'ble Supreme Court has not set aside the order passed by the High Court declining the additional evidence. Hence, even in the RSA, this Court cannot take a different view then the one earlier taken by the High Court. Otherwise also, this Court does not find any ground to permit the appellants to lead additional evidence at this stage. Needless to say that the appellants were well aware of the fact that there was one witness named R.K.Verma, who was the attesting witness of the Will. There is nothing on record to substantiate the assertion of the appellants that he was not aware of the whereabouts of the attesting witness R.K.Verma. In any case, when he had moved an application for examining of this witness during the trial itself; he was denied this right upto the level of the Hon'ble Supreme Court. This Court does not have any authority to review the order passed by the Hon'ble Supreme Court qua examination of the attesting witness R.K.Verma. Moreover, it would be too dangerous thing to permit the examination of this alleged witness at this stage; because no particulars of attesting witness R.K.Verma are mentioned on the Will. If permitted at this stage, the appellants can create any R.K.Verma to concoct the identity of

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some person, who might have, earlier; put the signatures on the document claiming to be the Will. Therefore, due to lack of any definite particulars of this witness on the document of alleged Will, the appellants cannot be permitted to examine anyone. Even the alleged signatures of this alleged witness on two different copies of the same alleged Will reflect a curious difference in style, movement and flow of pen, visible even to a casual look.

14. Otherwise also, this Court is considering the aspect in second appeal. The High Court in the second appeal is not required to interfere only because a different opinion is possible to be framed by re-appreciation of the evidence. Further more, this Court does not find any illegality or perversity with the concurrent judgments and decrees passed by the Courts below.

15. No other argument was raised.

16. In view of the above, finding no merit in the present appeal, the same is dismissed.

(RAJBIR SEHRAWAT)
JUDGE

25.05.2023
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Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No