

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA-2228-1992 (O&M)
Reserved on: 02.02.2024
Date of decision: 08.02.2024

BOGH SINGH (DECEASED) THROUGH LRS.

..Appellant

Versus

KARNAIL SINGH & ORS.

..Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Ms. Ojaswini Gagneja, Advocate
and Ms. Pawelpreet Kaur, Advocate
for the appellant.

Mr. Gurmeet Singh Saini, Advocate
for Mr. S.C. Chhabbra, Advocate
for respondent No.1 and 2.

ANIL KSHETARPAL, J.

1. In this regular second appeal, defendant No.1 Sh. Bogh Singh through his legal representatives assails the correctness of concurrent findings of fact arrived at by the Courts below while decreeing plaintiff's suit for grant of decree of possession. In substance, the dispute is with regard to inheritance of the property left behind by Sh. Jangir Singh son of Sh. Prem Singh on the basis of Will dated 10.06.1979 between his class-I heirs. Family tree of the parties is as under:-
2. Sh. Jangir Singh died on 20.06.1979. Sh. Karnail Singh and Sh. Gurdev Singh filed a suit for possession on 11.09.1986, claiming share in the property on the basis of natural succession. It was claimed that Sh. Jangir Singh did not execute any valid Will and the Will propounded by the defendant has been forged with the connivance of the witnesses. Sh. Bogh

Singh-defendant No.1 has also taken possession of the land forcibly. Defendant No.5 namely Smt. Choto daughter of Sh. Jangir Singh did not contest the suit. Defendant No.1 to 3 namely Sh. Bogh Singh, Sh. Harnek Singh and Sh. Hardev Singh sons of Sh. Jangir Singh filed a written statement and submitted that Sh. Jangir Singh did execute the Will dated 10.06.1979 in favour of Sh. Bogh Singh. All the sons of Sh. Jangir Singh got their respective land and the suit land fell to the share to the share of defendant No.4 Smt. Nand Kaur in partition and she is the owner in possession of the same. Sh. Jangir Singh did not execute any Will.

3. In oral evidence, the plaintiffs examined PW-1 Sh. Karnail Singh (plaintiff No.1) and PW-2 Sh. Varinder Bhushan Bhatnagar, handwriting and fingerprint expert.

4. On the other hand, Sh. Bogh Singh got recorded his statement as DW-1. Both the attesting witnesses namely DW-2 Sh. Kartar Singh and Sh. Prithi Singh were also examined. Defendant No.4 examined DW-4 Sh. Atul Singla, handwriting and fingerprint expert.

5. The trial Court decreed the suit, which has been upheld in appeal.

6. This Bench has heard the learned counsel representing the parties at length and with their able assistance perused the paperbook along with the requisitioned record of the Courts below.

7. The learned counsel representing the appellant while referring to the evidence produced on record submits that both the Courts have erred in decreeing the suit particularly when the execution of the Will was proved by examining both the attesting witnesses.

8. On the other hand, the learned counsel representing the respondents contends that the concurrent findings of fact arrived at by the

Courts below does not require any interference.

9. Upon analyses of the judgments passed by both the Courts below, it is evident that the following reasons have been given by the Courts to discard the Will:-

1. The Will was produced in the Court for the first time in the year 1988.
2. The defendant Sh. Bogh Singh did not examined any handwriting and fingerprint expert.
3. Both the attesting witness did not see the testator appending his thumb inpressions.
4. The testator died within a period of 10 days from the date of alleged execution of the Will.
5. The testator was not able to walk.
6. The word 'Aitwar' has been interpolated to make it 'war'.
7. The suit land is ancestral.
8. The Will has been scribed on a paper with pre-existing thumb inpression.
9. The attesting witnesses are at variance with respect to execution of the Will.
10. The scribe's family member have not been examined to prove his signatures.

10. Before analysing the correctness of the reasons assigned by the Courts below, a brief reference to the oral and documentary evidence is necessary.

11. Sh. Karnail Singh-plaintiff No.1 while appearing in evidence claims that Sh. Jangir Singh used to reside with them. He was the owner of

village. At the time of his death, Sh. Jangir Singh was the owner of about 7 acres of land. He also admitted that there was family partition, which was reduced into writing and he was given some land by Sh. Jangir Singh like all other brothers.

12. The next is evidence of PW-2 Sh. Varinder Bhushan Bhatnagar, handwriting and fingerprint expert, who appeared as PW-2. He states that the thumb mark 'Q1/A' is blurred due to heavy ink pressure and some portion has been fixed under the slippery manner and therefore, he cannot compare the disputed thumb impressions with standard thumb impression. In cross-examination, he admits that he has not obtained training in the forensic science from any recognized or unrecognized institution. He also admitted that he did not use the latest technology to analyse the thumb impressions.

13. DW-1 Sh. Bogh Singh stated that Sh. Jangir Singh, his father gave land to all brothers and sons of his brother Sh. Karnail Singh and Sh. Gurdev Singh but no land was given to him during his lifetime. Sh. Jangir Singh was staying with him and he performed last rites of his father but his brothers did not cooperate.

14. DW-2 Sh. Kartar Singh is the attesting witness of the Will. It has been stated that the Will was scribed by Sh. Sadhu Ram Pandit and it was written at the instance of Sh. Jangir Singh. It was scribed in the presence of both the attesting witnesses and it was read over to Sh. Jangir Singh in their presence. Sh. Jangir Singh appended his thumb impression on the Will in token of its correctness. Thereafter, he, as well as Sh. Prithi Singh attested the Will. He put his thumb impression on the Will and Sh. Prithi Singh signed. The learned counsel representing defendant No.2 suggested to the witness that the Will has been scribed on a blank thumb

marked paper, but he denied. In the cross-examination, he specifically stated that the Will was scribed in his presence. He also stated that Sh. Jangir Singh was able to walk but was weak.

15. Next is the deposition of Sh. Prithi Singh, who is headman of the village (Nambardar). He specifically states that Sh. Jangir Singh was in sound disposing mind at the time of execution of the Will and he was having perfect eye sight and reasonable hearing ability. Sh. Jangir Singh was residing with Sh. Bogh Singh, who served him. Sh. Bogh Singh performed the last rites of his father.

16. DW-4 Sh. Atul Singla, handwriting and fingerprint expert was examined by defendant No.1. He stated that the word 'Aitwar' has been converted into 'war' by erasing the initial portion. In cross-examination, he admitted that he was never asked to compare the thumb impression of Sh. Jangir Singh with his standard thumb impression.

17. The Will is Ex.D-1 on record. It is a hand written Will scribed by Sh. Sadhu Ram in the village. It is thumb marked allegedly by Sh. Jangir Singh and Sh. Kartar Singh, whereas, Sh. Prithi Singh and Sh. Sadhu Ram Pandit have signed the Will in Gurmukhi (Punjab) language.

18. This Bench now proceeds to analyse the reasons recorded by the Courts in the impugned orders.

19. The 1st reason assigned by the Courts is factually incorrect. In fact, on the basis of the aforesaid Will, the land was mutated in the name of Sh. Bogh Singh in the year 1985 by the revenue authorities. On 11.09.1986, the plaintiffs themselves challenged the correctness of the Will. Defendant No.1 to 3 while filing the written statement claimed that Sh. Jangir Singh did execute a Will on 10.06.1979, bequeathing his property in favour of Sh. Bogh Singh. When Sh. Bogh Singh appeared in evidence, he produced a

copy of the Will, however, the same was not exhibited. Subsequently, it was exhibited in the testimony of the attesting witnesses. Hence, the Courts were wrong in observing that the Will has been produced for the first time in the year 1988.

20. The 2nd reason assigned by the Court is also incorrect. The examination of a handwriting and fingerprint expert is not necessary to prove the Will. It may be noted here that both the attesting witnesses have been examined, who have proved the execution and attestation of Will. Moreover, two handwriting and fingerprint experts have been examined by the plaintiff and defendant No.4, respectively, however, none of them have opined that the thumb impression was not appended by Sh. Jangir Singh. Sh. Varinder Bhushan Bhatnagar has stated that the thumb impression on the Will is not comparable because it is blurred and fixed in slippery manner. On a careful perusal of the Will, it is evident that the thumb impression of Sh. Jangir Singh is clear. Even the lines and ridges of the thumb print on the edge are visible with naked eye. Both the Courts have also erred in overlooking the fact that there are two thumb impressions on the Will, one appended by Sh. Jangir Singh and second appended by Sh. Kartar Singh, attesting witness. Both the thumb impressions are clear. Moreover, while cross-examining the attesting witnesses, the learned counsel representing the defendants has not suggested them that the thumb impression is forged. In fact, the suggestion given to both of them is that the Will has been scribed on blank paper with pre-existing thumb impression of Sh. Jangir Singh. In such circumstances, even the 2nd reason assigned by the Courts below was incorrect.

21. The 3rd reason assigned by both the Courts is also incorrect because both the attesting witnesses have stated that Sh. Jangir Singh

executed the Will in their presence. In the cross-examination, there was no suggestion that both were not present at the time when the Will was scribed by the scribe and thumb marked by the testator.

22. With respect to the 4th reason assigned by the Courts below, it may be noted that DW-2 Sh. Kartar Singh has stated that Sh. Jangir Singh was in sound disposing mind and he could see and hear properly. He used to walk inside the house as he was weak. This part of the deposition remained unchallenged in the cross-examination. Similarly, DW-3 Sh. Prithi Singh, the second attesting witness has also stated on the similar lines. There is no suggestion to the witnesses that the testator was not in sound disposing mind. Thus, it is evident that defendants did not lead any evidence to prove that the testator was of weak mental health or was not in sound disposing mind.

23. The 5th reason assigned by the Courts below is also wrong. It has been stated by both the attesting witnesses that the testator used to walk inside the house but he would avoid going out. Sh. Jangir Singh was aged person. Hence, that itself would not make the Will suspicious.

24. The 6th reason assigned is also incorrect. The Will has been carefully examined by the Court as well as by the learned counsel representing the parties. They admit that there is no sign of any erasing on the word 'war'. Moreover, the Will was executed on 10.06.1979, which was Sunday and in Punjabi known as 'Aitwar'. Hence, there was no occasion for interpolating the word 'Aitwar' by converting into 'war'.

25. The 7th reason assigned is beyond pleadings. It is not the case of the plaintiffs that the suit land was ancestral.

26. The 8th reason assigned by the Courts below is also incorrect.

No doubt, there is a difference in spacing between the lines, however, the

Court cannot overlook that the Will was written by hand by the scribe. Moreover, no suggestion was given to any of the attesting witness to the effect that the Will has been forged on a pre-thumb marked blank paper of Sh. Jangir Singh. If there was any doubt it was the duty of either the parties or the Court to draw the attention of the attesting witnesses and solicit their response. In absence thereof, it was not appropriate for the Court to form conclusion.

27. The 9th reason assigned by the Courts below is also without substance because the only variance in the statement of attesting witnesses is with regard to who left first after execution of the Will. The witnesses were deposing after a period of 9 years from the date of execution of the Will. Minor variations in the oral testimonies of the witnesses are natural.

28. The 10th reasons assigned by the Courts below is also incorrect because as per Section 68 of the Indian Evidence Act, 1872, the Will is required to be proved by examining one attesting witness, who has seen the testator and the other attesting witness signing or having appended their thumb mark. The scribed Sh. Sadhu Ram Pandit had died. It was not necessary that his family members must be examined to prove his signatures.

29. 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.**

30. In **Sukhdev Singh Vs. Manish Agarwal and others, RSA-5792-2019 and other connected case, decided on 30.01.2024**, this Court after examining the comparative scope of Section 41 and Section 100 has

held that if the judgments passed by the Courts below are result of material irregularity, which goes to the root of the case, the High Court will hesitate to interfere even in concurrent findings of fact. In such situation, reappreciation of evidence would be necessary.

31. In cases of the Will, the Court is not required to impose its own perception. Unless and until, there is a genuine and substantial ground, which proves that the Will is surrounded by strong suspicious circumstances, the Court is not expected to interfere. Such suspicious circumstances should be confronted to the attesting witnesses or the scribe as the case may be to solicit his response. The alleged suspicious circumstances should not be based on figment of imagination. Unless a foundation is laid, which is corroborated by some evidence to prove that the Will is surrounded by suspicious circumstances, the Court should not interfere. The Will is a solemn document, which comes into effect after the death of the testator. The Court should try to honour the wishes of the testator unless the propounder fails to prove it or the testator did not execute it or there are some grounds on which are sufficient for the common man to believe that the testamentary disposition is not in accordance with the wishes of the testator/executor. While trying to analyze their credit worthiness in the context of being attesting witness in the solemn document. Their testimonies are required to be read in entirety. After passage of long time, human memory is not expected to recollect every small event in the exactly same manner. Some leverage in that account is required to be given to the attesting witnesses. Moreover, each individual has his own perceptions about the things/development/events which took place. In such circumstances, the oral evidence is required to be appreciated and critically analyzed. It has been noticed that the testamentary disposition are declared

to be surrounded by suspicious circumstances in a very casual manner. This is not a correct approach. The Courts are not required to substitute its own opinion. They are expected to decide the cases on the basis of evidence before declaring that the Will is surrounded by suspicious circumstances, the Court is required to sit on the chair of the executant and examine the circumstances.

32. Here is a case, where the testator was originally owner of 37 acres of land as admitted by Sh. Karnail Singh. He distributed remaining land with his male children, however, kept 7 acres with himself, which was bequeathed by a Will. Defendant No.2 and 3 are also natural heirs and they stand excluded from inheritance in the Will, however, they supported Sh. Bogh Singh-defendant No.1. While stating that late Sh. Jangir Singh did leave behind the Will. Still further, the Will was attested by the headman of the village as well as another resident. On a careful reading of the Will, it is evident that the testator has explained that his remaining four children are not even providing him food and is rather being harassed by them. He specifically writes that his younger daughter is married. In these circumstances, he has decided to bequeath his property in favour of Sh. Bogh Singh-defendant No.1.

33. Though, two handwriting and fingerprint experts were examined, one by the plaintiff and second by defendant No.4, however, neither of them has stated that Sh. Jangir Singh did not append his thumb impression or it is forged. In fact, when the attesting witnesses were cross-examined, the learned counsel representing the plaintiff directed his cross-examination towards the fact that the Will was scribed on blank paper with pre-existing thumb impression. In other words, it was sought to be projected that a thumb marked blank paper of late Sh. Jangir Singh was available with

defendant No.1, who has forged the Will. Thus, the existence of thumb impression of Sh. Jangir Singh was not the line of questioning.

34. Before declaring that the testator was suffering from a disease, impacting his decision making, the Courts are required to examine as to whether any evidence has been led to prove that the decision making power of the testator was compromised or not. In such matters, physical ailment may not be very important. The Court is required to examine the testator's mental health or sound disposing mind. In this case, though the testator died after a period of 10 days from the date of execution of the Will, however, there is no evidence that the testator was suffering from any serious ailment which resulted in compromising his decision making power. There is no evidence to prove that he was hospitalized. It has come in evidence that Sh. Bogh Singh performed the last rites of his father. Though, the plaintiffs claimed that Sh. Jangir Singh was residing with them, however, they failed to produce any evidence. On a careful and close examination of the two thumb impressions, one of the testator and the second of Sh. Kartar Singh, it becomes evident that both the thumb impressions were put with same ink pad. There is no difference in the colour. Although, one of the handwriting and fingerprint expert has opined that these are reflecting different colours, however, this Court has used magnifying glass to carefully examine the thumb impressions and came to conclusion that both the thumb impressions have been appended by using the same ink pad.

35. While examining the reliability of experts opinion, particularly, handwriting and fingerprint experts engaged by one of the party to the litigation, the Court is expected to be aware of the fact more often than not the expert gives opinion in their favour. Still further, the report given by the expert is an opinion, which is not binding on the Court. In these

circumstances, the Court is expected to critically analyze the report. The Court is required to give preference to the direct evidence rather than relying upon the opinion of the expert. It has also come on record that Sh. Jangir Singh was sufficiently exposed to the law and the Courts. Copy of the decree sheet passed on 01.04.1970, in a suit filed by Sh. Sardool Singh, Sh. Harbhajan Singh, minor sons of Sh. Hardev Singh-defendant No.2 against Sh. Jangir Singh for grant of decree of declaration has been produced. It is evident that Sh. Sardool Singh and Sh. Harbhajan Singh, minor sons of Sh. Hardev Singh were acknowledge to be the owners of 37 kanal and 13 marlas land. This decree was passed on the concession given by Sh. Jangir Singh.

36. It may be noted here that both the attesting witnesses have stated that the Will was scribed in their presence and the testator and both the attesting witnesses along with the scribe signed/thumb marked the same in the presence of each other. In such circumstances, the Courts erred in ignoring the Will on the ground that both the attesting witnesses did not see the testator appending his thumb impression. It was no where the case of the plaintiffs that both the attesting witnesses were not present when the Will was executed.

37. Keeping in view the aforesaid discussion, the result is evident. Both the Courts have erred in discarding the Will executed by late Sh. Jangir Singh. Hence, the plaintiffs suit is dismissed.

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

February 08th, 2024

(ANIL KSHETARPAL)
JUDGE

Ay
Whether speaking/reasoned
Whether reportable

: Yes/No
: Yes/No