

In the High Court of Punjab and Haryana, at Chandigarh

Regular Second Appeal No.474 of 1994 (O&M)

Date of Decision: 21.03.2024

Gurdial Singh and Another

... Appellant(s)

Versus

Phambi

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. P.S.Chauhan, Advocate
for the appellant(s).

Mr. Akshay Jindal and Mr. Vrishank Suri, Advocates
for respondent No.1 (iv), 1(v) and 1(viii).

Mr. Ravinder Malik, Advocate for
respondent No.1(i)(ii)(iii)(vi)(vii) & (ix).

Anil Kshetarpal, J.

1. The Regular Second Appeal in the States of Punjab and 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 v. Chandrika and Others (2016) 6 SCC 157*.
2. This is the defendants’ regular second appeal against the judgment and decree passed by the First Appellate Court which, in turn, has reversed the judgment passed by the Trial Court.
3. In order to comprehend the issues involved in the present case, the relevant facts, in brief, are required to be noticed. The dispute is with

regard to validity and correctness of the Will allegedly executed by Sh.Radha who died in the year 1961. It is the case of the parties that late Sh. Radha married twice. In the beginning, he married with Smt. Santi and two daughters, namely Smt. Phambi and Smt.Parbhi were born. Subsequently, he married Naraini, resulting in birth of defendant No.1 to 4. In other words, the plaintiffs are the children and grand children of Radha from Smt. Santi, whereas defendant No.1 to 4 are the children of Radha from Smt. Naraini. The children and the grand children of Smt. Santi filed a suit for the grant of decree of declaration that mutation No. 1085 of village Ratgal, sanctioned on the basis of an oral Will in favour of the defendants is null and void and inconsequential. They also prayed for possession of the property. It was stated that the land measuring 19 kanals and 13 marlas has already been acquired by the State Government.

4. The defendants, while contesting the suit, asserted that late Sh.Radha left behind his two sons and four daughters and in a family settlement, the suit property fell to the share of defendant No.1 and 2 who are in possession of the property and the Will was validly executed. The defendants also pleaded adverse possession. During the pendency of the suit, the children of Smt. Parbhi i.e. plaintiff No. 2 to 14 have relinquished their rights in favour of defendant No.1 to 4 vide compromise deed dated 21.05.1988, which is Ex.C1 on the record.

5. The Trial court decreed the plaintiffs' suit on the ground that the defendants have failed to prove the family settlement and the Will has been proved by deposition of the attesting witness i.e. PW.3-Nanha Ram. The

First Appellate Court, upon re-appreciation of the evidence, found that the

Will is surrounded by the suspicious circumstances and it has not been proved to have been executed in accordance with Section 63 of the Indian Succession Act, 1925 (hereinafter referred to as “the 1925 Act”).

6. Heard the learned counsel representing the parties at length and with their able assistance, perused the paper-book along with the requisitioned record.

7. The learned counsel representing the appellants submits that the execution of the Will has been proved by examining one of the attesting witnesses as required under Section 68 of the Indian Evidence Act, 1872 (hereinafter referred to as “the 1872 Act”). He further submits that another attesting witness had died and therefore, the First Appellate Court has erred in reversing the judgment of the Trial Court.

8. Per contra, the learned counsel representing respondent No. 1 (iv), 1(v) and 1(viii) submits that Nanha Ram, while appearing as DW.3, has not stated that the testator appended his thumb impression in his presence or another attesting witness, namely Maru Ram’s presence. Nanha Ram has also not stated that he and Maru Ram had appended their thumb impressions in the presence of the testator. The learned counsel submits that if one attesting witness is examined, he is required to prove the attestation of the Will by both the attesting witnesses as well as the execution by the testator. He relies upon the judgment of the Supreme Court in ***Janki Narayan Bhoir v. Narayan Namdeo Kadam (2003) 2 SCC 91.***

9. This Court has considered the submissions of the learned counsel representing the parties.

The Will is Ex.D1 on record. It is scribed on 06.12.1960 by

Regular Second Appeal No.474 of 1994 (O&M)**4**

Maru Ram who is also stated to be an attesting witness. It is a handwritten Will which is allegedly thumb marked by late Sh. Radha and it is attested by the two attesting witnesses, namely Nanha Ram and Maru Ram. However, Nanha Ram, while appearing in evidence as DW.3, failed to prove that the Will was executed in accordance with Section 63 of the 1925 Act. He is required to assert that the testator as well as another attesting witnesses have appended their thumb impressions on the Will in his presence. However, there is no statement to this effect. Moreover, the Will was produced in the First Appellate Court during the pendency of the suit after nearly 30 years from its execution. The First Appellate Court has recorded the cogent reasons to hold that the propounder has failed to prove the Will and it is surrounded by the suspicious circumstances. Such being finding of the First Appellate Court which is not proved to be suffering from any error.

11. Keeping in view the aforesaid facts, no ground is made out to interfere with the findings of fact arrived at by the First Appellate Court. Hence, the present appeal is dismissed.

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

(Anil Kshetarpal)
Judge

March 21, 2024

“DK”

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No