

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

RSA-2205-2023 (O&M)

Reserved on: 22.04.2024

Date of decision: 29.04.2024

Sh.Jagdish Chand through his LRs and others

..Appellants

Versus

Sunita and others

.Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. B.S.Bedi, Advocate for the appellants

Mr. Rajeshwar Singh, Advocate for the respondents

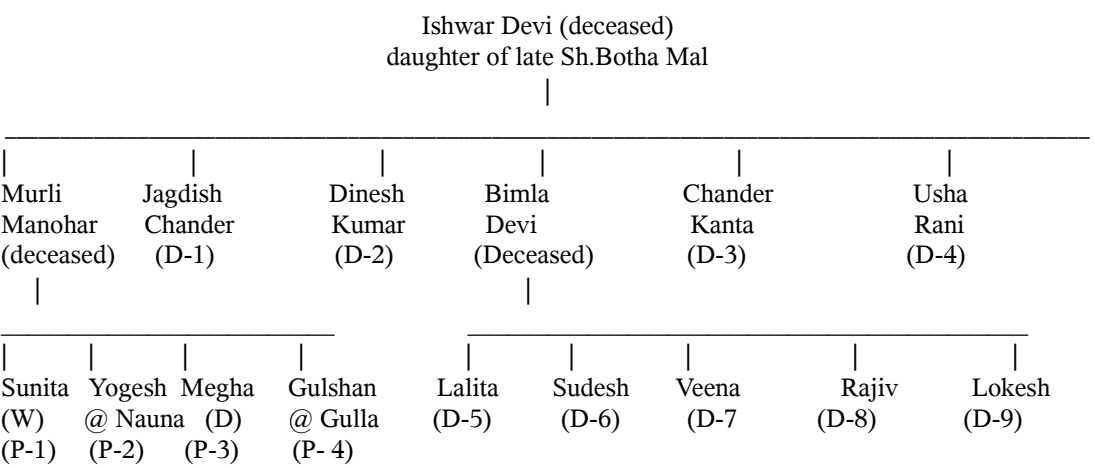
ANIL KSHETARPAL, J

1. In this Regular Second Appeal, the defendants assail the correctness of the judgment and decree passed by the First Appellate Court (hereinafter referred to as 'FAC'), which in turn has reversed the judgment and decree passed by the trial court. The plaintiffs filed a suit on 04.01.2014 for the grant of decree of declaration to the effect that the plaintiffs are joint owners in possession in equal share of land to the extent of 1/6th share and the registered Will executed on 03.05.2000, which was registered on 08.05.2000, is illegal, null and void and is result of fraud and misrepresentation with a consequential relief of permanent injunction, restraining the defendants from alienating the property in any manner.

2. The question which arises for adjudication by this Court is as under:-

“Whether a copy of the registered Will which is signed by the Testator and attesting witnesses retained in the office of Registrar after registration of the Will, is primary evidence, if identical multiple copies are prepared by the same process which ensure accuracy and signed?”

2. In order to understand the inter se relationship between the parties, a small pedigree table is extracted as under:-



3. Some relevant facts, in brief, are also noticed. Smt. Ishwar Devi daughter of late Sh.Botha Mal was owner of the suit property. She executed a registered Will on 03.05.2000 which was registered on 08.05.2000 bequeathing her property in favour of her three sons. Residential house located in Model Town, Karnal and the agricultural land was bequeathed in favour of her two sons namely Sh.Jagdish Chand and Sh.Dinesh Kumar whereas another residential house located in Model Town was bequeathed in favour of Sh.Murli Manohar Sharma alongwith certain amount in cash. She did not bequeath any property in favour of her three married daughters. On 07.06.2005 Sh.Jagdish Chand and Sh.Dinesh Kumar filed a petition under Section 372 of the Indian Succession Act, 1925 (hereinafter referred to as ‘1925 Act’) for the grant

of succession certificate for releasing Rs.1,47,063/- deposited with the Punjab National Bank. In this petition, it was stated that Smt. Ishwar Devi has not left behind any Will.

4. On 29.04.2006 unfortunately, Sh.Murli Manohar Sharma committed suicide, resulting in registration of FIR on 30.04.2006. The allegations were made against Sh.Jagdish Chand and Sh.Dinesh Kumar who were challaned by the police for committing an offence under Section 306 of Indian Penal Code, 1860 (hereinafter referred to as '1860 Act'). The Sessions Court, Karnal discharged both the accused on 03.01.2014. The petition filed under Section 372 of the 1925 Act was allowed. On 04.01.2014 heirs of late Sh.Murli Manohar Sharma filed the suit. It was alleged by the plaintiffs that Smt. Ishwar Devi could not execute the Will as the property was joint Hindu family property. It was also alleged that the Will in question was forged and fabricated that it was obtained by her two sons through fraudulent means. Defendant no.1 contested the suit. Defendant no.3, 5 (i), (ii), 2, 4, 6 to 9 filed their separate written statements. In order to prove their case, the plaintiff examined PW1 Megha @ Gudiya daughter of late Sh.Murli Manohar Sharma. On the other hand, DW1 Sh.Jagdish himself testified. He also examined DW2 Amit Kumar, Registration Clerk from the office of the Sub Registrar and DW3 Anil Gupta, Record Keeper from the Sessions Court. Certified copy of the Will was produced and proved. Sh.Amit Kumar, an official from the office of Registrar brought the original Bahi no.3 entry no.42/3 dated 08.05.2000. The trial court dismissed the suit. Before the First Appellate Court two separate applications for

permission to lead additional evidence were filed by defendant no.1. The first one was filed for permission to produce death certificates of both the attesting witnesses whereas the second one was filed for examining the children of attesting witness in order to prove the signatures of their respective fathers. Both the applications were allowed and before the First Appellate Court the defendant no.1 not only produced the original Will but also produced the death certificates of both the attesting witnesses namely Sh.Krishan Kumar and Sh.Harish Kumar, Nambardar. Identity cards of Sh.Harish Kumar and Aadhar card of Sh.Bharat Sharma were also produced. In oral evidence Sh.Bharat Sharma s/o Sh.Krishan Kumar and Sh.Ankit Sharma s/o Sh.Harish Kumar were examined.

5. The following reasons have been recorded by the 'FAC' while accepting appeal:-

- i) Sh.Jagdish Chand and Sh.Dinesh Kumar while filing the petition under Section 372 of the 1925 Act have claimed that Smt. Ishwar Devi died intestate.
- ii) Original Will was not produced in the trial court and the same has been produced in the First Appellate Court without seeking permission.
- iii) The scribe of the Will, stamp vendor or the handwriting and finger print expert have not been examined by defendant no.1.

iv) Original Will was also not produced in criminal case.

The finding of the Sessions Court while deciding the criminal case is not binding.

v) The Registry Clerk has not seen that the testator appended her thumb impression.

vi) Sub Registrar has not been examined.

vii) It appears to the court that the defendants are playing in a clever manner as they exhibited Ex.D17 only in the testimony of AW1 Sh.Bharat Sharma and AW2 Sh.Ankit Arora but have no concern with the execution of the impugned Will.

viii) The Will has not seen the light of the day at any time. But the same has come up for the first time at an appellate stage.

6. Pursuant to the liberty granted, the learned counsel representing the respondent has submitted a following written note of submissions, which reads as under:-

“5.That in spite of propounding defendants/appellants did not produce the Will and no witness was examined to prove the Will. However, the learned Trial Court dismissed the suit filed by the plaintiff-respondent, vide judgment and decree dated 25.9.2018 on the ground of limitation. The learned Trial Court did not decide the case on merits. Against the judgment and decree dated 25.9.2018 the respondent-plaintiff filed an appeal, which was allowed on 27.2.2023 and, therefore, against the same the present Regular Second Appeal has been filed.

6.That during the pendency of the first appeal the appellants-defendants filed an application under Order 41 Rule 27 CPC for leading additional evidence. The defendants-appellants placed on record copy of the Will (Ex.D-17) and also examined AW1 Bharat Sharma son of

Shri Kusum Krishan Kumar alias Krishan Kumar Shastri and also examined AW2 Ankit son of Shri Harish. It is pertinent to mention here that Bharat Sharma and Ankit are sons of Kusum Krishan Sharma and Harish, respectively. Kusum Krishan Sharma and Shri Harish were the attesting witnesses of the Will and had died before they could be examined in the Court.

7. That the first appellate court decided the appeal on 27.2.2023 and decreed the suit filed by respondents-plaintiffs. The appellate court while allowing the appeal has held that the suit was within limitation as the respondents-plaintiffs had no notice of Will and they came to know about the Will for the first time in the year 2013. The Appellate Court has relied upon the fact that the defendants appellants Nos.1 and 2 had filed a Succession Case No.30 of 2005 titled as "Jagdish Chander and another v. General Public" wherein they had taken a stand in para 3 of the Petition that the deceased Ishwar Devi had left no Will in writing at all as she died intestate. Even this fact was admitted by Jagdish Chander while appearing in the witness box as DW1 and the succession was granted in favour of all the LRs.

8 That the second fact which has been taken by the learned Court below is that at the time of discharge of the defendants-appellants in FIR No. 181 dated 30.4.2006 the respondents-plaintiffs were not before the Court and the order of discharge was pronounced at the back of the respondents-plaintiffs.

9. That the other point on the basis of which the judgment was reversed was that the defendants-appellants had failed to prove the Will on record. The defendants-appellants had simply placed the Will on record and the same was not proved as per Section 63 and Section 68 of the Evidence Act.

10. That it is important to point out that the defendants-appellants never moved an application under Section 69 of the Evidence Act to seek permission to prove the Will by way of secondary evidence. They moved the application under Order 41 Rule 27 of CPC to prove the Will and in order to do so examined AW1 and AW2, sons of the attesting witnesses. It is pertinent to mention here that the parameters to prove the Will under Section 69 and Order 41 Rule 27 of CPC are different. In the proceedings under Order 41 Rule 27 of the CPC it is also required to prove that the additional evidence, which was required to be proved was not within his knowledge and the same could not be produced in spite of exercise of due diligence. In the

instant case the defendants-appellants have not proved as to why in-spite of propounding the Will the same was not produced by them before the Trial Court even though the same was in their knowledge and was in their possession.

11. That it is also important to point out that the Will dated 3.5.2002 has been exhibited as D-17 by Shri Bharat Sharma who appeared as AW1. Shri Bharat Sharma is neither the witness nor the Scribe. He was not even present at the time of execution of Will and even he was not the beneficiary of the Will. Therefore, the Will could not have been exhibited. He was simply to prove the signatures of his father Shri Kusum Krishan Kumar, who has since died. The Will has never been produced by defendant/appellant No. 1-Jagdish Chander, who appeared in the witness box as DW1.

12. That it is a well settled proposition of law that in order to prove the genuineness of the Will the propounder is also required to lead the evidence in addition to examining the attesting witnesses. This has been held by the Hon'ble Supreme Court while deciding Civil Appeal No.3124 of 2008 "Babu Singh v. Ram Sahat' (Para No.11).The Madras High Court in LPA No.20 of 1975 "Doraiswami v.Rathnammal and others has held that identification of signatures of an executors does not amount to proof of execution by executor as there is a possibility of executors signatures having been taken on blank papers or on a misrepresentation. It has further been held that when due diligence has not exercised then no justification in allowing additional evidence.

13.That from the above, it becomes clear that the defendant-appellant had failed to prove the Will on record. The AW1 and AW2have not proved on record that the Will was signed by Ishwar Devi in front of them. They simply had identified the signatures of their father. AW1 Bharat Sharma has not been able prove that the Will has been signed by his father as the name on the Will and as per the record produced by him are different. Moreover the Propounder hasnot proved the Will in his testimony and, as such, there is no corroboration of the evidence of AW1 and AW2 with other evidence.AW1 and AW2 could not exhibit the Will as they are neither signatories to the Will, nor they are beneficiaries. Even the Scribe who was the best evidence available has not been examined.

14.That even the Will could have been proved by invoking the provisions of Section 69 of the Evidence Act. However, the defendants-appellants have moved the application under Order 41Rule 27 of CPC where the parameters are totally different as they were also required to prove as to why the

Will could not be produced at the time of trial even though the same was in their possession.”

7. This Court has gathered impression that the member of the Superior Judiciary namely the 'FAC' did not demonstrate maturity in writing the judgments. A member of Superior Judiciary is required to possess a legal analytical mind because they have sufficient experience either as a member of the Subordinate Judiciary or as a lawyer in the case of direct recruitment. They are required to cull out points in issue which requires adjudication under Order XLI Rule 30 (2) of the Code of Civil Procedure, 1908. The Supreme Court in **State Bank of India and another vs. M/s Emmsons International Ltd. and another 2011 (12) SCC 174** has already observed that the 'FACs' are required to identify the issue which requires adjudication. The 'FAC' is the last court on both matter of fact and law, after re-appreciation of evidence. Hence, a heavy responsibility lies upon the shoulders of Presiding Officers of the Superior Judiciary. It is expected that they are sufficiently judicially trained to write judgments, after analysing the entire case in the proper perspective. The observations made here or there shows lack of application of mind, which is not appropriate. Hence, the 'FAC's are advised to cull out the points in issue and thereafter, decide the first appeal.

8. The reason no.(i) assigned by the 'FAC' is wrong because Sh.Jagdish Chand, while appearing in evidence has specifically stated that his mother never disclosed that she has executed a registered Will in favour of two brothers. He came to know of the Will subsequently. The

correctness of his deposition of this aspect was not challenged by the plaintiff. Moreover, there was no challenge in the cross-examination to the deposition of Sh.Jagdish Chand that he did not know about the Will as his mother never disclosed the same. Moreover, the aforesaid petition was only with respect to a deposit in the Bank. The Will is with respect to immovable property. The stand of the defendants would not operate as estoppel because the plaintiff has not changed their position on account of stand taken in the petition by Sh.Jagdish Chand.

9. The reason (ii) shows that the 'FAC' has failed to analyse the evidence in proper perspective. Before the trial court, the defendant produced the attested copy of the Will from the criminal case as well as a certified copy from the office of the Sub Registrar. Sh. Amit Kumar, Registry Clerk brought the original Bahi no.3 in the court to prove the correctness of the Will. The original Bahi was seen and returned by the trial court. The Will was prepared in duplicate. Both the copies were signed and were thumb marked not only by the testator but also by the attesting witnesses. Hence, the copy of the Will available in the office of Sub Registrar was also original. Consequently, production of original Will in the appellate court did not make any difference.

10. The 'FAC' has also erred in observing that original Will has been produced in the 'FAC' without seeking permission. Before the 'FAC', the children of attesting witnesses were examined. They were required to prove the signatures of their respective father. Hence, the original Will was produced in their deposition and exhibited. Two

applications for production of additional evidence were allowed by the 'FAC'.

11. The 'FAC's reason no.(iii) is also erroneous. There is no requirement to examine the scribe or stamp vendor or handwriting expert. The Will has been scribed on a plain paper. Hence, there was no requirement of examining the stamp vendor. Similarly, the Will is registered. Hence, the examination of scribe was also not necessary because Section 69 of the Indian Evidence Act, 1872 (hereinafter referred to as '1872 Act') requires that the signatures of the attesting witness on the Will are required to be proved. In this case, children of both the attesting witnesses have been examined to identify and prove signatures of their respective father.

12. Similarly, the 'FAC' has erred in observing that finger print expert has not been examined. It may be noted here that predominantly, it is the plaintiff's case that Smt. Ishwar Devi had no right to execute the Will as the property was joint Hindu Family ancestral property. It was also claimed in the suit that the Will was result of misrepresentation and fraud. Moreover, defendant-Sh.Jagdish Chand appeared in evidence and stated that their mother voluntarily executed the Will in their favour. During his cross-examination, he was given suggestion that Sh.Jagdish Chand, by taking benefit of old age of his mother, has got the Will executed. In the cross-examination it was not disputed that the Will was not thumb marked by Smt. Ishwar Devi. A bare perusal of multiple copies of the Will, it is evident that the photograph of Smt. Ishwar Devi is pasted on the Will and she has appended her thumb impression in such

a manner that half of the thumb impression is on the photograph whereas the remaining half is on the paper on which the Will is scribed. At the bottom of the first page, she has also thumb marked the Will. Similarly, she has thumb marked the Will twice when the recitals of the Will came to an end at page 2 of the Will. She has also appended her thumb impression in the office of the Sub Registrar at the time of registration of the Will. At the time of registration, she has appended two thumb impressions. In these circumstances, the examination of hand writing expert was not necessary. Moreover, handwriting and finger print expert can only give an opinion, which is not binding on the court.

13. The 'FAC's reason no. (iv) is also not correct because in the Sessions case the original Will was not required to be proved. In the aforesaid case, the validity and genuineness of the Will was not in issue.

14. Similarly, reason no.(v) of the 'FAC' that the Registry Clerk has not seen the testator appending her thumb impression also shows lack of maturity. The Registry Clerk is an official, who has produced the original record. He does not claim that he has seen the testator appending when she appended her thumb impression.

15. Similarly, reason no.(vi) the 'FAC' has erred in observing that the Sub Registrar has not been examined. Similar is the reasoning of the 'FAC' that the Will has not seen the light of the day at any time. The court has overlooked that the copy of the Will was produced before the Sessions Court in criminal case in the year 2006 when the Sessions Court observed that the Will appears to be genuine. Moreover, the certified copy as well as attested copy of the Will was produced at the

time of evidence and the plaintiffs, while filing the suit, do not claim that there was no Will.

16. The argument of the learned counsel representing the respondent that no application under Section 69 of the 1872 Act was filed by the appellant is without substance because there is no provision for filing an application under Section 69 of the 1872 Act, which only permits the propounder to prove the Will by examining someone who identifies the signatures of the attesting witness of the Will.

17. Similarly, the next argument of the learned counsel that the Will was subsequently exhibited whereas the children of the attesting witness were examined earlier also lack substance. The copy of the original Will was exhibited in the deposition of Sh.Bharat Sharma son of Kusum Sh.Krishan Kumar alias Sh.Krishan Kumar Shastri. Similarly, Sh.Ankit also reiterated the aforesaid fact. Hence, the Will was not exhibited subsequently as is being contended by the learned counsel representing the respondent.

18. The next argument of the learned counsel representing the respondent that the thumb impression of the executant has never been identified also needs deeper examination. From the reading of the plaint, it becomes evident that the plaintiffs have not asserted that Smt. Ishwar Devi never executed the Will. Similarly, when Sh.Jagdish Chand appeared in evidence, a suggestion was given to him that he managed the Will by taking an advantage of old age of his mother. Thus, the thumb impressions of Smt. Ishwar Devi on the Will were not disputed. Moreover, Sh.Jagdish Chand has stated that his mother appended the

thumb impression. Ms. Megha, one of the plaintiffs, while appearing in evidence admitted that her grandmother Ishar Devi executed and registered the Will. The relevant extract of her deposition reads as under:-

“My grand mother had died on 03.03.2005. I do not remember when my grand mother executed Will. It is correct that the Will executed by my grand mother is registered by Sub Registrar Karnal. I do not remember registration deed no. of the Will. My father had died on 30 April 2006. I do not remember when the mutation of suit property was sanctioned on the basis of Will. I do not remember whether my father during his lifetime has filed any suit for any right of his land against my uncles.”

19. The suit filed by the plaintiff is also beyond the prescribed period of limitation. For filing suit for the grant of decree of declaration the limitation is 3 years from the date the cause of action first accrues in favour of the plaintiffs. In the plaint, the plaintiffs state that the cause of action accrued in their favour firstly on 08.05.2000. Para 1 of the plaint reads as under:-

“That the cause of action has arisen in favour of the plaintiff against the defendants No.1 and 2 firstly on 08.05.2000, when the alleged Will qua the suit land was got executed and registered by Smt. Ishwar Devi in favour of defendant No.1 and 2 thereafter when the mutations qua the suit land on the basis of alleged Will was entered and sanctioned by the revenue officers and again in the Month of June, 2013, when the defendants No.1 and 2 tried to sell, transfer or alienate the suit land illegally and forcibly in favour of some person of their own choice and then from time to time whenever the requests made by the plaintiffs were turned down by defendant No.1 and 2 with deaf ears and lastly about a week when the defendants No.1 and 2 have flatly refused to admit the claim of the plaintiffs, which is still continuing one.”

20. As per Article 58 of the Limitation Act, 1963 (hereinafter referred to as '1963 Act') in a suit for declaration the limitation will begin to run when the cause of action accrued for the first time. Moreover, the Will came to the notice of the plaintiffs when it was produced before the Sessions Court in criminal case. The order of discharge was passed in the year 2006. The plaintiffs have not led any evidence to prove that the Will was not to their notice before 2006. The suit was filed on 04.01.2014. The 'FAC' was incorrect in observing that the suit is based upon inheritance and therefore, there is no period of limitation. While making such general observation, the 'FAC' has not referred to any statutory provision. Limitation for filing all the suits is regulated by the statutory provision as provided in the particular Act or under the 1963 Act. Even if the suit does not fall in any of the Article to the Schedule attached to the 1963 Act same would be governed by Article 113 which is a residuary Article.

21. Keeping in view the aforesaid facts and discussion, the judgment of the 'FAC' is set aside and that of the trial court is restored. Regular Second Appeal stands allowed.

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

29.04.2024

rekha

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No

(ANIL KSHETARPAL)
JUDGE