



IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-474-2084 (O&M)
Reserved on: 17.07.2024
Date of decision: 23.07.2024

Atanu Sen Gupta and others
....Appellants

Versus

Shashanka Mohan Bose and others
..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Dr. Anmol Rattan Sidhu, Sr. Advocate, with
Mr. Harlove Singh Rajput, Advocate,
Mr. Gursher Singh Dhillon, Advocate
Mr. Gagandeep Singh Saini, Advocate
Mr. Jashandeep Singh Bains, Advocate
for the appellants.

Mr. Mohinder Singh Joshi, Advocate
Mr. Ravneet Singh Joshi, Advocate
Mr. Prabhjot Singh, Advocate
and Mr. Sarbjot Singh, Advocate
for appellant nos. 1 to 5.

Mr. Vijay Kumar Jindal, Sr. Advocate, with
Mr. Akshay Jindal, Advocate
Mr. Divanshu Jain, Advocate
Mr. Pankaj Gautam, Advocate
for the respondents.

ANIL KSHETARPAL, J

1. Brief facts of the case:-

1.1 The plaintiffs assail the correctness of the concurrent findings of fact arrived at by the courts below while dismissing their suit for the grant of decree for possession with respect to the portion of H.No.589 Sector 16, Chandigarh.

1.2 In order to comprehend the issues involved in the present case, some relevant facts, in brief, are required to be noticed.



1.3 The dispute in the matter at hand is with respect to the property left behind by late Ms.Sudha Sen daughter of Sh.K.M.Sen. She was a spinster. The plaintiffs no.1 to 5 are children of her brother. Defendant no.6 claims to be their attorney as well as the person who has promised to purchase the property from them. The plaintiffs claim the property on the basis of a registered Will dated 09.02.1997, which was registered on 09.04.1997 (hereinafter referred to as 'Will dated 09.04.1997'). On the other hand, defendants no.1 and 2 claim to be the acquaintance of the testator Ms.Sudha Sen and they claim the property on the basis of a registered Will dated 15.03.1995.

1.4 Late Ms.Sudha Sen was in the teaching profession. In fact, on reading of the registered Will dated 17.4.1985, it becomes evident that previously she executed another registered Will dated 24.02.1978. In the Will dated 17.04.1985, she bequeathed the property in favour of various persons, however, she bequeathed movable and immovable property in favour of her brother Sh.Shailendra Mohan Sen while stipulating that the beneficiary would give Rs.5000/-to Sh.Abhijet Sen, her nephew. After the Will dated 17.04.1985 Ms.Sudha Sen executed a registered Will dated 17.04.1993 bequeathing immovable property namely H.No. 589 Sector 16-D in favour of Sh.Atanu Sen Gupta, Sutanu Sen Gupta, Sujata Guha, Sunita Dass Gupta and Ms. Roma Sen. Thereafter it is the case of the defendants that Ms.Sudha Sen executed the registered Will in their favour on 15.03.1995. The plaintiffs claim that the last Will executed by her was on 09.04.1997.



1.5 Both the courts have held that the Will dated 15.03.1995 is proved whereas the Will dated 09.04.1997 is neither proved nor the propounder has explained the various suspicious circumstances surrounding the wall.

2. Evidence produced by the Respective Parties:-

2.1 In order to prove their case, the plaintiffs have examined PW1 (plaintiff no.6-Manjit Kaur) and attorney of remaining plaintiffs. PW2 Sh.H.P.S.Chawla, Manager, Punjab & Sind Bank, PW2 Amit, Clerk, PW3 Sh.Ravinder Arora, PW4 Sh.Deepak Suri, PW5 G.S.Bhullar and PW6 Kuldeep Verma.

2.2 On the other hand, the defendants examined DW1 Kuldeep Verma, Clerk, Sub Registrar Office, DW2 S.K.Chabbra, Advocate, DW3 (defendant no.1) himself.

3. Reasons recorded by the First Appellate Court:-

3.1 On a careful study of the judgment passed by the First Appellate Court, it is evident that the following reasons have been recorded by the First Appellate Court to disbelieve the Will dated 09.02.1997:-

- i) The deposition of PW3 Sh.Ravinder Arora, Advocate one of the attesting witnesses of the 1997 Will, failed to prove the Will in accordance with Section 68 of Indian Evidence Act, 1872 (hereinafter referred to as '1872 Act')
- ii) Sh.Ravinder Arora (PW3) has failed to depose that the executant was in a sound mental state and healthy condition.



- iii) The executant is required to sign the Will in the presence of both the attesting witnesses, who in turn is required to attest the Will in the presence of the attesting witnesses.
- iv) The age of the executant has not been specified in the Will.
- v) The Sub Registrar was required to obtain a medical certificate from a doctor regarding the fitness of the executant due to her advanced age.
- vi) Sh.Ravinder Arora has not testified that at the time of execution of the Will, the second attesting witness was present and signed in his presence.
- vii) Sh.Ravinder Arora (PW3) did not know the executant.
- viii) PW4 Sh.Deepak Suri, Advocate, the scribe did not come forward to face cross examination and he drafted the Will on 09.02.1997 as per the instructions of the testator.
- ix) Ms.Sudha Sen has not given any reason for cancelling the previous Will.
- x) The executant was residing alone in her home after retirement for almost 30 years but did not opt to return to her native place and stay with her collaterals.
- xi) The plaintiffs never visited and stayed with the testator at Chandigarh.
- xii) It is not understandable as to why the executant will repose confidence in Sh.Ravinder Arora, Advocate and Sh.J.L.Khanna, the attesting witnesses of the Will, when



there is nothing on record to suggest that they were acquaintances or had any connection with them.

xiii) Sh.J.L.Khanna has not been examined

xiv) It is not explained by the plaintiffs as to why the original Will was not produced in the Court.

4. Arguments put forth by the learned counsel representing the parties:-

4.1 Heard the learned counsel representing the parties at length and with their able assistance perused the paperbook. alongwith the requisitioned trial court's record.

4.2 On the one hand, learned senior counsel representing the appellants, while referring to deposition of Sh.Ravinder Arora submits that the First Appellate Court has not only misread the evidence but also erred in interpreting Section 63(c) of Indian Succession Act,1925 (hereinafter referred to as '1925 Act') and Section 68 of the '1872 Act'. He further contends that Ms.Sudha Sen always desired to bequeath her property in favour of her relatives including her brother or brother's children. While criticizing the Will dated 15.03.1995, he submitted that the defendants have failed to prove the same and it is surrounded by suspicious circumstances.

4.3 Per contra, learned senior counsel representing the respondents, while drawing the attention of the Court to the copy of the plaint, submits that plaintiff no.6 has been wrongly added to the array of parties and therefore, the suit has correctly been dismissed. While elaborating, he submits that the deposition of Sh.Ravinder Arora has correctly been discarded and Sh.Deepak Suri did not face cross



examination. Hence, his evidence cannot be read in order to decide the authenticity of the Will.

4.4 While referring to the Will dated 09.04.1997, the learned senior counsel representing the respondents contends that none of the witnesses or the testator have put the date while signing the Will. He submits that from the reading of the Will, it becomes evident that Atanu Sen Gupta and Sutanu Sen Gupta, two out of six plaintiffs relinquished their share in the property located in H.No.3/B Hauz Khas New Delhi, hence, the Will was some sort of exchange of the property. Learned counsel also referred to the cross examination of Sh.Ravinder Arora and highlighted that Sh.Deepak Suri never came forward to face the cross examination and Sh.J.L.Khanna was also not examined. The plaintiffs never visited or stayed with Ms.Sudha Sen. Additionally, registering authority did not seek the opinion of the doctor to the effect that Ms.Sudha Sen was in a proper mental condition particularly when she was more than 90 years of age. He submits that in the registered Will executed in the year 1995, her age is recited as 95 whereas in the Will executed in the year 1997 her age is mentioned as 90 years, which creates an iota of doubt. In the end, he submitted that the plaintiffs have failed to dispel the suspicious circumstances by producing evidence. He also highlighted that plaintiff no.6 has been wrongly added and her husband is a retired Director General of Police, Punjab.

5. Analysis of the reasons recorded by the First Appellate Court:-

5.1 At this stage, it is important to analyse the reasons recorded by the First Appellate Court while passing the impugned judgment.

**Reason no.I PW3's failure to prove the Will**

5.2 To begin with, the first reason assigned by the First Appellate Court is erroneous. As per Section 63 (c) of 1925 Act, the unprivileged Will is required to be signed or marked by the testator and it must be attested by two witnesses. However, the said provision does not mandate the presence of both the attesting witnesses at the same time. On a careful reading of Section 63 (c), it becomes evident that both the witnesses are not required to be simultaneously present because the statute uses the expression "*that either each of whom has seen the testator sign or fix his mark to the Will or has received from the testator a person acknowledgment of his signature or mark*". The provision requires that each witness shall sign the Will in the presence of testator. The last part of Section 63(c) clearly provides that both the witnesses are not required to be present at the same time and there is no particular form of attestation of the Will.

5.3 On a careful reading of the Will 09.04.1997, it becomes evident that it is signed by Ms.Sudha Sen, the testator and two attesting witnesses namely Sh.Ravinder Arora Advocate and Sh.J.K Khanna. The Will has been drafted on as many as five pages. On the first page, Ms.Sudha Sen has signed the Will thrice over. She has signed on the bottom margin of the page and thereafter she has signed again on the lower end of the page. She has also signed upon her photograph, which has been pasted on the registered Will. At the bottom margin of the page no.2, 3, 4 of the Will, she has appended signatures on each page. Thereafter, she signed the Will at 'page no.5' after the recitals of the Will



come to an end. She has also signed on the reverse side of the first page thrice over. In other words, she has appended three signatures on the reverse side of the first page when the Will was registered. These signatures were appended by her in the presence of the Sub Registrar who visited her house for the purpose of registration. Both the attesting witnesses have signed the last page of the Will as well as reverse side of the Will at the time of registration. While signing the Will, both the witnesses have also disclosed their address. Last page of the Will is also signed by Sh.Deepak Suri, Advocate as scribe.

5.4 Sh.Ravinder Arora, attesting witness of the Will appeared as PW3. He stated that Ms.Sudha Sen signed the Will in his presence and thereafter, he signed the Will. He stated that the Will was drafted by Sh.Deepak Suri, Advocate, whose signatures he identifies. He further stated that J.K.Khanna signed the Will as witness no.2 and Ms.Sudha Sen was in sound disposing mind. She had read the Will herself and signed it after understanding the same. Sh.Ravinder Arora was cross examined at length by the learned counsel representing the defendants on the various dates of hearing. All efforts were made to impeach his credibility however, he has categorically stated in the cross examination that it was already typed Will but its contents were read by Ms.Sudha Sen herself before signing. At one place, he has deposed that at the time when the Will was registered, he, Ms.Sudha Sen, Sh.Deepak Suri, Nagra, Sub Tehsildar were present and nobody else was present. Thus the courts have concluded that Sh.J.L.Khanna was not present at the time of registration of Will. However, this part of the evidence cannot



be given precedence, particularly when he has categorically stated in the examination-in-chief that Sh.J.L.Khanna signed the Will in his presence. Moreover, in the later part of the cross examination, he has categorically stated that Sh.J.L.Khanna signed as the second witness in his presence as well as the presence of the executant. As per Section 68 of the 1872 Act, examination of one attesting witness is sufficient if he proves the execution of the Will in accordance with Section 63 (c) of the 1925 Act. Thus, the First Appellate Court has erred in observing that deposition of Sh.Ravinder Arora did not prove the Will. Hence, the first reason assigned by the First Appellate Court is erroneous.

Reason no.II:- Failure to depose about the sound state:

5.5 The First Appellate Court's second reason also is also result of misreading of evidence of Sh.Ravinder Arora. In examination in chief, Sh.Ravinder Arora has categorically stated that Ms.Sudha Sen was of sound disposing mind at the time of execution of Will. It may be noted here that Ms.Sudha Sen thereafter, stayed alone in the house for a period of 7 months before she shifted to West Bengal. She remained alive for nearly 1 and ½ year after shifting to West Bengal. The defendants have not led any evidence to prove that she was not in sound disposing mind at the time of execution of the Will in April, 1997.

Reason no.IV:- Age of testator not specified:-

5.6 The First Appellate Court's reason no.iv is also misreading of the evidence because at the initiation of the Will, she has disclosed her age as 90 years. Similarly, on the reverse side of the page, again it has been stated that the age of the testator is 90 years.

**Reason no.V:- Requirement of obtaining the medical certificate:-**

5.7 The First Appellate Court has also erred in observing that it was incumbent upon the Sub Registrar to obtain a medical certificate from the doctor regarding fitness of the executant due to her advanced age. It may be noted here that after retirement from teaching profession, she stayed all alone being spinster in her residential house in Sector 16, Chandigarh. She had fallen down and fractured her hip bone in January, 1997. However, that would not be sufficient to assume that she was not in the sound disposing mind, particularly when there was no evidence. She has appended as many as 9 signatures on the different pages of the Will. Thereafter, she was in a position to travel to West Bengal and stay there for one and half year before her death. In these circumstances, the First Appellate Court was not correct in observing that the Registrar was required to obtain the medical certificate from a doctor. Hence, reason no.V assigned by the First Appellate Court is insubstantial.

Reason no.VI:- Absence of other attesting witnesses:-

5.7 Reason no.vi is again result of misreading of evidence. Sh.Ravinder Arora has categorically stated that Sh.J.L.Khanna, the other witness signed in his presence. It may be noted that while signing the Will, Sh.J.L.Khanna has disclosed his address as H.N.595 Sector 16B whereas Ms. Sudha Sen was residing in H.No.589. In other words, Sh.J.L.Khanna was Ms. Sudha Sen's neighbour. Moreover, it has come in evidence of defendant no.1 who was a doctor, on the recommendation of Ms.Sudha Sen, treated Sh.J.L.Khanna's wife. Hence, the families of Sh.J.L.Khanna and Ms.Sudha Sen were known to each other.

**Reason No. VII:- PW3 not knowing the testator:-**

5.8 Reason no.vii recorded by the First Appellate Court is also result of misreading of the entire evidence. Even though, Sh.Ravinder Arora stated that he did not previously know the executant, however, he has stated that he went to attest the Will on the directions of Sh.L.M.Suri, Sr. Advocate with whom he was working. Moreover, the court has overlooked that Sh.Ravinder Arora has also signed the Will executed by Ms.Sudha Sen on 17.04.1993. Sh.Deepak Suri s/o late Sh.L.M.Suri is the second attesting witness of the registered Will dated 17.04.1993. Thus, it is proved that Ms.Sudha Sen knew the family of Sh.L.M.Suri, Sr. Advocate. From the reading of the cross examination, it appears that Sh.Ravinder Arora became disoriented during his cross examination, however, he categorically re-emphasized in his deposition in the examination in chief by stating that Ms.Sudha Sen herself signed the Will after reading it and Sh.J.L.Khanna signed in his presence. Moreover, the provisions of the '1872 Act' do not mandate that the attesting witness must be personally known to the testator.

Reason No.VIII:- PW4 Deepak Suri failed to come forward to face cross-examination:-

5.9 Reason no.VIII assigned by the First Appellate Court is again erroneous. Failure to bring Sh.Deepak Suri, the scribe in the court for cross-examination would not be sufficient to discard a registered Will particularly when its execution has been proved by examining one of the attesting witnesses. Testimony of scribe may be important but not necessary. With respect to failure to examine Sh.J.L.Khanna, the courts have overlooked the fact that summons were sent to him but on



03.05.2012, learned counsel representing the plaintiff made a statement that he has died. Hence, an adverse inference for non-examination of Sh.J.L.Khanna could not be drawn to disbelieve the Will.

5.10 Another reason given by the First Appellate Court to the effect that the draft of the Will was prepared on 09.02.1997, whereas it was executed and registered on 09.04.1997, but plaintiffs have failed to show as to whether the draft was allegedly prepared by the scribe as per the wishes of the testator. It may be noted here that a Will is required to be proved in accordance with law, which requires examination of one of the attesting witnesses in the court. Sh.Ravinder Arora states that Ms.Sudha Sen herself read the contents of the Will and after having satisfied, she signed the Will. Hence, the view taken by the First Appellate Court is incorrect.

Reason no.IX:- No reason for cancelling the earlier Will:-

5.11 With respect to reason no.ix, it may be noted that the aforesaid finding is result of failing to read the Will dated 09.04.1997. She has specifically stated on the very first page of the Will that she had executed a Will previously also, in favour of defendant no.1 Dr. S.N.Bose. It is recited that the necessity of execution of this Will has arisen because after she executed the previous Will dated 15.03.1995, Dr. S.N.Bose of PGI got her signatures on certain papers, which were either agreements or some Will and he had also taken her to the Estate Office when she was under the influence of heavy drugs. Moreover, she has stated that Dr.S.N.Bose has not paid any amount whatsoever. The reference to the amount gains significance because on careful reading of



the Will dated 15.03.1995, it becomes evident that defendant no.1 and 2 were directed to pay Rs.20 lakhs to the plaintiffs. It is further recited that if the defendants failed to pay the amount or are unable to pay the said amount, the same can be recovered from them. If in case defendants no.1 and 2 die earlier than the testator then the amount will be recovered from the defendants' children. The defendants have also asserted that they paid Rs.20,000/- to Ms.Sudha Sen. They have produced documents Ex.DW3/1 , DW3/2 and DW3/3 to prove that fact. This payment is made on 12.05.1995 whereas the Will has been registered in their favour on 15.03.1995. Hence, the First Appellate Court committed an error in making observation, the earlier Will has been cancelled without citing any reason. It is significant to note here that testator is not required to give reasons for cancelling or revoking the earlier Will.

Reason No.X:- Executant staying alone and not returning to her native place:-

5.12 The First Appellate Court has also erred in making observation that the testator was residing alone in her house after retirement but she did not opt to return to her native place. This is the individual's decision and there was nothing unusual about it, particularly when she was staying in Chandigarh during her entire service career. Hence, reason no. X cited by the First Appellate Court lacks substance.

Reason no.XI:- Plaintiffs not visiting the testator

5.13 Similarly, reason no.xi recorded by the First Appellate Court is erroneous because the courts have drawn inference only on the ground that plaintiffs did not appear in evidence. The plaintiffs are



children of her brother. When the Will was registered they were not in Chandigarh. Hence, the failure to appear in evidence would be inconsequential. She being spinster had love and affection towards the plaintiffs. It may be noted here that in 1985, Ms.Sudha Sen bequeathed her property in favour of her brother, however, in the Will executed in the year 1993, she bequeathed the property in favour of the plaintiffs. In 1997, again she bequeathed the property in favour of plaintiffs.

Reason no.XII:- Executant reposed trust in Ravinder Arora and J.L.Khanna:-

5.14 Reason no.XII recorded by the First Appellate Court also lacks substance. Sh.Ravinder Arora has explained that at the relevant time, he was working with Sh.L.M.Suri, Sr. Advocate. It may be noted here that Sh. Deepak Suri is the attesting witness of the Will dated 17.04.1993. Hence, it appears that Ms.Sudha Sen was known to Sh.L.M.Suri, Sr. Advocate and she would contact him for legal advice. Sh. J.L.Khanna was her neighbour.

6. Analysis of the submissions put forth by the learned counsel representing the parties:-

6.1 This Court has considered and analysed the submission put forth by the learned counsel representing the parties.

6.2 With respect to the submissions of the learned senior counsel representing the defendants, it may be noted that most of the submissions have already been analysed while examining the reasons given by the First Appellate Court.

6.3 From careful analysis of the entire evidence, it becomes evident that the Will in favour of the plaintiffs, was though typed on 09.02.1997, however, it was executed and registered on 09.04.1997.



Learned counsel representing the appellants has also made detailed submissions criticising the findings of the courts below with respect to the Will dated 15.03.1995. However, the findings of fact arrived at by the courts below with respect to the Will dated 15.03.1995 does not require any interference. The Will dated 15.03.1995 is also a registered Will and it has been proved by examining Sh.S.K.Chabbra Advocate who was not only the scribe but also attesting witness of the Will. The photograph of testator has been affixed on the Will and it has been proved by examining the attesting witness.

6.4 One additional submission made by the learned senior counsel is with respect to the impleadment of plaintiff no.6 Smt.Manjit Kaur wife of Sh.G.S.Bhullar. It may be noted here that it may be a case of misjoinder of parties, however, that would not itself result in dismissal of the suit. Moreover, it is evident that this aspect has never been pressed before the courts below. Hence, it would not be appropriate to permit the appellant to take up this issue for the first time in this Regular Second Appeal.

6.5 Another additional submission of the learned senior counsel is with respect to certain recitals in the Will dated 26.04.1997. Learned counsel has submitted that there is a recital to the effect that Sh.Atanu Sen and Sh.Sutanu Sen Gupta, through a registered release deed, have relinquished their rights in the immovable property described as H.No.3/B, Houze Khas, New Delhi to the extent of 1/3rd share. He has submitted that such relinquishment appears to be result of an exchange and hence, it cannot be in the nature of Will. Sh.Atanu Sen Gupta and



Sh.Sutanu Sen Gupta are the children of testator's brother. There was some sort of family settlement. In the opinion of this Court, it proves that Ms.Sudha Sen had desired that the property should go to the plaintiffs after her death. On the other hand, if we carefully study the Will dated 15.03.1995, it gives an impression that it was some sort of transfer of property for Rs.20 lacs because while executing Will in favour of the defendants, the testator had specifically recited that the defendants will pay Rs.20 lakhs to the plaintiffs. In 1995, the amount of Rs.20 lacs was significant. There is no evidence on record to prove that the aforesaid amount was paid to the testator.

6.6 Learned counsel representing the defendants have also submitted that the original Will dated 26.04.1997, has not been produced. It may be noted here that the two copies of the exactly same Will were prepared. One was retained in the office of the Sub Registrar. The aforesaid official record was produced and proved on two occasions. Initially, the record was brought by Sh.Amit. who was the Record Keeper in the office of the Sub Registrar. Subsequently, Sh. Kuldeep Verma was also summoned and he brought the original record. The testator and the attesting witness have appended their signatures on the copy retained in the Sub Registrar's office which attested by the Sub Registrar. The photograph of the testator has also been posted on the copy retained in the official record. It is not the case of the defendant that the photograph is not of the testator but some other lady.

6.7 It may be noted here that the defendant no.1 has never operated on Ms.Sudha Sen. On reading of his deposition, it becomes



evident that she was treated by two other doctors namely Dr. N.C.Dass Gupta and Dr. Kuldeep Singh. Defendant no.1 is not an Orthopaedic doctor. He has only stated that he alongwith his wife visited and looked after her for treatment or otherwise.

7. Decision:-

- 7.1 Keeping in view the aforesaid discussion, the result is inevitable. The impugned judgments passed by the courts below are set aside and the suit filed by the plaintiffs shall stand decreed.
- 7.2 Hence, the Regular Second Appeal stands allowed.
- 7.3 All the pending miscellaneous applications, if any, are also disposed of.

23.07.2024
rekha
Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No

(ANIL KSHETARPAL)
JUDGE