

**(2008) 08 P&H CK 0083**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** None

Gurdial Singh

APPELLANT

Vs

Rachhpal Kaur and Others

RESPONDENT

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**Date of Decision:** Aug. 25, 2008

**Acts Referred:**

- Evidence Act, 1872 - Section 68
- Succession Act, 1925 - Section 62, 70

**Citation:** (2008) 152 PLR 329 : (2009) 1 RCR(Civil) 186

**Hon'ble Judges:** Rakesh Kumar Jain, J

**Bench:** Single Bench

**Final Decision:** Dismissed

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**Judgement**

Rakesh Kumar Jain, J.

Plaintiff is the appellant before this Court.

2. Briefly stated the facts of the case are that the plaintiff filed a suit for joint possession of 1/2 share of land measuring 62 Kanals 11 marlas, situated in village Dhilwan, Tehsil and District Kapurthala, on the ground that defendant No. 1. who is at present entered as an owner to the extent of 1/4th share has no legal right, title or interest in the suit land and prayed for the consequential relief that she may be restrained from alienating, the suit land or any part thereof to any body during the pendency of the suit. Pleaded case of the plaintiff is that one Kartar Singh son of Jawand Singh was father of the plaintiff and defendant Nos.1 and 2. He was the sole owner of the suit property. Kartar Singh died on 2.6.1977, but before his death, he executed a registered Will dated 14.2.1974 bequeathing his entire property both moveable and immovable including the suit land in favour of his two sons, namely, Gurdial Singh, the plaintiff and Gurmail Singh, defendant No. 2 in equal shares i.e. half share each, thereby, depriving his daughter defendants No. 1. Smt. Rachhpal Kaur and his wife Smt. Karam Kaur. It was further pleaded that defendant No. 1 in

collusion with revenue field staff got mutation of inheritance of said Kartar Singh entered and attested in her name, in the name of her mother Smt. Karam Kaur, the plaintiff and defendant No. 2, therefore, the said mutation is illegal and the plaintiff claims to be in joint possession of remaining half share in the suit property. It was also pleaded that Kartar Singh had other land in village Mand Dhilwan, which was correctly entered in the name of the plaintiff and defendant No. 2 according to the Will to the extent of half share each and the mutation of inheritance of said Kartar Singh entered vide No. 5520 was illegally and fraudulent got sanctioned on 25.8.1977 does not create any right, title or interest in the suit property in favour of defendant Nos. 1 and 2. It was also pleaded that defendant Nos. 3 to 5 are the mortgagees in possession on some area from defendant No. 2 and Smt. Karam Kaur deceased, but they have no other interest in the estate of deceased but since the suit is for joint possession, therefore, they have been impleaded as proforma defendants.

3. The suit was contested by defendant Nos. 1 and 2. Amended written statement was filed in which execution of the Will dated 14.2.1974 by said Kartar Singh in favour of the plaintiff and defendant No. 2 was denied. It was further maintained that if the plaintiff succeeds in praying the execution of the said Will, then the same is not binding upon the rights of answering defendants as it was a result of fraud and misrepresentation exercised upon deceased Kartar Singh, who allegedly had no sound disposing mind and the same was not executed with his free Will. It was further pleaded that if the Will is proved, even then said Kartar Singh himself had cancelled the alleged Will by a registered deed of revocation dated 18.3.1975 in sound disposing mind. It was further averred that Kartar Singh was rightly held to have died intestate by the revenue authorities. Therefore, Mutation No. 1683 dated 14.7.1987 of inheritance of deceased Kartar Singh has been wrongly sanctioned regarding land of village Mand Dhilwan, District Kapurthala and the same is illegal. The defendants also set up a counter claim in respect of the land measuring 26 Kanals 18 marlas of village Mand Dhilwan claiming themselves to be owner in possession of 2/3rd share and in the alternative for joint possession of 2/3rd share.

4. The plaintiff filed replication to the amended written statement in which it was denied that the Will is a result of fraud and misrepresentation etc. It was further denied that the said Will has been revoked. It was further submitted that in case there is an alleged cancellation deed, the same is the result of fraud, misrepresentation and undue influence exerted by defendant Nos. 1 and 2 on Kartar Singh deceased.

5. On the pleadings of the parties, following issues were framed from time to time:

1. Whether the plaintiff is in joint possession of 1/2 share as co-sharer in the suit land? OPP
2. Whether Kartar Singh deceased executed a valid Will dated 14.2.1974? OPP

3. Whether the suit is not maintainable in the present form? OP )
4. Whether plaintiff is estopped to file the present suit by his act and conduct? OPD
5. Whether the plaintiff is entitled to injunction prayed for? OPP

On 6.2.1990, following issue was also framed on the amended pleadings.

- 5-A. In case issue No. 2 is proved whether Will dated 14.2.1974 was cancelled through cancellation deed dated 18.3.1975. If so its effect? OPD

Again on 9.12.1991, following issues were framed:

1. Whether the plaintiff is entitled to joint possession of 1/2 share in the suit property as mentioned in the head note of the plaint? OPP
2. Whether defendant No. 1 has no right or interest in the suit land? OPP
3. Whether the counter claim does not lie in the present case? OPP
4. Whether the suit land is ancestral and coparcenary property? OPD
5. Whether the suit is barred by limitation? OPD
6. Whether the plaint is entitled to the declaration prayed for? OPP
7. Relief.

6. In order to prove his case, the plaintiff examined Mohinder Singh Head Registration Clerk as PW-1; Shankar Singh as PW-2, Swaran Singh as PW-3; Gurdial Singh plaintiff as PW-4; Ashok Kumar deed-writer as PW 5, Gurdial Singh also appeared in rebuttal as PW-4. He further examined Gurbax Singh as PW-6 and placed on record certified copy of the Will alleged to have been executed by Kartar Singh on 14.2.1974 Ex.P-1 copy of the mutation No. 1683 with regard to land situated in village Mand Dhilwan Ex.P-2 Copy of mutation No. 6403 with regard to land situated in Dhilwan Ex.P-4 Photostat Copy of Report Mark P-3, Copy of Jamabandi for the years 1982-83 Ex.P-5 Copy of jamabandi with regard to the land situated in village Mand Dhilwan Ex.P-6 of the order of A.C. Ist Grade Ex.P-7 and Anr. copy of the mutation Ex.P7/I.

7. Defendant Nos.1 and 2 in order to prove their case examined Mohan Lal as DW-1. Pal Singh as DW-2, Mohinder Singh HRC as DW-3, Inder Singh as DW-4, Gurmail Singh defendant as DW-5 and placed on file copy of the register of the deed writer Ex. D-1, certified copy of the deed of revocation Ex.D-2, Copy of the jamabandi for the year 1982-83, Ex.D-3 and copies of jamabandi for the year 1987-88, Exs.D4, D-5 and D6, copies of khasra girdawaris Ex.D-7, Ex.D8 and Ex.D-9, copy of the mutation with regard to the land situated in village Dhilwan No. 5520 Ex. D10; power of attorney by defendant No. 1 in favour of defendant No. 2. Ex.DW 5/1; pedigree table Ex.P-11; copy of the order of Collector, Kapurthala Ex.D-12 and copy of the revenue record in the form of Excerpt got prepared Ex.PW 6/1.

8. Issue No. 2 pertaining to the Will dated 14.2.1974 was decided by both the courts below in favour of the plaintiff and it was held that the Will was validly executed by Kartar Singh in favour of the plaintiff and defendant No. 2. However, finding on issue No. 5A was returned against the plaintiff wherein it was held that the Will dated 14.2.1974 was revoked by a deed of revocation dated 18.3.1975, therefore, the plaintiff was not held entitled to half share in the land situated in village Dhilwan and Mand Dhilwan and consequently a decree for joint possession was granted to the effect that the plaintiff Gurdial Singh, defendant No. 1 Rachpal Kaur and defendant No. 2, Gurmel Singh are joint owners in possession of 1/3rd share in the land measuring 62 Kanals 11 marlas situated in village Dhilwan and 26 Kanals and 18 Maria in village Mand Dhilwan.

9. In the present appeal, the sole substantial question for adjudication raised by counsel for the appellant is as to whether the registered Will dated 14.2.1974 which has been duly proved on record has been revoked by Kartar Singh and is proved in accordance with law.

10. At the time of admission of the appeal, the parties were directed to maintain status quo with regard to possession and not to alienate the suit property in any manner except with the permission of the Court.

11. Assailing finding on issue No. 5-A Mr. Kanwaljit Singh, learned senior counsel for the appellant has contended that defendants have failed to prove the revocation of the Will vide cancellation deed dated 18.3.1975 (Ex.D-2).

12. At the very outset of his arguments, learned Counsel drew the attention of the Court to the pleadings in the written statement, where the defendants have taken a contradictory stand that at the time of execution of the Will, Kartar Singh was not possessing sound disposing mind, whereas at the time of revocation of the Will, he had sound disposing mind. Learned Counsel has laid emphasis on the point that the Courts below have misread the evidence. He has submitted that original cancellation deed has not been produced on record by the defendants, rather, a bahi No. 3 from the office of Registrar, Kapurthala has been produced, which has not been proved in accordance with law. In this regard, he drew attention of the Court to the statement of DW-3 Mohinder Singh, who admitted in the cross-examination that the entry in the bahi is not signed by the executant, any witness or by the scribe. He also admitted that he cannot say whether it is the correct copy of the original and admitted that the original documents bearing the signatures of the executant and the witnesses are not maintained in the office of Registrar. Learned Counsel further referred to the statement of DW-1 Mohan Lal the scribe of the document of revocation, who, in the cross-examination admitted that he did not get the signatures of any witness in his register. Since burden of proof was upon the defendant, no effort was made to prove the thumb impression of Kartar Singh on Ex.D-1 which is the entry in the register of deed writer. It was also pointed out that the register has not been signed by any one and even the contents

of Ex.D-2 runs contrary to what is stated by DW-4 Inder Singh. Learned Counsel has further pointed out that the reason which has been assigned in Ex.D-2 was that both the sons namely Gurdial Singh and Gurmail Singh were ill-treating Kartar Singh, therefore, he decided to revoke the Will, whereas DW-4 Inder Singh stated in the examination-in-chief that prior to his death, Kartar Singh used to reside with his son Gurmail Singh who was looking after and serving Kartar Singh, although Gurdial Singh was not having good relations with Kartar Singh. It was thus, argued that the findings recorded by the Courts below are contrary to the evidence available on record.

13. It was further argued by the learned Counsel for the appellant that the first Appellate Court has erred in its observations that "the plaintiff while appearing as PW-4. has stated that he did not know if his father got cancelled the said Will Ex.P-1 after he came to know that a fake Will had been got prepared by him, thus, the plaintiff himself has not specifically denied the execution of cancellation dated Ex.D-2 by deceased Kartar Singh and has, thus, impliedly admitted the same. So, keeping in view the evidence of the defendant coupled with this implied admission of the plaintiff, the execution of the cancellation deed Ex.D-1 has been well established on the record.

14. It is further submitted by counsel for the appellant that the Will takes effect on the date of death of the executant and during his life time is an ambulatory document revocable at any moment and having no legal effect whatsoever, but the revocation has to be in accordance with law. In this regard, counsel for the appellant has referred to Sections 62 and 70 of the Indian Succession Act, 1925 (hereinafter referred to as "the Act?) which read as under:

Section 62-A.- Will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will?

Section 70.- "Revocation of unprivileged will or codicil".- No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same.

15. Counsel for the appellant has further relied upon a decision of the Hon"ble Apex Court in the case of Bhagat Ram and Anr. v. Suresh and Ors. 2004 (1) R.C.R. 285 to canvass that in case of revocation or modification of will by way of codicil, the standard of proof of execution of a codicil are the same as are applicable to the execution of a will.

16. As against this, Mr. G.S. Nagra, learned Counsel for the respondents has argued that there is no error or infirmity in the finding of fact recorded by the Court below.

He has argued that even according to Section 62 of the Act, power is vested with the propounder of the will to revoke or alter the same at any time when he is competent to dispose of his property by will and the said power has been exercised by deceased Kartar Singh in accordance with Section 70 of the Act by executing another will, namely, Ex.D-2 in which categoric reference is made regarding the previous registered will dated 14.2.1974. Counsel for the respondents has further argued that document Ex.D-2 has been fully proved in accordance with law.

17. To begin with Mr. Nagra, drew the attention of the Court to the statement of DW-1 Mohan Lal who has stated that the cancellation deed/revocation of the will was scribed by him at the instance of Kartar Singh which was read over to him and Kartar Singh had put his thumb impression after admitting the same to be correct in the presence of marginal witnesses, namely Pal Singh Sarpanch and Lachhman Singh Sarpanch. He further stated that both the witnesses had signed the cancellation deed in the presence of Kartar Singh testator which is entered at Serial No. 202 dated 18.3.1975 in his register which again has been thumb marked by Kartar Singh in the presence of the witnesses. Counsel for the respondents has further submitted that the attesting witness Lachhman Singh has since expired, therefore, Pal Singh another attesting witness entered the witness box as DW-2 and stated that he remained Sarpanch of his village for about 20 years and knew Kartar Singh. It was further stated by him that cancellation deed was scribed by Mohan Lal at the instance of Kartar Singh, which was read over to him by the deed writer and Kartar Singh had put his left thumb impression on the cancellation deed after admitting the same to be correct in his presence. The cancellation deed was signed both by him and Lachhman Singh as marginal witnesses in the presence of Kartar Singh and the deed writer entered the said cancellation deed in his register where Kartar Singh had put his thumb impression against the said entry. The cancellation deed was produced before the Sub Registrar Bholath. There also, the same was read over and Kartar Singh had put his thumb impression after admitting the same to be correct in his presence and in the presence of Lachhman Singh. Counsel has further argued that DW-3 Mohinder Singh, a Clerk from the office of Deputy Commissioner, Kapurthala had stated on oath that he had brought Bahi No. 3 from the office of the Registrar, Kapurthala. The second original copy of the document being registered by the Sub Registrar Bholath is maintained in this Bahi, which after completion is consigned. He had brought the Bahi with regard to entries from 10.1.1975 to 15.6.1976 pertaining to the documents registered by the Sub Registrar, Bholath in which on 18.3.1975, document No. 28 was registered with the Sub Registrar, Bholath by Kartar Singh son of Jawand Singh. He has further stated that the cancellation deed Ex.D-2 is a certified copy which is correct copy of the original maintained in the register. In the cross-examination, he stated that the original documents bearing signatures of the executant and the witnesses are not maintained in the office but according to the prevalent practice. Registration Clerk used to copy down the contents of the original documents in the Bahi word by word

and the same is attested by the Sub-Registrar concerned. It is further argued that DW-5 Gurmail Singh who is also beneficiary in the alleged will which has been cancelled has stated that the cancellation deed remained in possession of his mother till her death and after that it was in his possession. Thereafter, the plaintiff filed the present suit which gave an occasion to him to read the cancellation deed in which it was found that name of the grand father was wrongly typed, therefore, he had obtained certified copy of Ex.D-2 from the office of Sub Registrar to confirm the same but it was found that the wrong name of his father was written in the said copy. It is further stated by him that he gave the said copy to his counsel and kept the original at his home, but in the month of September, 1988, there were great floods in which original cancellation deed dated 18.3.1975 was washed away along with other record and articles and could not be found thereafter.

18. Counsel for the respondents has further argued that document Ex.D-2 has been duly proved by producing the scribe, the marginal witness as well as copy of the document Ex.D-2 from the custody of the Sub Registrar which has been duly produced by DW-3. It is further submitted that PW-5 has specifically explained loss of the original document which has not been challenged by the plaintiff. It is further argued by counsel for the respondents that according to Section 68 of the Evidence Act, if a document is required to be attested, it shall not be used as evidence unless one attesting witness at least has been called for the purpose of proving its execution if there being an attesting witness alive and subject to the process of the Court and capable of giving evidence.

19. In the present case, Pal Singh is the attesting witness of document Ex.D-2, who has been examined in the Court as DW-2 and has categorically stated that the testator Kartar Singh has got scribed the cancellation deed from Mohan Lal in his presence which was read over to him and he had put his left thumb impression on the cancellation deed after admitting it to be correct in his presence which was signed by him along with other witness Lachhman Singh, who has since expired. Therefore, it is argued that requirement of law has been duly complied with. It is also submitted that much stress has been laid on the mode of proof and not on the admissibility of the document, although no objection was raised at the time when this document was tendered. Therefore, this plea cannot be taken at this stage. In this regard, a Division Bench judgment in the case of the Net Ram etc. v. Harkesh Major etc. 1973 CLJ 373, has been relied upon by the counsel for the respondents.

20.1 have heard the learned Counsel for the parties and have perused the record with their assistance.

21. Admittedly, the registered will dated 14.2.1974 was executed by Kartar Singh in favour of his two sons, namely, Gurdial Singh and Gurmail Singh excluding his daughter Smt. Rachhpal Kaur and wife Smt. Karam Kaur. The said will was revoked by Kartar Singh on 18.3.1975 specifically mentioning the earlier registered will therein. Therefore, core issue was as to whether the document Ex.D-2 has been

proved in accordance with law.

22. The argument of the learned Counsel for the appellant that the certified copy of Ex.D-2 obtained from Bahi No. 3 is unreliable because the thumb impressions of the deceased have not been proved by the respondents is, in my view, not tenable because the respondents had discharged their burden after examining the attesting witness, namely, Pal Singh, who had categorically stated that Mohan Lal, Deed Writer had read over the revocation deed to the deceased Kartar Singh who had put his left thumb impressions after admitting the same to be correct in his presence. After this statement, the burden had shifted upon the plaintiff who alleges a fact that the document Ex.D-2 does not bear the thumb impression of the deceased, but the plaintiff himself has failed to discharged the onus shifted upon him by leading cogent evidence either oral or documentary. It has further come in the evidence of Mohinder Singh DW-3 that second original copy of the document Ex.D-2 registered by the Sub Registrar, Bholath is maintained in Bahi No. 3 and is registered as document No. 28 dated 18.3.1975. It has also further been stated by him that the Registration Clerk used to copy down the contents of the original document in the Bahi, word by word and the same is attested by the Sub Registrar concerned. There is another aspect which has been taken note of by the Courts below that Gurmail Singh DW-5 who is also a beneficiary in the alleged Will has specifically stated that the same has been revoked by his father vide document Ex.D-2 and has thoroughly explained the circumstances in which he had obtained the certified copy and the loss of the original.

23. Thus, in my view, the finding recorded by the Courts below is a pure finding of fact and no question of law much-less substantial is involved in the present appeal. Therefore, the appeal is devoid of any merit and the same is hereby dismissed without any order as to costs.