
AIR 2004 P&H 245 : (2004) 137 PLR 471 : (2004) 3 RCR(Civil) 146

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 1258 of 1980

Dhan Kaur and Others

APPELLANT

Vs

Bant Singh and Others

RESPONDENT

Date of Decision: Feb. 24, 2004

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100, 63
- Evidence Act, 1872 - Section 68
- Punjab Courts Act, 1918 - Section 41

Citation: AIR 2004 P&H 245 : (2004) 137 PLR 471 : (2004) 3 RCR(Civil) 146

Hon'ble Judges: Satish Kumar Mittal, J

Bench: Single Bench

Advocate: Avinash Mittal, for the Appellant; Sarjit Singh, Senior Advocate and Sandeepta Mehta, for the Respondent

Final Decision: Dismissed

Judgement

Satish Kumar Mittal, J.

(24th February, 2004) - This Regular Second Appeal has been filed by defendant No. 1 to 3 against the judgment and decree dated 23.1.1980 passed by Additional District Judge, Sangrur, vide which suit of the plaintiffs for declaration to the effect that they are owners in possession of the land in question was decreed.

2. The dispute in this appeal is about the estate of one Sajjan Singh. The plaintiffs are the sons of uncle of the said Sajjan Singh. Defendant No. 1 is the sister and defendants No. 2 and 3 are sons of another sister of Sajjan Singh. Defendant No. 4 is the father of the plaintiffs. The plaintiffs were claiming the property of Sajjan Singh on the basis of a Will dated 30.12.1969, whereas defendants No. 1 to 3 claimed the said property on the basis of natural succession.

3. The brief facts of the case are that there were two brothers Chetan Singh and Narain Singh. Narain Singh was having two sons, namely Gajjan Singh and Sajjan Singh and two daughters, namely Dhan Kaur and Kaki. Both the aforesaid brothers were having equal share in the land measuring 305 kanals 17 marlas situated in village Sekhuwas. The dispute is about the half share owned by Narain Singh. The case of the plaintiffs is that on the death of Narain Singh prior to the year 1956, his half share was inherited by his two sons Gajjan Singh and Sajjan Singh. Subsequently, Gajjan Singh also expired in the year 1953 i.e., much before the enforcement of the Hindu Succession Act, 1956. Therefore, his share in the disputed land was inherited by his brother Sajjan Singh, as at that time his two sisters, namely Dhan Kaur and Kaki, were not entitled to any share in the property. According to the plaintiffs, mutation No. 4063 dated 13.3.1968 was wrongly sanctioned in favour of the aforesaid two sisters of deceased Gajjan Singh to the extent of 1/16 share each and in favour of Sajjan Singh to the extent of 1/8 share. It was pleaded by the plaintiffs that Sajjan Singh was unmarried and issueless. He executed a Will in their favour on 30.12.1969 regarding his entire property and subsequently, he renounced the world, and for the last more than seven years, he was not heard of therefore, presumed to be civilly dead. Thus, on the basis of the aforesaid Will, they become owners in possession of the land in question owned by Sajjan Land.

4. The suit was contested by defendants No. 1 and 3. The share of the Chetan Singh and Narain Singh in the land in question was not disputed. However, it was pleaded that after the death of Narain Singh, his half share was inherited by his two sons and two daughters. As even prior to the enforcement of Hindu Succession Act, 1956, daughters were entitled to succeed the estate of their father under the custom. Regarding the death of Gajjan Singh, it was denied that he died in the year 1953. According to the contesting defendants, Gajjan Singh died after the coming into force of Hindu Succession Act. It was further pleaded by them that after the death of Gajjan Singh, his share was inherited by his two sisters and his brother Sajjan Singh in equal shares. Regarding the Will, it was pleaded that the same was never executed by Sajjan Singh and it was the forged document to deprive the rights of the contesting defendants. It was denied that Sajjan Singh was not heard of for the last more than 7 years and he was presumed to have died. It was alleged that the contesting defendants are in possession of the land in question and they are so recorded in the revenue record and the mutation was rightly sanctioned in their favour.

5. On the pleadings of the parties, the learned trial Court framed the following issues:-

1. Whether Gajjan Singh died before 1956 if so its effect? OPP
2. Whether Sajjan Singh became the exclusive owner of the property in suit? OPP
3. Whether Sajjan Singh is not heard for last more than 7 years if so its effect? OPP

4. Whether Sajjan Singh executed any valid will in favour of the plaintiffs, if so its effect? OPP

5. Whether mutation effected in favour of defendants is invalid for reasons stated in plaint? OPP

6. Whether Sajjan Singh and Gajjan Singh sons of Narain Singh were the owners of 1/2 share of the suit land if not effect? OPP

7. Whether defendants No. 1 to 3 became owners by adverse possession to the extent of 1/6th share in the land in suit? If so its effect? OPD

8. Relief."

6. On issue No. 1, the trial Court held that Gajjan Singh died before 1956. This finding has been affirmed by the first appellate Court. However, the trial Court found that after the death of Gajjan Singh his share in the property in question was inherited by his brother and two sisters in equal shares on the basis of custom. This finding of the trial Court has been reversed by the learned first appellate court while holding that there was no such custom nor any such custom was pleaded and proved that prior to 1956, sisters were having right to inherit the property of their brother. Therefore, it has been held by the appellate court that after the death of Gajjan Singh, his brother Sajjan Singh became exclusive owner of his share in the property in question. On issue No. 3 regarding the presumption of death of Sajjan Singh, the trial Court found that the plaintiffs could not prove that at the time of institution of the instant suit, Sajjan Singh was not heard of for the last more than seven years, therefore, it was held that he cannot be presumed to be civilly dead. This finding of the trial court has been reversed by the first appellate court. Regarding the Will dated 30.12.1969, both the Courts below held that the Will was proved and it was not surrounded by any suspicious circumstance. The trial Court partly decreed the suit of the plaintiffs declaring them owners to the extent of 1/3rd share of the property of Narain Singh on the basis of the Will dated 30.12.1969 and their suit regarding the remaining 2/3rd share of Narain Singh was dismissed. However, the first appellate court set aside the judgment of the trial court and decreed the suit of the plaintiffs qua the entire share of Narain Singh in the property in dispute. Hence, this Regular Second Appeal by defendants No. 1 and 3.

7. At the time of admission of this appeal on October 1, 1980, no substantial question of law was framed as required u/s 100 of the Code of Civil Procedure. Since at the time the appeal was filed u/s 41 of the Punjab Courts Act 1918 and there was no requirement of framing a substantial question of law, the appeal was admitted without framing of such question. But now, in view of the law laid down Kulwant Kaur and Ors. v. Gurdial Singh Mann and Ors. (2001) 128 P.L.R. 492 it is essential to frame the substantial question of law in Regular Second Appeal. Therefore, the learned counsel for the appellant formulated the following substantial question of law:-

Whether the evidence led by the plaintiff to prove the alleged Will is sufficient and cogent and convincing explaining all the suspicious circumstances surrounding its making to such an extent as to satisfy the conscience of the Court that the Will was duly executed by the testator?

8. Initially, learned counsel for the appellants had also assailed the findings recorded by both the Courts below on the point of death of Gajjan Singh and the findings recorded by the first appellate court on the fact that at the time of institution of the suit, Sajjan Singh was not heard of for the last more than seven years and was, therefore, presumed to be civilly dead. However, subsequently, he confined his arguments only with regard to the execution of the Will dated 30.12.1969 and the aforesaid question of law. The learned counsel for the appellants submitted that the plaintiffs who are the propounders of the Will and whose claim solely rests upon it, have not proved the execution of the same as per the requirements of law. Its execution is surrounded by many suspicious circumstances and the plaintiffs did not lead any evidence to remove those suspicious. Learned counsel further submitted that mere assertion of the propounders that the Will bears signatures of the testator or that at the time of execution of the Will, the testator was in a sound disposing state of mind will not discharge the burden of the propounders. They have to remove all the suspicious circumstances before the alleged Will can be accepted as the last Will of the testator. Learned counsel further submitted that in the instant case, the plaintiffs have examined only two witnesses to prove the execution of the Will i.e., Kamlesh Kumar (PW1) son of the deceased scribe and Ram Chand (PW2), the alleged attesting witness of the Will. Learned counsel submitted that the alleged Will was attested by two persons, out of whom one is Ram Chand (PW2) and the other is Chetan Singh, father of the plaintiffs. While referring to the evidence learned counsel for the appellants submitted that Chetan Singh took active part in execution of the Will, which itself is suspicious circumstance. According to learned counsel the Will in question is not a simple document, which requires only the normal proof of such document by examining the scribe and one of the attesting witnesses. In the instant case, the Will is surrounded by suspicious circumstances and in such cases, onus to prove its execution stands on different footings. Learned counsel has pointed out the following suspicious circumstances surrounding the Will in question;-

i) In his statement, Ram Chand (PW2), the attesting witness of the Will has categorically stated that at the time of execution of the will, the testator Sajjan Singh was a Sadhu. If that was so then he was deemed to have already renounced the world and, therefore, he could not have executed the alleged Will;

ii) Chetan Singh, father of the plaintiffs, took active part in execution of the Will. He was one of the attesting witnesses of the Will;

iii) Defendants No. 1 and 3 who are the natural heirs of the testator have been excluded in the Will without any specific reason;

iv) Mutation dated 18.8.1968 of inheritance of Gajjan Singh was sanctioned in favour of his brother Sajjan Singh and sisters Dhan Kaur and Kaki in equal shares, in the presence of Sajjan Singh testator. If that was so, it does not stand to any reason as to why, after about one year, Sajjan Singh executed the Will in favour of the plaintiffs by totally excluding his aforesaid two sisters;

v) In the Will, it has been mentioned by the testator that the Will was executed in favour of the plaintiffs in lieu of the services rendered by them, as they used to serve and help him in cultivating the land. However, as per the statement of Ram Chand (PW2) at the time of execution of the Will, the testator was "Sadhu" therefore, there was no question of serving such a man by the plaintiffs;

vi) Ram Chand (PW2) in his cross-examination, has stated that at the time of registration of the Will, it was thumb marked by the testator before the Clerk of the Sub Registrar, meaning thereby that it was never thumb marked by the testator before the Registrar.

9. On the basis of aforesaid suspicious circumstances, learned counsel for the appellants argued that the Will in question was not proved and the contrary findings recorded by the Courts below are not sustainable. In support of his contentions, learned counsel for the appellants relied upon two judgments of the Hon"ble Supreme Court in [H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others](#), and [Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others](#).

10. On the other hand, learned counsel for the respondents submitted that the question as to whether the Will was duly executed by the testator or the same is surrounded by any suspicious circumstance, is a question of fact and both the Courts below have recorded a concurrent finding of fact in this regard that the Will was duly executed and is not surrounded by any suspicious circumstances. Learned counsel while referring to the decision of the Hon"ble Apex Court in *Kulwant Kaur and Ors. v. Gurdial Singh Mann and Ors.* (2001) 128 P.L.R. 492 submitted that in Regular Second Appeal, this Court has no jurisdiction to interfere with the finding of fact recorded by the Courts below. Learned counsel further submitted that the Will in question is a registered Will, therefore, it is always presumed to be genuine. The registration of the Will itself dispel all the suspicious circumstances, therefore, according to him, there is no substance in the appeal of the appellants.

11. After hearing the arguments of learned counsel for the parties and perusing the record of the case, I am of the opinion that the substantial question of law, as has been formulated by learned counsel for the appellants in his submissions, is involved in this appeal.

12. Before examining the facts and evidence available on record, it is necessary to explain the position of law regarding the nature and onus of the proof of the Will on the propounders, nature and manner in which the evidence is to be appreciated and duty of

the Court in this regard. The Hon"ble Supreme Court in H. Venkatachala Iyengar v. B.N. Thimmajamma and Ors. (supra) has laid down the following propositions in this regard, which have been followed by the Hon"ble Apex Court in Smt. Jaswant Kaur v. Smt. Amrit Kaur and Ors. (supra);-

1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a Will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an process of the Court and capable of giving evidence.

3. Unlike other documents, the Will speaks from the death of the testator and therefore the maker of the Will is never available for deposing as to the circumstances in which the will, came to be executed. This aspect introduces as element of solemnity in the decision of the question whether the document propounded is proved to be the last Will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the Will.

4. Cases in which the execution of the Will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the Will. That suspicion cannot be removed by the mere assertion of the propounder that the Will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the Will excite the suspicion of the Court, the propounder must remove all legitimate suspicions before the document can be accepted as the last Will of the testator.

5. It is in connection with Wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the, judicial conscience has been evolved. The test emphasises that in determining the question as to whether an instrument produced before the Court is the last Will of the testator, the Court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the Will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the Will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the Will may raise a doubt as to whether the testator was acting of his own free Will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

13. In the light of the aforesaid propositions, the evidence led by the plaintiffs in this case has to be examined. To prove the execution of the Will, the plaintiffs have examined only two witnesses namely Kamlesh Kumar (PW1) son of the deceased scribe and Ram Chand (PW2), attesting witness of the Will. Kamlesh Kumar only acknowledged the signatures of his deceased father on the Will as a scribe. He was not in a position to tell as to whether the Will was thumb marked by the testator after reading its contents and with his free Will or not. The statement of Ram Chand, in my opinion, does not establish the due execution of the Will. This witness himself, in his cross-examination has stated that at the time of execution of the Will, the testator was "Sadhu". If this part of his statement is accepted, then it appears that when the Will was executed, Sajjan Singh testator had already renounced the world, whereas the case of the plaintiffs is that at the time of execution of the Will, Sajjan Singh was very much residing in the village and about two or three months thereafter he renounced the world and became "Sadhu". Once Ram Chand one of the attesting witnesses, himself is stating that Sajjan Singh became "Sadhu" prior to the execution of the Will, then there appears to be contradiction in his statement and the stand taken by the plaintiffs. This contradiction creates doubt in the mind of the Court. This aspect of the matter has not been properly appreciated and taken into consideration by the Courts below.

14. The second aspect which does not satisfy the conscience of this Court, is the other part of the statement of Ram Chand (PW2), attesting witness of the Will, that signatures of the testator were taken by the Clerk of the Sub Registrar. This part of his statement further creates a suspicion in the mind of the Court. Though the Will is a registered one, but it is well settled as has been held by the Hon"ble Supreme Court in [Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another](#), that mere registration of the Will by itself will not be sufficient to dispel all the suspicious regarding it where suspicious exists, without submitting the evidence of registration.

15. There are other suspicious circumstances surrounding the Will which further create doubt in the mind of the Court about its genuineness. The reason for execution of the Will in favour of the plaintiffs was that the plaintiffs were serving the testator and he was happy with their services therefore, he decided to bequeath his property to them. The fact that the plaintiffs were serving the testator has not been established by any evidence available on the record. Rather, it has come on record that the testator before execution of the Will, had become a Sadhu. When he was Sadhu there was no question of rendering services to him by the plaintiffs. The other suspicious circumstances, surrounding the Will is that when the mutation of inheritance of Gajjan Singh was sanctioned in favour of the testator and his two sisters on 18.8.1968 testator of the Will

was present. This fact further establishes that the relations between Sajjan Singh and his sisters were not strain and there was no reason for excluding his sisters by Sajjan Singh from the inheritance of his property Further, it has also come on record that Chetan Singh, father of the plaintiffs, took active participation in the execution of the Will. He was one of the attesting witnesses of the Will. This fact also creates doubt in the mind of the Court about the genuineness of the Will.

16. From the aforesaid facts and circumstances, the conscience of the Court is not satisfied that the Will in question was executed by Sajjan Singh. The evidence produced by the plaintiffs, in my opinion, is not sufficient to dispel the aforesaid surrounding circumstances which create doubt in the mind of the Court. In the aforesaid facts and circumstances the plaintiffs, who are propounders of the Will, have totally failed to discharge the heavy onus upon them explaining the suspicious circumstances surrounding the execution of the Will and of establishing that the Will in question was the last Will of the testator.

17. In view of the aforesaid discussion, this appeal is allowed. The judgments and decree passed by the Courts below are set aside and the suit filed by the plaintiffs is hereby dismissed.

18. No order as to costs.