

**(2013) 08 P&H CK 0541**

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

**Case No:** Civil Revision No. 578 of 2013

Balbir Singh

APPELLANT

Vs

Avtar Singh and Others

RESPONDENT

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**Date of Decision:** Aug. 6, 2013

**Acts Referred:**

- Constitution of India, 1950 - Article 227
- Evidence Act, 1872 - Section 63

**Citation:** (2013) 172 PLR 599

**Hon'ble Judges:** L.N. Mittal, J

**Bench:** Single Bench

**Advocate:** Vikas Mehsempuri, for the Appellant; Vivek Rattan, Advocate, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

L.N. Mittal, J.

Balbir Singh defendant no. 1 has approached this Court by way of instant revision petition filed under Article 227 of the Constitution of India impugning order dated 5.1.2013 passed by learned trial court thereby dismissing application Annexure P/4 filed by the petitioner for secondary evidence of alleged Will dated 22.9.2001. Respondent no. 1-plaintiff Avtar Singh has filed suit claiming registered Will dated 6.12.2000 executed in favour of plaintiff and proforma defendant no. 8 by plaintiff's maternal grand father Bhagat Singh whereas defendant no. 1 petitioner who is son of Bhagat Singh has set up unregistered Will dated 22.9.2001 in his favour allegedly executed by Bhagat Singh.

2. In application Annexure P/4, defendant no. 1 alleged that the original Will dated 22.9.2001 was produced in mutation proceedings wherein statements of marginal witness and scribe thereof and also statements of defendants no. 1 to 7 were recorded by the revenue officer and the Will was retained by the revenue officer.

However, Office Kanungo, who was summoned with the record of the mutation, has stated that the Will is not available in the revenue record. Accordingly, defendant no. 1 prayed for permission to lead secondary evidence of the Will in question.

3. Plaintiff by filing reply Annexure P/5 opposed the application and denied the existence and loss of the alleged Will.

4. Learned trial court vide impugned order dated 5.1.2013 has dismissed the application Annexure P/4 filed by defendant no. 1 who has, therefore, filed this revision petition to assail the said order.

5. I have heard counsel for the parties and perused the case file.

6. Counsel for the petitioner contended that existence and loss of the alleged Will has been proved and therefore, petitioner should be permitted to lead secondary evidence thereof by way of oral account of contents of the Will to be given by the persons who have seen the Will.

7. On the other hand, counsel for respondent no. 1 - plaintiff contended that existence and loss of the alleged Will is not proved nor oral account thereof by way of secondary evidence can be permitted.

8. I have carefully considered the matter. Prima facie existence and loss of the Will is proved by mutation proceedings and statements recorded therein as well as statement of Office Kanungo and also statements of other witnesses that the Will had been retained by the revenue officer in mutation proceedings and is not now available. In view thereof, the petitioner is entitled to lead secondary evidence of the Will in question.

9. Clause (5) of section 63 of the Evidence Act specifically stipulates that secondary evidence includes oral accounts of the contents of a document given by some person who has himself seen it. Consequently, oral evidence is admissible as secondary evidence on satisfying the requirements of the aforesaid provision. However, I am making it expressly clear that I am not making any observation regarding the validity of the evidence to be led or the probative value thereof.

10. Resultantly, I find that the petitioner has made out sufficient ground for permission to lead secondary evidence of the Will in question. Impugned order of the trial court suffers from illegality and jurisdictional error. Resultantly, the instant revision petition is allowed. Impugned order passed by the trial court is set aside. Application Annexure P/4 filed by defendant no. 1 petitioner for secondary evidence of Will dated 22.9.2001 is allowed subject to all just exceptions and petitioner is permitted to lead secondary evidence of the Will in question in accordance with law. Petitioner has not deposited the cost amount of Rs. 1000/- with the Registry pursuant to order dated 4.7.2013. The petitioner is directed to deposit the same within two weeks failing which the revision petition shall be deemed to have been dismissed.