

(2000) 11 P&H CK 0246

High Court Of Punjab And Haryana At Chandigarh**Case No:** Regular Second Appeal No. 727 of 1992

Jai Singh

APPELLANT

Vs

Bhim Singh

RESPONDENT

Date of Decision: Nov. 30, 2000**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 100
- Evidence Act, 1872 - Section 68

Citation: (2001) 4 RCR(Civil) 388**Hon'ble Judges:** V.K. Jhanji, J**Bench:** Single Bench**Advocate:** S.C. Kapoor, Ashish Kapoor, Pradeep Kapoor and Pankaj Midha, for the Appellant; R.S. Mittal and Sudhir Mittal, for the Respondent**Final Decision:** Allowed

Judgement

V.K. Jhanji, J.

This is plaintiffs" second appeal directed against the judgment and decree passed by the learned Additional District Judge, Rohtak whereby on first appeal preferred by the 2nd defendant, judgment and decree of the trial Court decreeing the suit of the plaintiff, has been set aside and as a consequence thereof suit of the plaintiff dismissed.

2. In brief, the facts are that one Thandi Ram was the owner of the plot in dispute which he had purchased vide sale deed dated 25.10.1962. Thandi Ram died in the year 1965 leaving behind sons, namely, Naurang, Bhim Singh, Daryao Singh and Sube Singh. Naurang died on 11.11.1966 leaving behind son Jai Singh and widow Dhanpati (plaintiffs No. 1 and 2 respectively). Plaintiffs being the son of widow of deceased son of Thandi Ram, filed suit for possession by way of partition in regard to the plot in dispute claiming to be the owners of 1/4th share. They contended that the plaintiffs and defendants are joint owners in possession of the plot and there

being dispute in regard to the use of the plot between the plaintiffs and the defendants, they are entitled to get the same settled by getting the plot partitioned. Upon notice of the suit, defendants 2 and 3 contested the claim of plaintiffs and inter-alia pleaded that Thandi Ram used to reside with defendant No. 2, namely, Daryao Singh and as a result of services rendered by him, Thandi Ram executed Will dated 25.9.1963 in his favour. Defendants contended that the plaintiffs have no right title or interest in the plot in dispute. Defendant No. 1 namely, Bhim Singh son of Thandi Ram admitted the claim of the plaintiffs and submitted that the plot in dispute be partitioned in accordance with the shares of the parties. Plaintiffs, in their replication, reiterated the stand taken by them in the plaint and denied the execution of the Will in favour of Daryao Singh, defendant No. 2.

3. On the basis of the pleadings of the parties, trial Court framed the following issues :-

1. Whether the plaintiff is entitled for the decree for possession by way of partition on the grounds mentioned in the plaint ? OPP

1-A. Whether the deceased Thandi Ram executed Will on 25.9.1963 regarding the plot in suit in favour of defendant No. 2. If so, its effect ? OPD

2. Whether the suit has not been properly stamped. If so, to what effect ? OPD

3. Whether the suit is not maintainable in present form ? OPD

4. Relief.

4. Trial Court, on appreciation of evidence adduced by the parties to the suit, decided the issue in regard to execution of Will dated 25.9.1963 against the defendants and held the same to be a suspicious document. Resultantly, trial Court decreed the suit of the plaintiffs. 2nd defendant being aggrieved of the decree of the trial Court preferred first appeal before the Additional District Judge, Rohtak. Vide impugned judgment and decree, the learned Additional District Judge, Rohtak set aside the finding of the trial Court on Issue No. 1-A and held the Will to be a valid document. As a consequence thereof, suit of the plaintiffs has been dismissed. Hence this second appeal by the plaintiffs.

5. Learned counsel appearing on behalf of plaintiffs has contended that the first appellate Court has committed a grave error in accepting the Will to be genuine. Counsel read in extenso the evidence led by the parties to the suit in regard to execution of the Will. He contended that from a reading of the evidence, it is clear that the Will allegedly executed in favour of 2nd defendant by Thandi Ram is a suspicious document and the trial Court rightly held so. Against this, learned counsel appearing on behalf of contesting defendants contended that the first appellate Court has correctly appreciated the evidence in regard to execution of the Will and it is not a suspicious document as contended by the counsel for the plaintiffs.

6. After hearing the learned counsel for the parties and on going through the record and the various judgments cited by the counsel regarding proof of Will. I am of the view that the judgment and decree of the first Appellate Court is not sustainable in law. The principle laid down in the various judgments cited by the counsel for the parties regarding the proof of the Will is that a Will is one of the most solemn document known to law. The executant of the Will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the court to establish genuineness and authenticity of the Will. In [Kalyan Singh Vs. Smt. Chhoti and Others](#), their Lordships of the Supreme Court have stated that the factum of execution and validity of the Will cannot be determined merely by considering the evidence produced by the propounder. In order to judge the credibility of witnesses and disengage the truth from falsehood the court is not confined only to their testimony and demeanour. It would be open to the court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the Court to look into surrounding circumstances as well as inherent improbabilities of the case to reach a proper conclusion on the nature of the evidence adduced by the party.

7. In the present case, undoubtedly the contesting defendants have been able to prove execution of the Will as required u/s 68 of the Evidence Act by examining D W-1, Jugti Ram, scribe of the will, DW-6; Devi Singh son of Hardam Singh, one of the attesting witnesses of the Will and DW-10, Yash Pal Jain, handwriting and finger expert, besides 2nd defendant giving his statement as DW-7, but in my view the execution of the Will has not been proved to be free from suspicious circumstances. The Will in question is an un-registered document and has not been scribed by any deed-writer. It is alleged to have been scribed by DW-1, Jugti Ram. DW-1 Jugti Ram conceded in his cross-examination that he is having family relations with Daryao Singh since 1951, DW-6, Devi Singh, the only attesting witness examined did not disclose his relationship with 2nd defendant Daryao Singh in his examination-in-chief but in cross-examination, he conceded that his wife and the wife of Daryao Singh are real sisters. Both these witnesses are interested witnesses, Jugti Ram having family relations with 2nd defendant, Daryao Singh since 1951 and Devi Singh being closely related to Daryao Singh. Thandi Ram was an ex-sarpanch and admittedly, at the time of alleged execution of Will, was ailing and was not in a position to move about. No evidence has been led by the contesting defendants to explain that in such a situation why did he choose to get the Will scribed at Rohtak and that too from D W-1, Jugti Ram who was not a petition-writer. One cannot lose sight of the fact that at Rohtak, the services of regular/licensed petition writers were easily available, being the district head-quarters. There is also no explanation as to why the second attesting witness, namely, Prahbu son of Shakti was not examined. It is true that u/s 68 of the Evidence Act, it is not incumbent upon a party who wants to prove the Will, to call all the attesting witnesses to prove a will but where the only

attesting witness is found to be an interested witness being closely related to the beneficiary under the Will, then it is expected that at least one independent person who is not related to the person in whose favour the property is bequeathed, should be examined to dispel the suspicious circumstances surrounding the execution of the Will. I am further of the view that the first appellate Court committed a grave error in accepting the statement of DW-10, Yash Pal Jain, hand-writing and finger expert and his report, Ex. DW-10/1. The Will is in Urdu script whereas the hand-writing expert in his cross-examination admitted that he is not conversant with Urdu script. He conceded that he cannot read and understand Urdu as he has never studied Urdu. The statement of such an expert cannot be relied upon for proving the signatures of the testator on the Will. The only reason given in the Will for giving plot to 2nd defendant, Daryao Singh, is that the testator had not given ornaments to him at the time of his marriage whereas the same were given to the wives of other sons at the time of their marriage. No evidence has been led by Daryao Singh that what was given to the wives of his other brothers, which was not given to him at the time of his marriage. In absence of evidence in this regard, the reason so given in the Will cannot be accepted. Daryao Singh was employed as a Clerk in Government School and was required to submit property statement every year. He conceded that he had not shown the plot in question in his property statement which he had submitted to the school. Learned Additional District Judge is not right in observing that the mere fact that he had not shown the plot in his property statement, cannot be taken to be a suspicious circumstance. Onus was on the contesting defendants to dispel all the suspicious circumstances by bringing satisfactory material on record, but to my mind they have failed to do so. They have also not been able to explain why the Will did not see the light of the day for almost 19 years. Will is alleged to have been executed in 1963 and Thandi Ram died in the year 1965, but the existence of the Will was mentioned for the first time in the written statement filed 23.12.1982. There is also no explanation why it was not produced before the Municipal authorities for getting the mutation sanctioned. The cumulative effect of the suspicious circumstances, as noticed above, is that the Will set up by defendant Daryao Singh is not a valid document and cannot be given effect to.

8. Faced with this situation, learned counsel for contesting defendants contended that the findings of the first appellate Court that the Will is genuine being a finding of fact should not be interfered with. It is true that normally this Court in second appeal does not interfere with the finding of fact recorded by the first appellate Court but when the first appellate Court has not considered about the proper execution of the Will, the Court in second appeal is entitled to consider the evidence and come to the conclusion whether the execution has been properly proved, it is not a re appreciation of evidence but the Court is only finding out whether the conclusion arrived at on the available evidence is legal and correct. Present one is a case of such a type.

For the reasons recorded above, the appeal is allowed, judgment and decree of the first appellate Court is set aside and that of the trial Court is restored, with no order as to costs.

9. Appeal allowed.