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**(2014) 07 P&H CK 0572**

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

**Case No:** RSA No. 2405 of 2013(O&M)

Gurmail Singh

APPELLANT

Vs

Ajmer Singh

RESPONDENT

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**Date of Decision:** July 21, 2014

**Acts Referred:**

- Evidence Act, 1872 - Section 65

**Hon'ble Judges:** Rakesh Garg, J

**Bench:** Single Bench

**Advocate:** Naresh Kaushal, Advocate for the Appellant

**Final Decision:** Dismissed

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### **Judgement**

Rakesh Garg, J.

This is plaintiff's second appeal challenging the judgments and decrees of the Courts below whereby his suit for declaration to the effect that he is owner in possession of the suit property on the basis of registered Will dated 21.12.1998 was dismissed.

2. As per averments made in suit, one Ramji Dass was the owner of the suit property who expired on 21.07.2000. The parties to the suit are the sons, widow and daughters of aforesaid Ramji Dass. According to the plaintiff-appellant, he used to serve said Ramji Dass during his life time and due to the services rendered by him and his family members, Ramji Dass executed a registered Will dated 21.12.1998 in his favour. The defendants never served Ramji Dass. The said Ramji Dass, who was dragged into unnecessary litigation by the defendants, disinherited them by giving a news in daily "Ajit" newspaper on 15.08.1998. In fact, the appellant was also appointed a special attorney of Ramji Dass in partition proceedings. It is the further case of the appellant that the defendants in connivance with revenue authorities got sanctioned the mutation of inheritance of Ramji Dass on the basis of natural succession whereas the mutation was to be sanctioned on the basis of Will dated

21.12.1998 in his favour and thus, mutation Nos. 206 and 482 with regard to the suit property were illegal and liable to be set aside. Since the defendants refused to admit his claim, he had filed the instant suit.

3. The defendants contested the suit by filing written statement raising various preliminary objections. On merits, it was submitted that Ramji Dass was being looked after by them during his life time and he never executed any Will dated 21.12.1998 as alleged by the plaintiff-appellant. The said Will was forged and fabricated. Ramji Dass was having equal love and affection for all of his legal heirs and the plaintiff-appellant has put up a false and concocted story. Remaining averments of the plaint were denied specifically and dismissal of the suit was prayed.

4. In response to the written statement, replication was filed by the plaintiff wherein all the averments of the written statement were denied while that of the plaint were reiterated.

5. From the pleadings of the parties, the following issues were framed by the trial Court-

1. Whether Ramji Dass executed a registered Will dated 21.12.1998 in favour of the plaintiff ?OPP

2. Whether the plaintiff is entitled to the declaration, as prayed for ?OPP

3. Whether the plaintiff is entitled to the permanent injunction as prayed for ?OPP

4. Whether the suit is not maintainable ?OPD

5. Whether the plaintiff has no locus standi to file the present suit ?OPD

6. Whether the plaintiff has no cause of action to file the present suit ?OPD

7. Relief

6. After considering various pleas by both the parties and the evidence on record, the trial Court dismissed the suit. While dismissing the suit which was on the basis of the Will, the trial Court observed as under:-

12. After going through the discussion above even I am of the view that the learned counsel for the defendant has rightly stated that the plaintiff was required to establish that the testator has signed the will in the presence of two witnesses and the attesting witnesses have signed the same in the presence of each other, at least one attesting witness is required to be examined for the purpose of proving the execution of the will and moreover, it is required to be shown that the will has been signed by the testator with his free will and that at the relevant time he was in sound disposing state of mind and the testator was understanding the nature and impact of disposition. In my view the plaintiff has failed to prove on record and he has failed to examine one of the attesting witness who should have fully corroborated the

version of the plaintiff. The attesting witness appeared as PW-5 can said to be a shaky witness and his statement cannot be relied upon. However, PW-1, PW-2 and PW-3 have been examined who were the official witnesses and who have proved entries regarding the will in question only and thus their testimony is not relevant for proving the Will as the legal requirement for proving the execution of Will has not been fulfilled as per the Indian Evidence Act. The learned counsel for the plaintiff has further argued that while executing the will the propounder of the will has fully explained that why he has disinherited his sons and why he has not given any property to the daughters, but even then I am of the view that the legal requirement to prove the will has not been proved on record. It was the duty of the plaintiff to examine at least one attesting witness who should have fully support the plaintiff version, but PW5 is giving the inconsistent statement and even he is stating that Ramji Dass was in drunkard condition at that point of time. However, he is giving the name of Kewal Singh other attesting witness, but that is not sufficient to prove the execution of the will. However, the learned counsel for the plaintiff has relied upon citation reported in 2010 (4) C.C.C. Page 326 wherein it has been held that-

Will-Execution-Proof-One attesting witness examined to prove the Will who deposed that other witness also signed the document though not in the presence of testator-Held, it by implication and inference shows the attestation by other witness also.

13. But this authority is not applicable to the present facts in hand because, in the case in hand one attesting witness was examined as PW5 to prove the will but even that attesting witness was giving the cloudy picture regarding execution of the Will. The authority as cited above is applicable only in those circumstances where one attesting witness will appear before the Court and he will fully support the plaintiff version and only then the statement of attesting witness who deposed that other witness also signed the document though not in the presence of testator will be admitted. The learned counsel for the plaintiff has relied upon 2011 (1) C.C.C. 222 (S.C.). The authorities cited above are not applicable to the present facts in hand as the question involved in the present case is that the legal requirement of section 65 of Indian Evidence Act is not fully complied with. The question of construction of will and interpretation of the Will come later on. First of all it has to be proved by the plaintiff that the will executed by testator is genuine and valid one and all the legal requirements have to be fully complied with, but in the present case, the construction of will and the interpretation of the Will is not in question. The simple question is that no attesting witness has fully supported the case of the plaintiff and no one has stated in clear terms that the testator had executed the will in favour of the plaintiff in free state of mind and in sound disposing mind. The attesting witness appearing as PW5 is stating that the propounder of the will was in a drunkard condition and moreover PW5 who is an attesting witness is saying in the chief examination that he has not remembered whether he put his signatures on the back side of the will or not and even PW5 is stating that Ramji Dass told him that he

is going to execute the will in favour of all of his sons. The publication, if any, has not been proved on record by the plaintiff disinheriting the other legal heirs. Hence, under these circumstances I am of the view that the plaintiff has failed to prove on record the due execution of the Will in his favour. Hence, the present issue goes against the plaintiff.

7. Feeling aggrieved from the aforesaid judgment and decree of the trial Court, the plaintiff filed an appeal before the Lower Appellate Court and the same was also dismissed vide impugned judgment and decree dated 11.8.2012 observing as under:-

13. So far as the execution of Will is concerned, the plaintiff/appellant has sought to prove the same through the testimony of PW5 Gurmit Singh who is an attesting witness of the impugned Will. It is pertinent to mention here that the plaintiff/appellant has not examined the other witness Kewal Singh, Nambardar in the trial Court. Since the whole of the case of the plaintiff/appellant is based upon the impugned Will and the only witnesses which has been examined as PW5, therefore, the testimony of this witness is liable to be minutely scrutinized for arriving at a just decision. This witness has categorically stated in his examination-in-chief that Ramji Dass did not execute any document/instrument in his presence. This opening line of the examination-in-chief of this witness has totally smashed the case of the plaintiff/appellant regarding execution of any Will. The matter does not end here, this witness has gone to the extent of stating that the Will had already been prepared and Ramji Dass had asked him to sign on the same by telling that he had executed a Will in favour of his children. The witness has though identified his signatures on the Will, but at the same time he has stated that the Deed Writer did not read over and explained the contents of the Will to him. Mere identification of his signatures on the impugned Will would be of no consequence as the main ingredients of execution of the Will in his presence are not narrated by this witness. He has also stated that the other witness Kewal Singh Lambardar also happened to come at the spot. These reevaluations made by the plaintiffs own witness would show that even Kewal Singh, Lambardar had come after the Will was already prepared. In-fact, this witness has not stated anywhere that he Will was scribed at the instructions of Ramji Dass testator and the same was read over to him who after admitting the contents of the same appended his thumb impression upon it in the presence of the marginal witnesses who also appended their signatures on the said Will in the presence of the testator. When these requirements of law to prove execution of the Will are neither narrated by the witness nor can be inferred from his testimony then apparently the plaintiff/appellant has failed to prove execution of the Will on record.

14. There is another aspect of the present case. It is settled law before the impugned Will is accepted to be the last and genuine Will of the testator the propounder thereof is duty bound to shed away all the suspicious circumstances

surrounding the execution of the Will. As discussed above, the exaction of the Will has not been established on record. The suspicious circumstances which have come on record in the testimony of PW5 are that it has been admitted by this witness that Gurnmail Singh was accompanying Ramji Dass on the day of execution of the Will. He has also stated that Ramji Das testator was in a drunkard condition on the said date but is not sure as to whether it was Gurmail Singh, who was instrumental in making Ramji Dass drunk. If these two circumstances are collectively viewed and the circumstances that all the other legal heirs have been disinherited by the testator and the impugned Will is in favour of only Gurmail Singh, who was accompanying the testator on the date of execution a dense cloud of suspicious circumstances is surely surrounded the execution of the Will in question. In such situation, it was incumbent upon the plaintiff/appellant to lead some rebuttal evidence to shed these suspicious circumstances. Needless to say that he could examined Kewal Singh, Lambardar in his rebuttal evidence to prove that testator was not in a drunkard condition or that he was not being accompanied by Gurmail Singh, plaintiff/appellant. However, no such effort has been made by the plaintiff/appellant in the trial Court. Therefore, these suspicious circumstances have remained unexplained on record. It goes without saying that the plaintiff/appellant had not even urged the trial court to declare Gurmit Singh PW5 as a hostile witness as apparently this witness hasn't been supported his case on execution of will. Consequently when it is stated by PW5 that testator had told him that he had executed a Will in favour of his children then apparently the plaintiff/appellant who was accompanying him on that day had kept him in dark about the beneficiaries. This court cannot ignore the fact that as per PW5 the Deed Writer had not read over the Will to the testator. Therefore, the Will in question could not come clean out of the above mentioned suspicious circumstances.

15. Further, it is a settled law that when the beneficiary of the Will takes an active part in execution of the Will that itself would cast a cloud of suspicion regarding free and voluntary execution of the same. This circumstance has also not been explained by the plaintiff/appellant. Therefore, even if viewed from any angle the execution of the impugned Will is not established on record. Resultantly, when the execution itself is not proved on record then the mere registration of this document as sought to be proved through the testimony of PW1 and PW2 would be of no consequent. Needless to say that law hardly recognizes any difference between a registered and an unregistered Will the same being not a compulsorily registrable document.

8. Still not satisfied, the plaintiff has filed the instant appeal submitting that the following substantial questions of law arise in this appeal:-

(I) Whether the impugned judgments and decrees of the learned courts below are result of believing of untrustworthy evidence on the record of the case?

II) Whether the findings recorded are result of misreading of the material evidence on the record of the case?

(III) Whether the learned courts below are in any way justify in dismissing the suit especially when, voluminous evidence in the form of oral as well as documentary, have come on record to prove the genuineness of the registered Will Ex. P-3?

(IV) Whether the learned courts below have legally erred in totally ignoring the voluminous corroborating evidence on the record of the case, proving the case of the plaintiff and falsifying the stand taken by defendants?

(V) Whether the learned courts below have misinterpreted and mis-construed oral as well as documentary evidence on the record of the case?

9. I have heard learned counsel of the appellant and perused the impugned judgments and decrees of the Courts below.

10. The appellant has set up his title over the suit property on the basis of a registered Will dated 21.12.1998 allegedly executed by Ramji Dass, who was the owner of the suit property and father of plaintiff as well as defendants No. 1, 2, 4 & 5 and husband of defendant No. 3.

11. Both the Courts below on appreciation of the evidence have found that execution of the Will has not been duly proved. The onus to prove the aforesaid Will was upon the appellant. The Will was attested by the witnesses, namely, Gurmit Singh and Kewal Singh. However, the appellant has produced Gurmit Singh as PW-5 to prove the Will in question and has not examined the other witness Kewal Singh, Lambardar. While discarding the Will, the Courts below have noticed the fact that the aforesaid witness, namely, PW5 Gurmit Singh has categorically stated to the effect that Ramji Dass did not execute any document/instrument in his presence. The matter does not end here. The aforesaid witness has gone to the extent of stating that the Will had already been prepared and Ramji Dass had asked him to sign on the same telling him that he has executed the Will in favour of his children. The witness though has identified his signatures on the Will but has further stated that the scribe/deed writer had not read over and explained the contents of the Will to him. According to the aforesaid witness, the other witness, namely, Kewal Singh, Lambardar happened to come at the spot meaning thereby that he had come only after preparation of the Will. The statement of Gurmit Singh PW-5 also does not mention that the Will was scribed at the instructions of Ramji Dass testator and the same was read over to him who after admitting the contents of the same appended his thumb impression upon it in the presence of marginal witnesses and they also appended their signatures on the said Will in the presence of the testator.

12. In view of the aforesaid observations, the requirement of law to prove execution of the Will cannot be inferred from the testimony of PW-5 Gurmit Singh. Not only this, the Courts below have further found that the beneficiary of the Will has taken active part in the execution of the Will as PW-5 admitted that Gurmail Singh was accompanying Ramji Dass on the date of execution of the Will. The said witness has also stated that Ramji Dass testator was in a drunkard condition on the said date.

Therefore, even if viewed from this angle, the Will in question is not free from suspicious circumstances. Simply because the Will is registered in favour of the appellant, it makes no difference as the same is not a compulsorily registrable document.

13. In view of the concurrent findings recorded by the Courts below and in the absence of compliance of provisions of Indian Succession Act as required to prove the execution of the Will, this Court is of the view that no question of law, much less substantial, arises in this appeal.

14. No other argument was raised.

15. Dismissed.