

(1979) 11 P&H CK 0056

In the Punjab And Haryana At Chandigarh

Case No : Letter Patent Appeal No. 153 of 1976

Phool Chand

APPELLANT

Vs

Amrit Lal

RESPONDENT

Date of Decision : 09-11-1979

Acts Referred:

East Punjab Urban Rent Restriction Act, 1949 — Section 13
Evidence Act, 1872 — Section 33

Citation : AIR 1980 P&H 122

Hon'ble Judges : S.S. Sandhawalia, C.J;G.C. Mital, J

Bench : Division Bench

Judgement

Gokal Chand Mital, J.—In order to appreciate the facts of this case, the following pedigree-table deserves to be noticed:--

KALU RAM _____|_____

| |

Bipat Ram Jhauo Ram

| |

Kanhya Lal Duni Chand

(died in 1967) |

| Amrit Lal

Tara Chand (plaintiff)

(died in 1947)

=Padma Wati

Kanhaya Lal owned a house in Ferozopore Cantt. and is alleged to have made will dated 15th August, 1966, in favour of Phool Chand, his wives" brother, as his only

son Tara Chand had died long before in the year 1947 and his two wives, who were sisters, had also predeceased him. Kanhaya Lal died on 22nd of February, 1967.

2. Phool Chand, legatee from Kanhaya Lal filed a petition for ejectment under S. 13 of the East Punjab Urban Rent Restriction Act, 1949, on 1st June, 1971, against Amrit Lal, grandson of father's brother of Kanhaya Lal, from a portion of the house which he was occupying. When Amrit Lal came to know of the ejectment petition, he filed a suit on 10th of February 1972, against Phool Chand for a declaration that he was owner in possession of the house and denied the tenancy as also the will set up by Phool Chand and claimed a permanent injunction against him not to interfere in his possession. It is not disputed that Phool Chand was in possession of no part of the house whereas Amrit Lal was in possession of a part of the house. Phool Chand contested the suit and set up the will dated 15th Aug. 1966, and claimed ownership of the house thereunder. The trial Court by judgment and decree dated 8th March, 1973, dismissed the suit which was maintained by the first appellate Court on 24th of Dec. 1973, and on second appeal by Amrit Lal to this Court, a learned single Judge allowed his appeal on 27th of October, 1975, and granted him a decree that his title over the house is good against Phool Chand except the true owner and further granted him a decree for perpetual injunction restraining Phool Chand from interfering with his possession over the house. While allowing the appeal, the learned single Judge found that the execution of the will set up by Phool Chand was not proved as none of the attesting witnesses nor the scribe thereof was produced to prove the same. In fact, the learned single Judge came to the conclusion that there was no evidence to prove the execution of the will. It was further held that the will was surrounded by suspicious circumstances as the same was alleged to have been executed at Ferozepore Cantt where regular petition writers were available, it was unregistered and did not see the light of the day for over four years till late 1970, when it was set up in a suit against Smt. Padma Wati widow of the predeceased son of Kanhaya Lal. It was also found that Amrit Lal was proved to be the first cousin's son of Kanhaya Lal. It was further found that since Amrit Lal was in possession of part of the house, he was entitled to a declaration and injunction on the basis of possessory title which deserved to be protected against the whole world except the true owner.

3. Feeling dissatisfied with the decision of the learned single Judge Phool Chand defendant has come up in Letters Patent appeal with leave of the learned Single Judge.

4. One of the main points which came up for consideration before the Courts below was whether the execution of the will dated 15th of Aug. 1966, was proved in this case or not. No attesting witness of the will nor its scribe was produced in this case, as they had died by the time they were to be examined. However Phool Chand produced a certified copy of the statement of Locan Chand, one of the attesting witnesses, as Exhibit D-1 who was examined P.W. 2 in the Court of

Shri R. S. Sharma, Subordinate Judge 1st Class, Ferozepore, in Civil Suit No. 122 of 1972--Phool Chand v. Smt. Padma Wati, which was duly proved by the Reader of the Court. Besides the above, Phool Chand produced Dharam Singh D.W. 4, son of Thakar Singh scribe, who proved the signatures of his father on the will. Both the sides also examined handwriting experts. The expert produced by Phool Chand stated that the signatures on the will were of Kanhaya Lal whereas the expert produced by Amrit Lal stated that the signatures of Ranhaya Lal on the will did not tally with his admitted signatures. The first two Courts accepted the document Exhibit D-1, the previous statement of Locan Chand, attesting witness, to be legal evidence u/s 33 of the Evidence Act and on its basis held the will to be duly proved whereas the learned single Judge held that the ingredients of the proviso to Section 33 of the Evidence Act were not complied with and, therefore, it was inadmissible in evidence.

5. To prove the due execution of the will, counsel for the appellant has stated that the previous statement of Locan Chand attesting witness, contained in Exhibit D-1, was admissible in evidence u/s 33 of the Evidence Act and all the ingredients were proved and the learned single Judge was in error in rejecting this document. In order to appreciate the argument, Section 33 of the Evidence Act deserves to be noticed which is in the following terms:--

"33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.

Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party or its presence cannot be obtained without any amount of delay or expense which under the circumstances of the case, the Court considers unreasonable:--

Provided that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation--A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

A reading of the above section shows that the previous statement of Locan Chand would have been relevant in this case if the ingredients of the proviso were complied with. Those ingredients are-

i--that" the earlier proceedings were between the same parties or their predecessor-in-interest;

ii--that the adverse party in the first proceeding had the right and opportunity to cross-examine; and

iii--that the question in issue was substantially the same in the first the second proceeding.

6. In order to find out whether the, aforesaid three ingredients can be said to be satisfied in this case the history of the previous litigation deserves to be noticed. Phool Chand filed a suit on 10th of July, 1970, against Smt. Padma Wati alone, who admittedly was in Meerut and was in occupation of no part of the house. The basis of that suit was the will in favour of Phool Chand. Smt. Padma Wati did not appear to contest the suit and after ex parte evidence, the same was decreed on 25th of December, 1970, vide Exhibit D-9. In those proceedings, Locon Chand was examined as an attesting witness of the will to prove the same, which statement is now being sought to be produced as the sole evidence to prove the will

7. The aforesaid facts clearly show that the two suits are not between the same parties. The question which: will arise for consideration is whether Amrit Lal can be said to be representative-in-interest of Smt. Padma Wati and if the answer is in affirmative, then the first ingredient will be satisfied, otherwise not. On the facts of the case, it is dear that Phool Chand is wanting to get the house am the basis of the will, Amrit Lal is wanting to inherit the house as first cousin"s son of Kanhaya Lal as also on the basis of possessory title and Smt. Padma Wati, although was involved in a suit by Phool Chand, has not come forward in any of the two proceedings to lay claim to the house. In any event, her claim would be based on succession as widow of a predeceased son. In this manner, the claim of all the three parties would be mutually exclusive, inconsistent and antagonistic to the interest of each other. Therefore, unless Amrit Lal is representative-in-interest of Smt. Padma Wati, the first condition would not be satisfied and from the aforesaid facts, it is amply clear that the interest of Amrit Lal is wholly opposed to the interest of Smt. Padma Wati and, therefore, he cannot be called to be representative-in-interest and in this view of the matter, we are firmly of the view that the first" ingredient of the proviso to Section 33 of the Evidence Act is not fulfilled

8. Even the second condition of opportunity to Smt. Padma Wati to cross-examine the attesting witness, in the first proceeding has not been proved in this case as Phool Chand has not proved in these proceedings that Smt. Padma Wati was duly served and the ex parte proceedings were well-based. Once the two ingredients of the proviso to Section 33 of the Evidence Act or any one of them is not satisfied, the previous statement of Locan Chand would not be admissible in evidence and the learned single Judge was right in rejecting the same.

9. Shri Roop Chand Chaudhry, appearing for the appellant, urged that Amrit Lal

would be a representative-in-interest of Smt. Padma Wati in view of AIR 1933 202 (Privy Council) and Karri Venkata Narasayamma v. Pentapati Venkata Rattamma AIR 1957 AP 378, as both are interested in disputing the will set up by Phool Chand. We find no merit in the argument which is negated on a plain reading of the aforesaid two decisions which, on the facts of this case, clearly go against" the contention raised. The relevant portion from the judgment of the Privy Council may be reproduced below:--

"The person who is called by Proviso (1) a representative in interest" of another is a person who was a party to the first proceedings. Whatever may have been the intention of those who framed the section, the first proviso exactly inverts the requirements of the English law, which requires that the parties to the second proceeding, should legally represent the parties to the first proceeding, or be their privies in estate. The first proviso requires that the party to the first proceeding should have represented in interest the party to the second proceeding in relation to the question in issue in the first proceeding to which "the facts which the evidence states" were relevant. It covers not only cases of privity in estate and succession of title, but also cases where both the following conditions exist, viz. (1) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical".

The view which the learned single Judge took and which is now affirmed by us is further supported by AIR 1930 79 (Privy Council); *Doctor Manavala Ayyar Vs. Muhammad Yoosaf Maracair* (since deceased) and *Others*, ; *Raj Mangal Misir v. Mathura Dubein* ILR (1916) All 1 and *Poonam Chand v. Moti Lal* AIR 1955 Raj 179.

10. For the reasons recorded above, we are firmly of the view that Exhibit D-1, the previous statement of Locan Chand, the attesting witness, is not covered by the proviso to Section 33 of the Evidence Act and cannot be looked into in evidence. Since there is no material on the record in support of the due execution of the will, we find no reason to differ from the finding of the learned single Judge.

11. The finding of the learned Single Judge that the will did not see the light of the day for four years and was unregistered and not scribed by a regular petition writer also throws doubt on the genuineness of the will, which doubts have not been cleared by Phool Chand, the propounder of the will. Accordingly, we also affirm the finding of the learned Single Judge that the will is not a genuine document.

12. Once Phool Chand is not proved to be the owner of the house under the will, the next question that arises for consideration is whether Amrit Lal could succeed in his suit without proving his title to the property. Chaudhary Roop Chand has

argued that a plaintiff cannot succeed on the weakness of the defendant and even if the defendant is not proved to be the owner under the will, since the plaintiff has failed to prove his ownership, the suit deserves to be dismissed. He has submitted that the learned single Judge has only found that Amrit Lal is proved to be first cousin's son of Kanhaya Lal and not his next heir in the presence of Smt Padma Wati, predeceased son's wife, and, therefore, in spite of his being a relation of Kanhaya Lal, he is not owner of the house and therefore, on the finding of the learned single Judge alone, the suit could not be decreed. It is not disputed that Amrit Lal is in possession of part of the house in dispute and it is further not disputed that he was in occupation thereof even during the lifetime of Kanhaya Lal. In this view of the matter, once Amrit Lal is found to be in occupation of part of the house, then he is entitled to seek a declaration of possessory title as good against the whole world including Phool Chand, except the true owner and also for a perpetual injunction restraining him from interfering with his possession by filing a petition for ejectment under the East Punjab Urban Rent Restriction Act due to the filing of which Amrit Lal had to file the present suit. We find that the learned single Judge was right in granting a decree to Amrit Lal on the aforesaid facts on the basis of Section 110 of the Evidence Act and *Nizam-Ud-Din v. Naranjan Das* AIR 1927 Lah 841 *Ismail Ariff v. Mahomed Ghous* ILR 20 Cal 834 and *Abdul Hamid Saribuland Khan* 78 Pun Re. 1908.

13. For the reasons recorded above, we find no merit in this appeal which is dismissed but on the peculiar facts of this case we leave the parties to bear their own costs.

S.S. Sandhawalia, C.J.

I agree.

14. Appeal dismissed.