
(1996) 04 P&H CK 0023

In the Punjab And Haryana At Chandigarh

Case No : Letters Patent Appeal No. 216 of 1993 in R.F.A. No. 254 of 1979

Sh. Harbans Singh

APPELLANT

Vs

Hardayal Singh and Others

RESPONDENT

Date of Decision : 19-04-1996

Acts Referred:

Evidence Act, 1872 — Section 67, 68
Succession Act, 1925 — Section 278, 63

Citation : (1996) 2 CivCC 401 : (1996) 113 PLR 544 : (1996) 3 RCR(Civil) 532

Hon'ble Judges : R.P. Sethi, Acting C.J.; S.S. Nijjar, J

Bench : Division Bench

Advocate : Ashok Aggarwal and Rajinder Goyal, for the Appellant; Harbhagwan Singh and J.S. Yadav, for the Respondent

Final Decision : Dismissed

Judgement

R.P. Sethi, Acting C.J.—The will dated 3.12.1974 executed by Sultan Singh, the predecessor-in-interest of the parties, was the subject matter of a suit filed by the respondent/plaintiffs in the court of Sub-Judge Ist Class, Zira which was dismissed vide judgment and decree of the trial Court dated 24.10.1978. The appeal preferred by the plaintiffs was allowed by the learned Single Judge vide judgment impugned in this appeal. It is submitted that the judgment of the learned Single Judge is against law and facts and thus liable to be quashed.

2. The Facts giving rise to the filing of the present appeal are that the plaintiff/respondents, namely, Hardial Singh and others filed a suit for possession of land measuring 269 kanals 5 marlas situated in village Pandori Arian Tehsil Zira on the basis of their title claimed through Sultan Singh son of Ganda Singh. A further declaration was sought for the plaintiffs' entitlement to the payment of an amount of about Rs. 50,000/- lying in deposit in Post Office and Central Bank of India, Dharampur. The land in dispute was admittedly in the ownership of Sultan Singh. The plaintiffs claimed to be the 4th decree collaterals of Sultan Singh. The defendants were alleged to have got the land mutated in their favour on the

basis of the Will, the subject matter of dispute between the parties. It was alleged that even if the Will was proved to have been executed, the same was false and fictitious and Procured under suspicious circumstances. The claim of the plaintiffs was also resisted on the ground that they were not in any way related to Sultan Singh and the will executed by said Sultan Singh was stated to have been validly executed on 3.12.1974.

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

1. Whether the plaintiffs are the legal heirs of Sultan Singh?
2. Whether Sultan Singh made a valid will in favour of the defendant?
3. Whether the defendants are the collaterals of Sultan Singh?
4. Relief.

4. After affording the parties opportunity to lead evidence and hearing rival contentions the trial Court dismissed the suit vide its judgment and decree 24.10.1973. In appeal, the learned Single Judge held the Will to have been executed under suspicious circumstances and decreed the suit of the plaintiffs for joint possession to the extent of half share in the land and the cash deposits left by Sultan Singh.

5. We have heard learned counsel for the parties and perused the record. Both the courts have held the parties to be the legal heirs of Sultan Singh being his 4th degree collaterals. In case the Will is proved to have been validly executed, the plaintiff/respondents herein would not be entitled to grant of any relief and if the Will is found to have been executed under suspicious circumstances then the judgment of the learned Single Judge has to be upheld.

6. While considering the meaning, scope and effect of the will, this Court in Smt. Bhagya Wati Jain and Anr. v. General Public and Ors., L.P.A. 1159 of 1985 decided on 2.2.1994, reported as (1994) 107 P.L.R. 649, held :-

"Under the Act will has been defined to mean a legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. Under the General Clauses Act will includes a codicil making a voluntary posthumous disposition of property intending to take effect after the death of the testator. According to Halsbury's Laws of England, a Will or testament is a declaration in a prescribed manner of the intention of the person making it with respect to the matters which he wishes to take effect upon or after his death. A Will made for disposal of property of the testator after his death and of appointing an executor, for appointing a testamentary guardian, for exercising a power of appointment and for revoking or altering a previous Will. The essential characteristics of a Will are :

- a) There must be a legal declaration,

- b) Such declaration must be with respect to the property of the testator; and
- c) the declaration must be intended to operate after the death of the testator.

In order to hold a document to be a Will it has to be proved that the same is in conformity with the provisions as regards the execution and attestation as provided u/s 63 of the Act and executed by a person competent to make it. The Will must relate to the property of the maker which he intends to dispose of and if no reference is made to the disposal of the property, the document cannot be termed to be a Will. The declaration intended to take effect after the death of the testator impliedly means that declaration should not be meant to take effect immediately and if it does so then it is not a Will. The testamentary document can be revoked by the testator during his life time. A Will can be executed in any form but to be effective it is required to be signed and attested by the witnesses as required under the Act. No specific form or language is required to be applied while executing the Will. As the Will diverts the rule of natural succession, its execution is required to be satisfactorily proved in accordance with the provisions of the law and keeping in view the judgments delivered by the Apex Court and the various High Courts in the country. The origin of the Will can be referred to ancient times as it is shown to be in existence as in Babylon and Assyria. It was considered that the idea of disposition by Will was the gift of Rome's aspiring civilisation to Rome's rude conquerors awakened at last, by closer contact with that civilisation to a better life. The laws prevalent in various civilised countries concede to the owner of the property the right of determining by Will to whom the effects which he leaves behind him shall pass. Such a right is, however, subject to statutory restrictions imposed, if any. It is common knowledge that instincts and affections determine and will lead the man to decide for these who are nearest to him in kindred and who in life has been the object of his affection. It is reasonably presumed that a man leaving the world and going back to his creator would naturally distribute his property amongst his children or nearest relatives on the judged opinion based upon his experience in life and not being influenced by extraneous consideration. The concept of making the will was unknown under the ancient Hindu Law as no name equivalent or pseudonymous to Will has been traced either in Sanskrit or in the vernacular languages. The absence of testamentary disposition of the property under the old Hindu Law can be attributed to the joint family system and the custom of adoption prevalent amongst the Hindus. The old joint Hindu Family system was considered to be inconsistent with the independent dominion over property and perhaps it was the main reason to ignore the testamentary disposition. However with the growth, development and change of law regarding succession the power of Hindu to create interests in property during his life time leads to the power to create interests in the property on his death. From a pretty long time the testamentary power of a Hindu has been recognised and he is authorised to make Will regarding his self acquired property. Such a right has got statutory sanction after the passing of the Act. Before the passing of the Act, no part of the coparcenary property could be disposed of by making a Will which was restricted only to self

acquired property. However, Section 30 of the Hindu Marriage Act now enables the Hindus to dispose of by Will his share in the coparcenary property at the time of his death. The Act has consolidated the law applicable to intestate and testamentary succession of India and is applicable to all the testaments made in the country subject to the exceptions made in Sub Section 1 of Section 58 of the Act. Section 63 of the Act regulates the execution of the Will providing that the testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his directions. Signature or mark of the testator, or the signature of the person signing for him shall be also placed that it shall appear that it was intended thereby to give effect to the writing as a Will. Such a Will is required to be attested by two or more witnesses each of whom is required to see the testator signing or affixing his mark to the will or see some other person signing the same, in the presence and by directions of the testator or should have received a personal acknowledgement of his signature from the testator, or of the signature of such other person, and each of the witnesses should sign the Will in the presence of the testator. It is, however, not necessary that more than one witness be present at the same time, and no particular form of attestation is necessary."

7. In *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, , it was held that the party propounding a Will is required to prove the document in accordance with the provisions of law as laid down u/s 278 of the Indian Succession Act and Sections 67 and 68 of the Evidence Act. The propounder or beneficiary of a Will is required to prove that the testator was of sound mind, not a minor, had affixed his signatures in the presence of the requisite number of witnesses and had signed after having understood the nature and effect of the disposition in the Will. The witnesses are further required to affix their signatures in the presence of the testator. Courts are required to see that all legitimate suspicions are removed before the document is accepted as the last Will of the testator. The presence of the suspicious circumstances tends to make the initial onus to prove the Will very heavy and unless such onus is satisfactorily discharged, Courts would be reluctant to treat the document as the last "Will" of the testator. Besides suspicious circumstances, the Wills propounded may also disclose other infirmities which if proved may render the document inadmissible in evidence.

8. The Supreme Court again in *Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee* since deceased and after him his legal representatives and Others, , dealt with the question of made of onus of proof in the matter of determining due execution of the Will and laid down the following principles :-

"....The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63, Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however

there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the will as genuine. Where the caveator, alleges undue influence, fraud and coercion the onus is on him to prove the same. Even where there are no such pleas but the circumstances gave rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator. If the propounder himself takes part in the execution of the Will which confers a substantial benefit on him, that is also a circumstance to be taken into account and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the Will might be unnatural and might cut off wholly or in part near relations."

9. In Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others, , it was held:-

"There is a long line of decisions bearing on the nature and standard of evidence required to prove a Will. Those decisions have been reviewed in an elaborate judgment of this Court in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, . The Court speaking through Gajendragadkar, J., laid down in that case the following propositions :-

1. Stated generally, a will has to be proved like any other document, the 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 will, 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 attesting witness alive, and subject to the 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 an 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 signatures, 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. That 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.

7. If a caveator alleges fraud, undue influence coercion etc. in regard to 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."

10. It was further held that in case where the execution of the Will is shrouded in suspicion, its proof ceases to be a simple lis between the parties and in such a case it becomes the duty of the Court to satisfy itself as to whether the evidence led by the propounder of the Will is such as to satisfy the conscience of the court that the will was duly executed by the testator. The party propounding the will has to eliminate the existence of suspicious circumstances.

11. If any genuine reasonable or bona fide doubt is created regarding the execution of the Will or the mental faculty of the testator a duty is cast upon the propounder and the beneficiary of the will to remove the suspicious circumstances by placing satisfactory material on record.

12. In *Katyan Singh v. Smt. Chhoti and Ors.* AIR 1990 S.C. 397, it was held:-

"A Will is one of the most solemn documents 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. It must be 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 creditability 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."

13. After critically analysing various judgments of the Apex Court and the other High Courts in the country, this Court in Smt. Bhagya Wati Jain's case (supra) held that for proper execution of the Will, it must be established:

- a) the testator must have a disposing mind free from all extraneous influences with sound mental mind;
- b) the testator is presumed to be sane having a mental capacity to make a valid Will until contrary is proved;
- c) the Will should be executed in accordance with the provisions of the Act as incorporated in Section 63 of the Act read with Sections 67 and 68 of the Evidence Act. In other words, the testator should have signed or affixed his mark to the Will in the presence of the two witnesses who are required to see the testator signing or affixing his mark on the Will and each of the witnesses should sign the Will in the presence of the testator;
- d) the onus of proof of the Will is on the propounder or beneficiary of the Will;
- e) the existence of suspicious circumstances make the onus of proof very heavy and such circumstances are required to be removed by the propounder before the document is accepted as a last Will of the testator;
- f) the mode of proving the Will does not ordinarily differ from that of proving any other document except the special circumstances as incorporated in Section 63 of the Act; and
- g) in order to ascertain the free disposing mind free from extraneous considerations, the whole of the attending circumstances in a particular case are required to be taken note of."

14. The learned Single Judge dealt with the evidence led in the case and held:

"The defendants in order to prove the due execution of the Will, examined both the attesting witnesses namely, Sohan Singh son of Nasib Singh (D.W.1) and Gurbachan Singh son of Bahadur Singh (D.W.2) as well as deed-writer Surinder Kumar (D.W-3). Deed-Writer Surinder Kumar in his cross-examination has stated that Sultan Singh was not personally known to him. Sohan Singh (D.W.-1) though has stated that the Will was executed by Sultan Singh, but he has admitted in his cross-examination that he is closely related to one of the defendants, namely, Teja Singh. He has also admitted that he did not know as to whether Sultan Singh was literate or not. He further stated that at the time of execution of the Will, he was about 40 years old and Sultan Singh was older to him by 45 years

meaning thereby that he put the age of Sultan Singh to be 85 years. In the Will Sultan Singh is shown to be 65 years of age. Therefore, no reliance can be placed on his statement. Gurbachan Singh (D.W.2) in his statement nowhere stated that the Will was executed by Sultan Singh. He rather stated that the Will was executed by Teja Singh (Teja Singh is one of the defendants). He also stated that the Will was read over to Teja Singh, who after admitting the same to be correct put his thumb impression. His statement too, therefore, cannot be taken into consideration for the purpose of due execution of the Will. The plaintiffs produced Harbans Lai, Sub Post Master Dharamkot, as P.W.-2 who brought the record relating to the account maintained by Sultan Singh in the post office. From the relevant record, he deposed that at the time of opening of the account, specimen signatures of Sultan Singh in Gurmukhi script were obtained. This shows that Sultan Singh was literate and used to put his signatures. The defendants have not explained as to why he thumb marked the Will instead of putting his signatures on the Will. The discrepancies as pointed out clearly establish number of suspicious circumstances surrounding the execution of the Will. The burden to remove the suspicious circumstances was on the defendants, who have failed to explain them to the satisfaction of this Court. The Will, therefore, set up by the defendants cannot be accepted as genuine."

15. Applying the test as noted hereinabove and having regard to the facts and circumstances of the case in the light of the evidence led by the parties we are of the opinion that the learned Single Judge was justified in coming to the conclusion that the Will in dispute had not been properly executed and that the propounder had failed to remove suspicious circumstances brought to the notice of the Court.

16. The judgment of the learned Single Judge being based upon proper appreciation of evidence and the relevant provisions of law requires no interference.

17. There is no merit in the appeal which is accordingly dismissed but without any order as to costs.