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**(2012) 03 SHI CK 0224**

**In the High Court Of Himachal Pradesh**

**Case No : Regular Second Appeal No. 315 of 2002**

Smt. Paramjeet Kaur

APPELLANT

Vs

Khilllo

RESPONDENT

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**Date of Decision : 20-03-2012**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 100  
Evidence Act, 1872 — Section 68  
Succession Act, 1925 — Section 63  
Transfer of Property Act, 1882 — Section 3

**Citation : (2012) 2 ShimLC 869**

**Hon'ble Judges : Sanjay Karol, J**

**Bench : Single Bench**

**Advocate : Rewal Dua, for the Appellant; Karan Singh Kanwar, for the Respondent**

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## **Judgement**

Justice Sanjay Karol, Judge

1. This is defendant's Regular Second Appeal filed u/s 100 of the Code of Civil Procedure. Plaintiff Smt. Khillo filed Civil Suit No. 96/1 of 2000, titled Smt. Khillo versus Smt. Maro, for declaration and possession, with respect to the suit land against defendant Smt. Maro, her real sister. The same was decreed by the Court of Sub Judge 1st Class, Court No. 1, Paonta Sahib, District Sirmour, in terms of judgment and decree dated 17th September, 2001. In the defendant's Civil Appeal No. 17-N/13 of 2001, titled Smt. Maro versus Smt. Khillo, learned District Judge, Sirmour at Nahan, has affirmed the judgment and decree, vide its judgment and decree dated 15th June, 2002. The present appeal stands admitted on the following substantial questions of law:

1. What is the effect of the statements of the witnesses which are shown to have been made without oath?
2. Whether there has been misreading and mis-appreciation of evidence in the present case?

3. Whether the suit of the plaintiff was barred by time?

2. I have heard Ms Jyotsna Rewal Dua, learned counsel for defendant-appellant, Mr. Karan Singh Kanwar, learned counsel for plaintiff-respondent and perused the record. Learned counsel have relied upon decisions rendered by various Courts, including the Apex Court.

Ms Jyotsna Rewal Dua has referred to the following decisions:

1. Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta,
2. Ram Lal Vs. Harikishan,
3. Damodhar Bordoloi Vs. Mrinalini Devi Trust Board and Others,

Whereas, Mr. Karan Singh Kanwar has referred to the following decisions:

1. Lalitaben Jayantilal Popat Vs. Pragnaben Jamnadas Kataria and Others,
2. Yumnam Ongbi Tampha and Ibemma Devi Vs. Yumnam Joykumar Singh and Others,
3. Gopal Swaroop Vs. Krishna Murari Mangal and Others,

3. Learned counsel for the parties agree that only substantial question of law No. 2 arises for consideration in the instant appeal. While elucidating this substantial question of law, learned counsel addressed only on the issue of due attestation of the Will as required in law.

4. The moot point, therefore, for consideration is as to whether there is full and substantial compliance of provisions of Section 63 of the Indian Succession Act, 1925 (hereinafter referred to as the Succession Act), Section 68 of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act) and Section 3 of the Transfer of Property Act, 1882 (hereinafter referred to as the Transfer of Property Act).

5. Facts are not much in dispute. Plaintiff and defendant are real sisters, born from Shri Ganga Ram, who expired on 11th January, 1996. Allegedly said Shri Ganga Ram left a registered Will dated 20th December, 1988 in favour of defendant Smt. Maro which was propounded in the year 2000. Aggrieved thereof, on 25th August, 2000, plaintiff Smt. Khillo instituted a suit for declaration to the effect that the said Will is invalid and she is entitled to half share in the estate of late Shri Ganga Ram. She also claimed possession to the extent of her share.

6. Defendant Smt. Maro resisted the suit, inter alia, on the ground that she and her husband lived with Shri Ganga Ram, who had accepted her husband as a "Ghar Jamai". Since they were looking after Shri Ganga Ram, out of love and affection in a sound disposing state of mind, he willed the property exclusively in her favour, excluding the plaintiff who was otherwise well settled and compensated.

7. Based on the pleadings of the parties, trial Court framed the following issues:

1. Whether plaintiff is entitled for declaration sought for? OPP
2. Whether deceased Ganga Ram executed a valid Will in a sound disposing state of mind. If so, its effect? OPD
3. Whether Will dated 20.12.1988 is a forged and fraudulent document? OPP
4. To what relief the plaintiff is entitled? OPP
5. Relief.

8. Trial Court rejected the Will on the ground that the defendant had failed to establish due compliance of provisions of Section 63 of the Succession Act. Significantly, trial Court did not find that the Will was shrouded by suspicious circumstances or that it was an act of misrepresentation, fraud or forgery or that the testator was not of sound disposing state of mind.

9. Lower Appellate Court rejected the Will primarily on the ground that the defendant had failed to establish due "attestation" of the Will, in accordance with the provisions of the Succession Act and the Evidence Act.

10. The Court below did not deal with the question of the Will being shrouded by suspicious circumstances and the soundness of the mind of the testator. Consequently, the only question, which needs consideration is as to whether the Courts below erred in correctly/completely reading and appreciating the evidence led by the parties.

11. Principles with regard to the exercise of jurisdiction by the High Court, u/s 100 Code of Civil Procedure, 1908 are now well settled.

12. The Apex Court in Hari Singh vs. Kanhaiya Lal (1999) 7 SCC 228, has held that "the jurisdiction of courts in first appeals, second appeals or revisions are all to the extent conferred by the legislature. No litigant possesses any natural or inherent right to appeal against any order, unless a statute confers it and it is to the extent it is conferred. Thus the area of challenge is also hedged by the legislature. Hence challenge to the impugned order has to be confined with such limitation.

13. The word "substantial" as qualifying question of law has been clarified by the Apex Court in Gurdev Kaur and Others Vs. Kaki and Others, to mean "having substance, essential, real, of sound worth, important or considerable." It is further held that "even if the first appellate Court commits an error in recording a finding of fact, that itself will not be a ground. In other words, a search for truth has to be reconciled with the doctrine of finality. An unqualified right of first appeal may be necessary for the satisfaction of the defeated litigant; but a wide right of second appeal is more in the nature of a luxury. To interfere, because they seem to feel that a decree following upon a gross mis-appreciation of evidence involves injustice -no jurisdiction to entertain a second appeal on the

ground of an erroneous finding of fact."

14. In *Municipal Committee, Hoshiarpur Vs. Punjab State Electricity Board and Others*, , the Apex Court has further held that "it is only in very exceptional cases and on extreme perversity power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection."

15. Further in *Ramanuja Naidu Vs. V. Kanniah Naidu and another*, , the Apex Court has held that "what is administered in courts is justice according to law and considerations of fair play and equity, however, important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the High Court contravenes the express provisions of Section 100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid."

16. However in *Kulwant Kaur and Others Vs. Gurdial Singh Mann (dead) by Lrs. and Others etc.*, the Apex Court held that "technicality alone by itself ought not to permit the High Court to decide the issue since justice oriented approach, is the call of the day presently."

17. But then subsequently in *Manjunath Anandappa Urf. Shivappa Hanasi Vs. Tammanasa and Others*, , it clarified that "an appellate power interferes not when the order appealed is not right but only when it is clearly wrong. The difference is real, though fine."

18. The ratio of law laid down by the Apex Court in *Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd.*, even post amendment of the provisions of Section 100 CPC, stands reiterated by the Apex Court and in its various judicial pronouncements, it is held that it would be open for the High Court to interfere with the findings of facts recorded by the Court below only where findings of facts are vitiated by;

(i) non-consideration of relevant evidence, *Jagdish Singh Vs. Natthu Singh, & Ram Das alias Ram Suraj Vs. Smt. Gandiabai and others*,

(ii) conclusion is based on no evidence, *Neelakantan and Others Vs. Mallika Begum*,

(iii) Conclusions are biased and evidence is not sufficient to support the same; {*Ramanuja Naidu (supra)*};

(iv) material evidence having a direct impact on the decision of the case was ignored; *Bharatha Matha and Another Vs. R. Vijaya Renganathan and Others*,

(v) misread evidence which led to miscarriage of justice, *Rohini Prasad and Others Vs. Kasturchand and Another*,

(vi) Rejected the witness accepted by the trial Court, { *Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others*,

(vii) Findings are erroneous being contrary to the mandatory provisions of law applicable/settled by the Apex Court, {Kondiba Dagadu Kadam (supra)};

(viii) assumed jurisdiction not vested in the Court {Kondiba Dagadu Kadam (supra)};

(ix) not appreciating oral and documentary evidence properly which materially prejudices the case of the parties rendering the findings to be perverse, Kulwant Kaur and Others Vs. Gurdial Singh Mann (dead) by Lrs. and Others etc., , Ramlal and Another Vs. Phagua and Others, & Municipal Committee Hoshiarpur (supra)};

(x) interpretation of documents which goes to the root of title of a party, Dinesh Kumar Vs. Yusuf Ali,

(xi) where the courts have wrongly cast the burden of proof, { Narendra Gopal Vidyarthi Vs. Rajat Vidyarthi,

19. The Apex Court has held that the High Court cannot set aside findings of the first Appellate Court in the following circumstances;

(i) No point of law pleaded before the Courts below { V. Pechimuthu Vs. Gowrammal, Hero Vinoth (minor) Vs. Seshammal,

(ii) to arrive at a different conclusion on reappraisal of evidence, to adjudge the adequacy or sufficiency of evidence to sustain the conclusion of facts, {Ramanuja Naidu (supra)},

(iii) mere equitable consideration, {Kondiba Dagadu Kadam (supra)};

(iv) the first Appellate Court did not advert to all the reasons given by the trial Court, { Arumugham (Dead) By Lrs. and Others Vs. Sundarambal and Another,

(v) where two inferences are possible, the one drawn by the lower Appellate Court is binding on the High Court, Karnataka Board of Wakf Vs. Anjuman-E-Ismail Madris-Un-Niswan, and Hero Vinoth (supra)};

(vi) Another view is possible on re-appreciation of the same evidence, Navaneethammal Vs. Arjuna Chetty,

20. Relevant provisions of the Statutes, circumferencing adjudication of the legal question are reproduced as under:

Section 63 of the Succession Act:

63. Execution of unprivileged Wills.-Every testator, not being a soldier employed in an expedition or engaged in actual warfare (or an airman so employed or engaged,) or a mariner at sea, shall execute his Will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has been some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

Section 3 of the Transfer of Property Act:

3. Interpretation clause.- In this Act, unless there is something repugnant in the subject or context,-

...

instrument" means a non-testamentary instrument;

[attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other persons sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary:]

Section 68 of the Indian Evidence Act:

68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until 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:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

21. It is settled principle of law that "attestation" and "execution" are two different acts one following the other. There can be no valid execution of a document under which the law is required to be attested without the proof of its due attestation and if due attestation is also not proved, the factum of execution

is of no avail. Section 63 of the Succession Act lays down certain rules with regard to the execution of unprivileged Wills. Word "attestation" has been defined in Section 3 of the Transfer of Property Act *Kashibai and Another Vs. Parwatibai and Others*,

22. To "attest" is to bear witness to a fact. The essential conditions of valid attestation are (i) two or more witnesses have seen the executant sign the instrument; (ii) each of them has signed the instrument in presence of the executant. "Animus attestandi" is a necessary ingredient for providing the attestation. *Benga Behera and Another Vs. Braja Kishore Nanda and Others*, ; and *Lalitaben Jayantilal Popal (supra)* }.

23. The Apex Court in *Gopal Swaroop (supra)* has culled out the following principles for establishing proof of execution of Will:

17. A careful analysis of the provisions of Section 63 would show that the proof of execution of a Will would require the following aspects to be proved:

(1) That the Testator has signed or affixed his mark to the Will or the Will has been signed by some other person in the presence and under the direction of the Testator.

(2) The signature or mark of the Testator or the signature of the persons signing for him is so placed has to appear that the same was intended thereby to give effect to the writing as a Will.

(3) That the Will has been attested by two or more witnesses each one of whom has signed or affixed his mark to the Will or has been seen by some other person signing the Will in the presence and by the direction of the Testator or has received from Testator a personal acknowledgement of the signature or mark or the signature of each other person.

(4) That each of the witnesses has signed the Will in the presence of the Testator.

24. In *Naresh Charan Das Gupta (supra)*, the Apex Court has held that

12. ....

The learned Judges of the High Court were of the opinion that as the execution and attestation took place at one sitting at the residence of P. W. 1, where the testator and the witnesses has assembled by appointment, they must all of them have been present until the matter was finished, and as the witnesses were not cross-examined on the question of attestation, it could properly be inferred that there was due attestation. It cannot be laid down as a matter of law that because the witnesses did not state in examination-in-chief that they signed the will in the presence of the testator, there was no due attestation. It will depend on the circumstances elicited in evidence whether the attesting witnesses signed in the presence of the testator. This is a pure question of fact depending on appreciation of evidence. The finding of the Court below that the will was duly attested is based on a consideration of all the materials, and must be accepted.

Indeed, it is stated in the judgment of the Additional District Judge that "the fact of due execution and attestation of the will was not challenged on behalf of the caveator at the time of the hearing of the suit." This contention of the appellant must also be rejected.

25. Now, in written statement, defendant has clarified that her father kept her husband as a "Ghar Jamai" as there was no other male member in the family. Defendant alongwith her husband continued to look after and maintain her father over a considerable period of time. After the death of her father, she alongwith her husband performed the last rites. Her father expired on 11th January, 1996, whereas out of love and affection and in a sound state of mind, without any threat, pressure or coercion, he voluntarily executed a registered Will on 20th December, 1988. Plaintiff was aware of the said fact and never objected to the same. Even after the death of her father, defendant is exclusively cultivating and possessing the land, without any let, hindrance or objection on the part of the plaintiff. The Will was given effect to and entries of mutation also effected.

26. Significantly, record reveals that there is no replication to the said written statement. Though in the plaint, it is averred that it was only in the year 2000 when plaintiff demanded her share in the estate of late Shri Ganga Ram, defendant propounded the Will on the basis of which entries of mutation dated 22nd February, 1996 were also got recorded by the defendant in her own name.

27. Plaintiff has examined herself as PW-1. Significantly, she does not state that her father was not in a sound disposing state of mind. She admits that both she and the defendant are married to real brothers. She also admits that both Smt. Maro (defendant) and her husband had been living with her father for years. She also admits that she resides at a different place.

28. Defendant examined herself as DW-1 and has narrated the version as disclosed by her in her written statement.

29. In order to prove that the Will was scribed, attested and executed, defendant has examined three more witnesses. Conjoint reading of their testimonies indicates that the entire transaction took place in a single meeting and on the same day. Significantly, there is no cross-examination about the presence of the witnesses at the time of execution, attestation or registration of the Will. Also, there is no credible evidence to show that plaintiff possessed the land between the date of death of the testator and filing of the suit. Real sisters were married to real brothers. Defendant admittedly lived with her father whereas plaintiff lived at a distant place. There is nothing suspicious about excluding the other daughter from the estate.

30. Shri Naranjan Singh (DW-3) is the scribe. He states that on the asking of Shri Ganga Ram, on 20th December, 1988, he scribed the Will (Ex. DW-2/A), which was read over to him and after accepting it to be correct, the testator appended his thumb impression on the same. An attempt has been made by the plaintiff to demolish the credibility and creditworthiness of this witness by

suggesting that his licence was cancelled in the year 1996, but then his cross-examination, to my mind, does not render his statement to be unworthy of credence. Creditability of this witness cannot be said to be impeachable. In no uncertain terms he has deposed that Will was scribed by him under the instructions of the testator, who was in a fit state of mind and only after the contents thereof were read over did the testator append his thumb impression thereon. He even made endorsement in the register maintained by him, which testimony goes unrebutted.

31. His version, in fact, stands corroborated by Shri Kikar Singh (DW-4), who identified Shri Ganga Ram. He states that Shri Ganga Ram had asked him to accompany him to the office of Tehsildar and Will was accepted by Shri Ganga Ram to be correct. Shri Ganga Ram executed the Will in favour of the defendant. Significantly, he states that Shri Prem Singh (DW-2) and Shri Yad Ram were also present before the Tehsildar. He has denied the suggestions with regard to the mental health of the testator and the fact that the contents of the Will were not read over to Shri Ganga Ram by the Tehsildar.

32. Now, one of the attesting witness Shri Prem Singh (DW-2), in no uncertain terms, has deposed that Will was got scribed by Shri Ganga Ram from Shri Naranjan Singh (DW-3). Both, he and Shri Yad Ram remained witnesses. At that time Shri Ganga Ram was in a fit state of mind. The scribe, after scribing the Will, read over the same to Shri Ganga Ram, who then appended his thumb impression, accepting it to be correct. He further states that he signed the Will (Ex. DW-2/A) and Shri Yad Ram also appended his signatures thereafter. The Will was presented before the Tehsildar, who enquired about the same from Shri Ganga Ram and thereafter registered it. This witness also records presence of Shri Kikar, who identified the testator. Significantly, this witness states that Shri Ganga Ram appended his thumb impression and thereafter he and Shri Yad Ram appended their signatures. He denies the suggestion that Shri Ganga Ram was not mentally fit or that he did not understand the implications of making the Will.

33. I find that the facts in the instant case are almost akin to the facts considered by the Apex Court in Gopal Swaroo (supra). There the Court was dealing with a case where one of the attesting witnesses, in clear and unambiguous terms, stated that not only he but the other attesting witness to the will was also present at the time the attestator affixed his signatures on the Will. The Court observed that no suggestion was put to the witness with regard to the presence of the attesting witnesses. Significantly, in the very said decision, the Apex Court reiterated its earlier view taken in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, , to the effect "that in the matter of proof of documents, as in the case of proof of Wills, it is idle to expect proof with mathematical certainty. The test to be applied always is the test of satisfaction of a prudent mind in such matters".

34. In my view, principles of law laid down by the Apex Court in the aforesaid decisions stand fully complied with by the defendant in the instant case. The

witnesses have categorically deposed about soundness of the mind of the testator; testator put his thumb impression on the Will, scribed under his instructions; the contents of the Will were read over to him which he understood to be correct and wanted to give everything to the defendant; the Will was attested in the presence of two witnesses who signed in the presence of each other and in the presence of the testator who also put his thumb impression in their presence. They were also present at the time of registration of the document. Thus, in my considered view, the defendant has been able to establish and prove due compliance of provisions of the Succession Act, Transfer of Property Act and the Indian Evidence Act. Observation made by the lower Appellate Court in Paras 13,14,15 & 16 of the judgment are incorrect and not borne out from the record. It was a case of single transaction. Will was executed, attested and registered on the same day. There is no suggestion by the plaintiff to the contrary. Appreciation of evidence cannot be by way of mathematical calculation.

35. Thus, applying the principle of law laid down by the Apex Court in *Bharatha Matha (supra)* etc., I am of the considered view that interference in this case is warranted as finding rendered by the Courts below is based on incorrect and improper appreciation of evidence led by the parties, which has resulted into travesty of justice as the finding and decision are clearly wrong. Courts below misdirected themselves, in a perfunctory manner and appreciated the testimonies without taking into consideration the correct provisions of the statutes and the law laid down by the Apex Court.

36. This Court has only dealt with the question of valid attestation and execution of the Will as was so urged by the parties. In any event, the trial Court itself rejected plaintiff's contention with regard to the Will being forged or fabricated. The question that the Will is shrouded by suspicious circumstances neither arises for consideration nor is so urged.

37. In view of the aforesaid findings, I need not deal with the decision referred to by *Ms Jyotsna Rewal Dua in Ram Lal (supra)* and *Damodar Bordoloi (supra)*.

38. Coming to the remaining decisions referred to by *Mr. Karan Singh Kanwar*, I find that the same are inapplicable to the facts of the present case. The decisions are *Lalitaben Jayantilal Popal (supra)* and *Yumnam Ongbi Tampha Ibema Devi (supra)*.

39. In *Lalitaben Jayantilal Popat (supra)* the Court observed that the case set up by the propounder was contradicted by the contents of the Will and there were other attending suspicious circumstances which were not cleared by the propounder. Declaration made in the Will by the testator that he had signed before both the witnesses and both of whom had also signed before him was not corroborated by the attesting witnesses. In this background, the Court rejected the valid execution and attestation of the Will.

40. In *Yumnam Ongbi Tampha Ibema Devi (supra)*, the Court returned a

categorical finding that the attesting witnesses had not deposed to the effect that the testator had signed the Will in his presence or that each of the witnesses had signed the Will in the presence of the testator. Consequently, findings returned by the Courts below are reversed and judgment and decree, dated 17th September, 2001, passed by the Sub Judge 1st Class, Court No. 1, Paonta Sahib Civil Suit No. 96/1 of 2000, titled Smt. Khillo versus Smt. Maro and judgment and decree dated 15th June, 2002, passed by the learned District Judge, Sirmour at Nahan in Civil Appeal No. 17-N/13 of 2001, titled Smt. Maro versus Smt. Khillo, are set aside and plaintiff's suit is dismissed.

Pending application(s), if any, also stand disposed of.