

(2004) 11 P&H CK 0087
In the Punjab And Haryana At Chandigarh
Case No : Second Appeal No. 2857 of 1980

Tikkan Lal Batta (deceased by LRs) and Others	APPELLANT
Vs	
Ashok Kumar and Others	RESPONDENT

Date of Decision : 17-11-2004

Acts Referred:

Civil Procedure Code Amendment Act, 1976 — Section 100
Civil Procedure Code, 1908 (CPC) — Section 100
Punjab Courts Act, 1980 — Section 41
Succession Act, 1925 — Section 63

Citation : AIR 2005 P&H 145 : (2005) 1 RCR(Civil) 453

Hon'ble Judges : Viney Mittal, J

Bench : Single Bench

Advocate : H.L. Sibal, B.L. Gulati and Sapan Dhir, for the Appellant; M.L. Sarin and Alka Sarin, for the Respondent

Judgement

Viney Mittal, J.—This judgment shall dispose of two regular second appeals bearing R.S.A. No. 2857 of 1980 and R.S.A. No. 2958 of 1980, as both the aforesaid appeals arise out of a common judgment and decree passed by the learned courts below. Whereas R.S.A. No. 2857 of 1980 has been filed by the legal representatives of deceased Chanan Devi, R.S.A. No. 2958 of 1980 has been filed by defendants No. 13, 11 and 15.

2. Chanan Devi, plaintiff, filed suit for joint possession claiming 2/9th share in the suit land measuring 203 kanals, 2/27th share in the land measuring 2 kanals 14 marlas, 1/18th share in the land of Khata No. 18/42 to 52 and 2/9th share in khasra No. 936/(6-18). It was claimed by her that the aforesaid lands were originally owned by Shrimati Bhagwanti Devi widow of Dewan Chand son of Bishan Dass. Aforesaid Bhagwanti had died intestate leaving no issue behind. Thus, according to the plaintiff, the property left behind by Shrimati Bhagwanti was to revert back to defendants namely, Jamna Dass, Harkishan Dass and Labhu Ram. The plaintiff claimed that accordingly the property was to revert back in equal shares i.e. 1/3rd to the branch of Labhu Ram, 3/3rd to the branch

of Harkishan and 1/3rd to the branch of Jamna Dass who were real brothers of Bishan Dass, father of Dewan Chand. Accordingly, the plaintiff claimed that the mutation of inheritance of Bhagwanti should have been entered and decided accordingly. Chanan Devi, plaintiff, was the daughter of Labhu Ram. Accordingly, she claimed that she was entitled to her 1/3rd share out of 1/3rd share to the branch of Labhu Ram, i.e. 1/9th share from the total estate left behind by Bhagwanti. She further pleaded that at the time of mutation, the existence of the plaintiff Chanan Devi and her sister Pritam Devi was not disclosed and, therefore, the property was mutated wrongly. On that basis, the plaintiff filed the suit for joint possession.

3. The suit was contested by defendants No. 1 to 4 and 14 only. The aforesaid defendants admitted the relationship between the parties. The ownership of Bhagwanti was also not denied. However, it was disputed that Smt. Bhagwanti had died intestate. According to the aforesaid defendants Shrimati Bhagwanti had executed a Will on August, 13, 1966 whereby she had bequeathed her entire property in favour of Ashok Kumar, Rajinder Kumar and Ram Murti. On that basis the defendants claimed that plaintiff had no right or interest in the property left behind by Shrimati Bhagwanti.

4. To prove the aforesaid execution of the Will dated August 13, 1966, the defendants produced one Sagli Dass as DW 1. Aforesaid Sagli Dass is the petition writer. However, the Will in question was shown to have been scribed by another petition writer Arjan Singh. Sagli Dass DW 1 stated that the aforesaid petition writer Arjan Singh had since died. He further stated that he (Sagli Dass) was conversant with the writing of Arjan Singh. On that basis he identified the scribing of aforesaid Will by Arjan Singh. Shakuntla Devi was produced by the defendants as DW 2. Shakuntala Devi is shown to be one of the attesting witness of the Will. The other attesting witness Ram Saran was not produced by the defendants.

5. On the basis of the evidence available on the record, the learned trial Court held that the statements of the two witnesses did not conform to the requirements of Section 63 of the Succession Act and, as such, the aforesaid Will Ex.D1 could not be taken to have been duly executed by Bhagwanti. It was further held by the learned trial Court that Shakuntla Devi, DW 2 had stated that Bhagwanti had put her thumb impression on the Will in her presence and that she had also signed on the Will in presence of Shrimati Bhagwanti. However, the said witnesses did not make any statement with regard to the fact that the other attesting witness. Ram Saran had also attested the Will and put his signatures in the presence of Smt. Bhagwanti. On the basis of the aforesaid findings, the learned trial Court held that the due execution of the Will dated August 13, 1996, Ex.D1 was not proved by the defendants in accordance with the law. Accordingly the said Will was rejected. Consequently, the suit filed by the plaintiff was decreed for joint possession as claimed by her.

6. Defendants No. 2, 3, 6 and 7 (beneficiaries of the Will) felt aggrieved. They

filed an appeal against the judgment and decree of the learned trial Court. The learned first appellate Court reappraised the evidence. On the basis of the reappraisal of the evidence, the learned first appellate Court come to the conclusion that the Will in question stood duly proved and was shown to be duly executed by Smt. Bhagwanti. It was also held that there were no suspicious circumstances in execution of the aforesaid Will. On the aforesaid conclusion, the learned first appellate Court reversed the findings recorded by the learned trial Court and consequently after acceptance of the appeal filed by the defendants, dismissed the suit filed by the plaintiff.

7. The plaintiff having died, her legal representatives have chosen to challenge the aforesaid judgment and decree passed by the teamed first appellate Court through RSA No. 2857 of 1980. The other second appeal No. 2958 of 1980, challenging the aforesaid judgment and decree of the learned first appellate Court has been filed by defendants No. 11, 13 and 15 who have also claimed that the suit filed by the plaintiff was liable to be decreed.

8. I have heard Shri H.L. Sibal, the learned senior counsel for the plaintiff appellants and Shri M.L. Sarin, the learned senior counsel appearing for the contesting defendant-respondents and with their assistance have also gone through the record of the case.

9. At this stage, it may be noticed that the present regular second appeals had been filed in the year 1980 under the provision of Section 41 of the Punjab Courts Act, 1980. A Full Bench of this Court in the case of Ganpat Vs. Ram Devi and Others, had taken a view that in view of the aforesaid local law (Punjab Courts Act), the amended provisions of Section 100 of the Code of Civil Procedure, as amended in 1976, were not applicable to the second appeals filed in this Court. Accordingly, no substantial question of law was framed nor the aforesaid regular second appeals were admitted on any such substantial question of law. However, the Hon"ble Supreme Court of India in the case of Kulwant Kaur and Others Vs. Gurdial Singh Mann (dead) by Lrs. and Others etc., has held that after the amendment of the CPC in the year 1976, thereby amending Section 100, Section 41 of the Punjab Courts Act had become redundant and repugnant to the Central Act i.e. CPC and therefore, was to be ignored and, therefore, the second appeal shall only lie to this Court u/s 100 of the amended CPC on a substantial question of law.

10. In view of the law laid down by the Apex Court in Kulwant Kaur and Others Vs. Gurdial Singh Mann (dead) by Lrs. and Others etc., , during the course of arguments, the following substantial question of law were found to have arisen in the present regular second appeals :

(a) Whether the Will Ex. D1 dated 13-6-1966 alleged to have been executed by Smt. Bhagwanti Devi has been duly attested in terms of Section 63 of the Succession Act ?

(b) Whether the suspicious circumstances in execution of the aforesaid Will Ex.

D1 stand duly dispelled ?

11. Learned counsel for both the parties have addressed arguments on the aforesaid substantial questions of law.

12. Shri H.L. Sibal, senior Counsel appearing for the plaintiff appellants has vehemently contended that the Will Ex.D1 was not shown to be attested in terms of Section 63 of the Succession Act and, therefore, the said Will could not be taken to have been executed by Smt. Bhagwanti Devi. Elaborating the aforesaid contention, the learned senior counsel has argued that the Will in question was shown to be scribed by Arjan Singh, petition writer. It was further shown to have been attested by two attesting witnesses, namely, Ram Saran and Shankutla Devi, Ran Saran has not been produced by the defendants. Only Shakuntala has appeared as DW 2. The aforesaid witness has merely stated that the Will was read over to Bhagwanti Devi and she thumb marked it admitting it to be correct and that she also signed the same as an attesting witness in the presence of Bhagwanti Devi, learned counsel maintains that the witness has merely stated that other attesting witness Ram Saran has signed in the presence of Shakuntala Devi without stating at all that the other attesting witness had also signed in presence of Smt. Bhagwanti Devi. Because of the aforesaid omission of the said witness, the learned senior counsel has argued that the requirement of Section 63 of the Succession Act was not fulfilled and, accordingly, the Will Ex. D1 could not be taken to have been executed in conformity with Section 63 of the Succession Act and, as such, could not be recognised as a Will duly executed by Smt. Bhagwanti Devi.

13. Besides the aforesaid contention, the learned senior counsel for the plaintiff has also argued that the Will in question was surrounded by many suspicious circumstances. It has been pointed out that according to the case set up by defendants, the Will in question was shown to be scribed by one Arjan Singh, petition writer. The aforesaid Arjan Singh was claimed to be a deed writer. Accordingly, the writing of the aforesaid Arjan Singh was contended to be proved by another petition writer (Sagli Dass), DW1. Sagli Dass has claimed that he had seen wilting of Arjan Singh and was therefore, conversant with his writing. According to the learned counsel Shakuntala Devi, the attesting witnesses of the Will who has appeared as DW 2 has, however, not uttered a single word with regard to the scribing of the Will by Arjan Singh. Nor has it been detailed out by the aforesaid witness as to who had scribed the said Will and who had read out the Will to Smt. Bhagwanti Devi, learned counsel has also made pointed reference to the statement of Shakuntala Devi DW 2 to show that the other attesting witness Ram Saran was merely a chance witness who was found roaming in the Court compound and was not even known to Shakuntala Devi. It has also been pointed out that even the statement of Shakuntala Devi did not inspire any confidence inasmuch as she herself had admitted that she was living in Delhi for the last 30/35 years and that Smt. Bhagwanti Devi was also an old lady of 80/90 years at the time of the execution of the Will. According to the

aforesaid witness both the aforesaid two ladies had gone from their village to Phagwara Court compound on a Ricksha to get the Will executed. According to the learned counsel, the aforesaid fact has itself shown that the story put up by the defendants was a made up story and that the Will Ex. D1 was surrounded by suspicious circumstances.

14. Refuting the aforesaid argument, the learned counsel for the plaintiff, Shri M.L. Sarin, the learned senior counsel appearing for the contesting defendants has argued that the Will Ex. D1 was duly proved and shown to be executed by Smt. Bhagwanti Devi. Shri Sarin has stated that the statement of Smt, Shakuntala Devi DW 2 was sufficient to prove the due execution of the Will and bring the same in conformity with the legal requirement of Section 63 of the Succession Act. It has also been pointed out by Shri Sarin that the Will in question was scribed by a petition writer, namely, Arjan Singh who had since died. The said Will was attested by witnesses, namely, Ram Sarin and Shakuntala Devi. Scribe had since died and Ram Saran had gone out of country and, therefore, according to the learned counsel, the defendants, had no other option except to produce the remaining available witness, namely, Shakuntala Devi. On that basis, the learned counsel has contended that the Will in question was duly proved. It has also been argued that there are absolutely no suspicious circumstances surrounding the execution of the Will. Learned counsel has further argued that the beneficiaries of the Will were serving Smt. Bhagwanti Devi and, therefore, it was natural for her to have bequeathed her property in their favour. Besides this, the learned senior counsel has also argued that the finding with regard to the due execution of the Will is a finding of fact which is not open to challenge in the regular second appeal before the High Court. On that basis, the learned senior counsel has argued that the present appeals are liable to be dismissed.

15. I have given my thoughtful and due consideration to the arguments raised by the learned counsel for the parties.

16. At the out set, certain observations made by the Apex Court in the case of Major Singh Vs. Rattan Singh (Dead) by LRs. and others, may be noticed (Para 3 of AIR).

"Learned counsel for the appellant has contended that the High Court could not interfere u/s 100 CPC since the suspicious features of the Will are questions of facts. The trial Court and the appellate Court had considered the suspicious feature and were not inclined to interfere. It is the duty of the propounder of the Will to establish that Will was validly executed removing all the suspicious features satisfying conscience of the Court. In that behalf, the High Court was not justified in interfering in the second appeal as there was no substantial question of law for decision u/s 100, CPC. It is seen that it is an admitted position that Rattan Singh, on coming to know that his brother was unwell, had gone from Calcutta to see him. After his coming, the Will came to be executed and the execution of the Will also was not disputed. The only question is whether

the Will came to be executed in the normal circumstances ? The Courts below relied heavily on two suspicious features, namely the Will was not produced at the earliest point of time, it was produced sometime before the trial. Secondly, the attestors were disbelieved on two grounds, namely, that Hari Singh, one of the at testators had not disclosed that the Will was not executed when the mutation was effected in his presence. The High Court has explained that the mutation was not properly proved and that there was no reason to disbelieve that fact. The High Court had perused the original as well as the photocopy of the Will produced in the trial Court in the first instance. The High Court has found that there is no interpolation in the original Will. Therefore, the rejection of the evidence of the attestator, Hari Singh's evidence was found to be not correct. As regards the other attestator witness, by name Gurdev Singh, it was disbelieved on the ground that he filed a suit in the litigation against Jeet Singh. It was hardly a ground to disbelieve the evidence of the attestator's evidence. Under these circumstances, when the courts below had rejected and is believed the evidence on the ground that the propounder had not properly discharged his duty, it is the duty of the High Court to consider whether the reasons given by the Courts below were sustainable in law. In view of the above reasoning of the trial Court as affirmed by the appellate Court, necessarily the High Court requires to go into that question to test the reasons. In this perspective, the High Court has rightly gone into that question and found that the reasons given by the Courts below are flimsy. Thus, there is substantial question of law that has arisen for consideration and the High Court has rightly considered the question. We are entirely agree with the High Court."

17. From the law laid down by the Apex Court in Major Singh Vs. Rattan Singh (Dead) by LR's. and others, , it is apparent that it is the duty of the High Court to consider whether the reasons given by the Courts below upholding the execution of the Will are in fact sustainable in law and in a situation where the High Court finds that the reasons given by the Courts below upholding the Will in question are flimsy, that itself is a substantial question of law. Thus, I find that the challenge made by the plaintiff-appellants to the Will Ex. D1 and consequently to the findings recorded by the learned first appellate Court is liable to be examined on merits, by this Court.

18. For the appreciation of the first question involved in the present, appeals i.e. whether the Will Ex.D1 has been shown to be duly executed by Smt. Bhagwanti Devi it terms of Section 63 of the Succession Act or not, it is necessary to refer to the solitary statement available on the record of the case for that purpose i.e. the statement of DW 2, Shakuntala Devi. DW 2 in her examination-in-chief has stated as under :

"Formerly I used to live at Delhi. Smt. Bhagwanti Devi widow of Diwan Chand of Hadiabad was my aunti. She executed a Will Ex. D1 in favour of Ashok Kumar, Ram Murti and Rajinder Kumar. The Will was read over to her and Smt. Bhagwanti Devi thumb marked it admitting it to be correct. I singed the Will as

an attesting witness in the presence of Smt. Bhagwanti Devi. The other witness was Ram Saran who signed in my presence. Smt. Bhagwanti Devi was in her full sense at the time of execution of the Will. I had come to Hadiabad to see my mother. None of the legalities was present at the time of execution of Will Ex. D1."

19. Besides the aforesaid statement of Shakuntala Devi, there is no other evidence available on the record to show the manner in which the Will in question was executed. It is apparent from the statement of Shakuntala Devi that she has merely stated that Smt. Bhagwanti Devi had executed the Will Ex. D1 in favour of Ashok Kumar, Ram Murti and Rajinder Kumar. The Will was read over to her and Smt. Bhagwanti Devi thumb marked it admitting it to be correct. She (the witness) signed the Will as attesting witness in the presence of Smt. Bhagwanti Devi. The other attesting witnesses Ram Saran signed in her (the witness's) presence. There is apparently no evidence that the other witness Ram Saran had signed in the presence of Smt. Bhagwanti Devi. It is also not clear from the perusal of the aforesaid statement as to who had scribed the Will and as to who had read over the same. The statement of Shakuntala Devi in this regard is totally cryptic and sketchy. In these circumstances, it is apparent that the aforesaid statement cannot be construed to be a sufficient compliance to the requirement of Section 63 of the Succession Act. Thus, the learned trial Court was absolutely justified in holding that the Will Ex. D1 cannot be taken to have been duly executed by Smt. Bhagwanti Devi. The aforesaid finding was reversed by the learned first appellate Court. However, in my opinion, reversal of the said finding by the learned first appellate Court was not justified and was rather contrary to the material available on the record. Thus, the said finding recorded by the learned first appellate Court cannot be legally sustained and, accordingly, I have no hesitation in holding that the Will Ex. D1 is not shown to be duly executed by Smt. Bhagwanti Devi in terms of Section 63 of the Succession Act.

20. This brings me to the next limb of the contest between the parties as to whether the Will Ex. D1, if the same is taken to be duly executed, is free from all suspicions? The answer has to be given in the negative. The narration of facts by Shakuntala Devi, in her own statement shows that she was residing in Delhi for the last 35 years. She sometimes before making her statement in Court, was living in Bombay. She had come to her village Hadiabad only 15 days prior to the execution of the Will. She has been candid enough to admit that she did not know Ram Saran, the other attesting witness. According to her, Smt. Bhagwanti Devi was aged 80-90 years at the time of execution of the Will. A part of the statement of Shakuntala Devi DW 2 in her cross-examination may be noticed, at this stage, with advantage :

"Bhagwanti had expressed her desire to will away her property in my name, for the last 15-16 years ago, I do not remember when she expressed her desire to execute the Will in favour of my brother. I never talked to my brother that Bhagwanti deceased wanted to Will away the property in their favour. I had come

here as my mother was ill and also to collect my share. I might have taken 2000-3000 from my brother as my share of the property. I never executed any receipt. My sister Raksha Devi also filed this suit with regard to estate of Raghunath and she got a share through litigation. And it is also correct that I also got share through that litigation.

I had come to Hadiabad 15 days earlier from the execution of the Will. I did not know Ram Saran the other attesting witness. I did not know even today. I do not know whether Ram Saran Dass came from Nawanshahr or Hadiabad. I and my deceased aunt had come in Riksha at Phagwara. We had reached Phagwara at 11.00 am. I do not know whether the Court was open or not. Bhagwanti had herself talked the scribe that she was to execute a Will, before that she had not told me about the Will. I do not know how much time was consumed in getting the Will scribed from that petition writer. Ram Saran Dass the other witness was also roaming about in the Court premises. It is correct that I only came to know that my aunt had willed away the property in favour of my brothers and Ram Murti when the Will was read over to me. I told this fact to my brothers. It is correct that my statement was recorded at the time of mutation arising of this Will. I might have forgotten to state there that I told my brother about the Will or might have given the statement that I never told the factum of Will having been executed by my aunt in favour of my brothers. I do not know with whom the will remained. I do not know whether the other attesting witness separated from this place or not. It is correct that Ram Saran and my brother had attended the marriage of my brother. And there is photograph of them. It is correct that Ram Saran Dass was employed at Nawanshahr, Hadiabad is about two miles from Phagwara. I do not know what was paid as the fees for the Will. It is incorrect to suggest that I was never present at the time of execution of the will and my brothers wrote the Will and obtained my signatures."

21. Thus the case, set up by the defendants as proved through the aforesaid statement of Shakuntala Devi is that an old lady aged about 80-90 years accompanied by another lady, Shakuntala Devi, who herself was living in Delhi for the last 35 years had started from their village Hadiabad in a rickshaw alone, without: being accompanied by any male member of the family, for executing a Will by Smt. Bhagwanti Devi. They reached the Court compound, and got the Will scribed through some scribe, whose name is not described. Ram Saran is a chance witness who was found to be roaming around in the Court compound. Aforesaid Ram Saran was asked to attest the Will and he (Ram Saran) willingly helped the two ladies. Although the defendants have also led some evidence to show that aforesaid Ram Saran was known to the defendants and had even been attending the marriage in the family but the presence of such a chance witness who was not known to Shakuntala Devi at all creates a suspicion which has not been dispelled by the defendants at all.

22. Another suspicious circumstance which has not been explained at all by the defendants is that according to the Will Ex. D1 only beneficiaries of the aforesaid

Will were Ashok Kumar, Rajinder Kumar and Ram Murti. All the other natural heirs of Smt. Bhagwanti stood excluded by the said Will. Shakuntla Devi herself was a natural successor to the estate of Bhagwanti Devi. After the death of Bhagwanti Devi, mutation of the estate of Bhagwanti Devi was entered in the name of heirs of Harkishan Dass and heirs of Jamna Dass and Labhu Ram, i.e. Rajinder Kumar, Ashok Kumar and Shakuntla Devi herself. The factum of the execution of the aforesaid Will, in any case, was known to Shakuntla Devi. In these circumstances, there was absolutely no justification for the aforesaid mutation to have been entered in favour of heirs of Harkishan Dass and Jamna Devi and in any case of in favour of Shakuntla Devi. It is, thus, apparent that at the time of entry of the mutation the Will in question had not seen the light of the day.

23. The Will in question is an unregistered Will. Of course, the law does not require a Will to be compulsorily registered but the facts as noticed above, coupled with the fact, that the Will in question was not produced at the time of mutation cast a serious doubt on the fact as to whether any such Will was ever executed by Bhagwanti. It is, in these circumstances that the nonregistration of the aforesaid Will stands highlighted.

24. One more fact which has been pressed into service by Shri M. L. Sarin, the learned senior counsel for the defendants is that Shrimati Bhagwanti Devi was being served by the beneficiaries and, as such the Will in question had been executed by Smt. Bhagwanti out of the love and affection and due to the aforesaid service. However, Shakuntla Devi D.W. 2 has herself admitted in her cross-examination that after the partition of the property between Raghunath Dass, Harkishan Dass and Jamna Dass, Shrimati Bhagwanti Devi was living separately and was getting maintenance. She was cooking her meals separately. She was living in a separate portion of the same house in which Raghunath was living. There is absolutely nothing in the statement of the aforesaid witness to show that the beneficiaries of the Will had ever served Bhagwanti Devi. The evidence led by the defendants taken as a whole, in my opinion, could not be taken to be sufficient to hold that the Will in question was shown to have been duly executed by Bhagwanti Devi nor the various suspicious circumstances surrounding the execution of the Will stand explained. In these circumstances, I find that the reasons given by the learned first appellate Court in upholding the aforesaid Will are absolutely flimsy and do not conform to the accepted principles of law.

25. Accordingly, the substantial question of law (a) and (b) referred to above are answered in the negative and against the defendants and in favour of the plaintiff. Accordingly, it is held that the Will Ex. D1 dated August 13, 1966 is not shown to be duly executed by Bhagwanti Devi in terms of Section 63 of the Succession Act nor the suspicions surrounding the aforesaid Will have been dispelled by the defendants.

26. As a result, of the aforesaid discussion, the present regular second appeals

are allowed. The judgment and decree of the learned first appellate Court are set aside and that of the learned trial Court are restored and consequently, the suit filed by the plaintiff is decreed as prayed for. There shall be no order as to costs.