

Joginder Singh Alias Rajinder Singh Vs. Dharuv Singh

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Court : Punjab and Haryana

Decided On : Mar-07-2003

Reported in : (2003)135PLR545

Judge : Hemant Gupta, J.

Acts : [Indian Succession Act, 1925](#) - Sections 63

Appeal No. : Regular Second Appeal No. 616 of 1982

Appellant : Joginder Singh Alias Rajinder Singh

Respondent : Dharuv Singh

Advocate for Def. : M.L. Sarin, Sr. Adv. and; Hemant Sarin, Adv.

Advocate for Pet/Ap. : S.K. Pipat, Sr. Adv. and; Naresh Kaushal, Adv.

Disposition : Appeal dismissed

Judgement :

Hemant Gupta, J.

1. The plaintiff is in second appeal challenging the Judgment and decree passed by the first appellate court whereby the decree granted by the learned trial court was reversed and his suit for declaration to the effect that the plaintiff is owner of 45 kanals 13.5 marlas of land was dismissed.

2. Plaintiff and defendant No. 1 are the sons of Hakam Singh. The dispute in the suit is regarding the estate of their uncle Hans Raj who died on 20.3.1975. Hakam Singh, the father of the plaintiff and defendant No. 1, had died in the year 1952-53. Hans Raj died unmarried and issueless and therefore, the plaintiff filed the suit for declaration that he inherits the estate of deceased Hans Raj equally with defendant No. 1 on the basis of Will dated 29.8.1962. It was alleged that the said Will is in possession of defendant No. 1. The plaintiff was in Army and was posted in Field Area and therefore, defendant No. 1 taking advantage of the absence of the plaintiff got attested mutation in his name alleging Will executed in his favour by Hans Raj. It was the case of the plaintiff that no Will was executed by Hans Raj in sound and disposing mind in favour of defendant No. 1 alone. Such a document is fictitious and false and brought about in conspiracy with the witnesses.

3. Defendant No. 1 controverted the allegations of the plaintiff by filing a written statement and alleging that he and the plaintiff were the only legal heirs of Hans Raj. He admitted that Hans Raj executed will dated 29.8.1962 in his favour and in favour of the plaintiff which was got registered. However, on 2.9.1971, Hans Raj made another Will in his favour alone to the exclusion of the plaintiff who joined services in the Army and completely neglected and deserted Hans Raj. Defendant No. 1 served Hans Raj and in lieu of the services, he executed a valid will on 2.9.1971 in his favour in sound disposing mind and got the same registered. Mutation was also attested on the basis of that Will after the death of Hans Raj.

4. In order to prove the Will dated 2.9.1971 defendant has produced Kul Bhushan Dutt, the scribe of the Will as DW1, Chaudhry Ram one of the marginal witnesses as DW3 and he himself appeared as DW2, The Will dated 2.9.1971 Ex.DI is registered. There is a recital in the said Will that executant is revoking the previous Will dated 29.8.1962 wherein all details about the registration have been mentioned. However, the learned trial court decreed the suit returning a finding that the said Will is surrounded by suspicious circumstances.

5. However, the learned First Appellate Court reversed the finding recorded by the learned trial court and held that the Will is proved to have been validly executed on the basis of the statement of the scribe and the attesting witnesses. Reliance is

placed on *Jaswant Kaur v. Smt. Amrit Kaur and Ors.*, A.I.R. 1977 Supreme Court 74, wherein the court has held that generally a Will has to be proved like any other document. However, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. One attesting witness at least has to be produced for the purpose of proving the execution of the Will and since Will has to be given effect after the death of the testator, therefore the intention of the testator has to be given due regard. Shaky signature, 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 from it and such other circumstances raise suspicion about the execution of the Will. To determine, whether the will is surrounded by suspicious circumstances the Court is called upon to decide a solemn question on the test of satisfaction of the judicial conscience.

6. The first Appellate court keeping in view the principles laid down for proof of the Will held that the registration of the Will goes a long way to prove the validity and genuineness of the Will. The learned first appellate Court relied upon *Harbhajan Singh v. Chanan Singh and Ors.*, (1964)66 P.L.R. 1170. The reference was also made to *Naranjan Singh etc. v. Parsa Singh alias Parsu*, 1971 Current Law Journal 195 wherein it was held that one of the attesting witnesses should be examined and that Sub Registrar can be taken as attesting witnesses in view of the provisions of Section 60 of the Registration Act.

7. The testator died almost three and half years after the execution of the Will and as per the plaintiff himself, Hans Raj was suffering from blood pressure but he had no other ailment and continued to do work, thus the lower appellate court found that the testator cannot be said to be of unsound mind or under undue influence at the age of 63-64 years. So non-examination of one of the attesting witnesses was held to be wholly inconsequential. As per the plaintiff himself the attesting witness and the scribe knew the testator.

8. The argument that Dharuv Singh the beneficiary under the Will has taken a prominent part at the time of the execution of the Will, cannot be described as an exercise of undue influence. The reliance was placed on *Lal Singh v. Surjit Singh*

and Ors., 1972 P.L.R. 225.

9. The learned lower appellate Court found that Dharuv Singh alone was rendering service to the testator in the absence of the plaintiff who was serving in the Indian Army. The plaintiff as PW1 has stated that the attesting witnesses and the scribe of the Will are not inimical towards him. and they are respectable persons and known to each other. It is admitted that even the testator Hans Raj was known to Kul Bhushan, the scribe. On these circumstances, the first appellate Court dismissed the suit holding that Will Ex.DI is proved to be last Will of deceased Hans Raj.

10. Mr. S.K. Pipat, learned Senior Counsel for the appellants has vehemently argued that the Will Ex.DI is surrounded by suspicious circumstances and the learned first appellate court has gravely erred in law in reversing the well reasoned judgment and decree passed by the learned trial court. It was submitted that the beneficiary defendant No. 1 has taken active part in the execution of the Will which is evident from the fact that he is signatory to the Will itself. Reliance was placed upon A.I.R, 1959 Supreme Court 443; A.I.R. 1964 Supreme Court 629 and Nikka Singh v. Nachattar Singh, (1980)82 P.L.R. 308.

11. 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 signatures 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. The suspicious circumstances may be, as to the genuineness of the signatures 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 suspicions should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes a prominent 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. Any and every circumstance is not a suspicious circumstance. A circumstance would be suspicious when it is not normal or is not normally expected in a normal situation or is not expected of a normal person.

12. Apart from the above well settled principles the Hon'ble Supreme Court in *Madhukar D. Shende v. Taranao Aba Sheduge*, A.I.R. 2002 S.C, 637, has held that law of evidence does not permit conjecture or suspicion having the place of legal proof. Well founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict. It was held by Hon'ble Supreme Court as under :-

'8. The requirement of proof of a Will is the same as any other document excepting that the evidence tendered in proof of a Will should additionally satisfy the requirement of Section 63 of the [Indian Succession Act, 1925](#) and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the Court either believe that the Will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the Will was duly executed by the testator, then the factum of execution or Will shall be said to have been proved. The delicate structure or proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same, time ought not to be permitted to be demolished by wayward pelting of stones or suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the Jury in *R. v. Hodge*, 1838 2 Lewis CC 227 may be apposite to some extent - 'The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected hole; and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take or granted some fact consistent with its previous theories and necessary to

render them complete.' The conscience of the Court has to be satisfied by the propounder of Will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a Will provided that there is something unnatural or suspicious about the Will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict positive or negative.

9. It is well settled that one who propounds a Will must establish the competence of the testator to make the Will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the Will in the manner contemplated by law. The contestant opposing the Will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the Court affirmatively that the testator did know well the contents of the Will and in sound disposing capacity executed the same. The factors, such as the Will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of not proved merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties, would be relevant and of significance.

13. In *S. Sundaresa Pal and Ors. v. Mrs. Sumangala T. Pal and Anr.* A.I.R. 2002 S.C. 317 it has been held by Hon'ble Supreme Court that uneven distribution of assets amongst children by itself, cannot be taken as circumstance causing suspicion surrounding the execution of the Will. It was held by Hon'ble Supreme Court as follows:

'It is significant to note that only the plaintiff has questioned the Will. All the defendants were supporting the will. The High Court also found that in view of the testimony of the attesting witness, the Will had been formally proved. Under these

circumstances, we fail to understand how the conclusion about the Will being unnatural on the basis of uneven distribution of the assets by Indira Bai could be reached. The widowed daughter had not questioned the Will. She rather supported it. Therefore, it could not be taken a circumstance to show that the Will was unnatural by observing that she was more deserving. It is a question which lies squarely within the pure discretion of the executant of the Will. The finding that the 'Will is most unnatural' cannot be sustained.'

14. The reasons which weighed with the learned trial Court are not sufficient reasons to hold that the Will was surrounded by suspicious circumstances. The learned trial court was influenced by the fact that the scribe was not able to tell the number of brothers of the testator or the fact whether he was married or not. Such factors weighed with the learned trial court to discredit the testimony of the scribe that he was known to the testator. Similarly, the testimony of Chaudhary Ram DW3 was found to be unreliable by the learned trial Court inter-alia on the ground that he did not remember if mention of the previous Will¹ was made in the Will Ex.D1 and that he could not state whether the testator was carrying a copy of the Will or that of Jamabandi. In fact such cross-examination related to the contents of a document and thus it was not open to the plaintiff to cross-examine the attesting witness in respect of the contents of the documents. Still further the attesting witness is not a witness of the contents of the document but is the attesting witness of the signatures of the testator on the Will. Section 63 of the Succession Act contemplates that an unprivileged Will is required to be signed or his mark affixed by the testator in the presence of attesting witness who has seen the executant signing in his presence. Thus, what is expected of the attesting witness is the signing of the Will in his presence. The knowledge of the contents of the Will cannot be attributed to him. Section 63 of the Succession Act reads as under :

'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 seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark or 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.'

15. It has been held in *Rajammal alias Sundarammal and Ors. v. Sbapathi Filial and Anr.*, A.I.R. (32) 1945 Privy Council 82 that mere attestation is not enough to involve the witnesses with knowledge or the contents of the deed, and this is equally true of the witnesses who identify the executant before the Registrar. Subsequently, in *Smt Chandrakantaben J. Modi and Narendra Jayantifal Modi v. Vadilal Bapnial Modi and Ors.*, A.I.R. 1989 Supreme Court 1269, the Hon'ble Supreme Court held that there is no presumption that an attesting witness of a document must be assumed to be aware of its contents.

16. The testator has died after more than three and half years of the attestation of the Will. The testator had enough time to revoke the Will if the Will was not a genuine document. In *Smt. Mtilkani v. Jamadar and Ors.*, (1987)1 S.C.C. 610 and *Satya Pal Gopal Das v. Smt. Panchubala Dasi and Ors.*, A.I.R. 1985 Supreme Court 500, it has been held that the fact that the Will has not been revoked for a sufficiently long period after its execution is a factor to hold the Will as a genuine document.

17. Learned counsel for the respondents also placed reliance on *Harbhajan Singh v. Chanan Singh and Ors.*, (1964) P.L.R. 1170, and *Rani Purnima Devi and Ors. v. Kumar Khagendra Narayan and Anr.*, A.I.R. 1962 Supreme Court 567 to submit that where a Will has been registered it is a circumstance to prove its genuineness.

18. The argument that the beneficiary has taken active participation in the execution of the Will which is evident from the factum of his attestation is again without any merit. It has come in evidence that the deceased was living with the beneficiary and it was he who was providing him services. A persual of the statements of scribe and the attesting witness shows that the testator thumb marked the Will in their presence and in the presence of each other including in the presence of Yash Pal Singh, the other attesting witness. Thus, the execution of the Will stands proved. The Will is registered and the same is attested by the Sub-Registrar. The thumb impression of the testator appear at two places at the time of attestation along with the witness on the back page of the Will. Therefore, participation in the execution of the Will by the beneficiary by itself does not create doubt regarding the testamentary capacity of the executor or the genuineness of the Will. Smt. Malkani v. Jamadar and Ors., (1987)1 S.C.C. 610; Lal Singh v. Surjit Singh and Ors., (1972)74 P.L.R. 225 and Sita Ram v. R.D. Gnpta and Ors., A.I.R. 1981 Punjab and Haryana 83 are the few judgments on which the learned counsel for the respondents has placed reliance to contend that the participation of the beneficiary in the execution of the Will itself cannot throw doubt on its genuineness. It is only a circumstance which is required to be considered.

19. Therefore, the mere fact that beneficiary has also attested the Will is not sufficient to return a finding that the Will is surrounded by suspicious circumstances. The Will is proved to have been duly executed in sound disposing mind more than three and half years prior to the death. The challenge to the execution of the Will is on account of inequitable distribution of assets. As discussed above inequitable distribution of assets is not a ground to return a finding that the Will is surrounded by suspicious circumstances. The mere fact that the plaintiff has been excluded by the testator from his estate in the Will Ex. D.I, it cannot be held that the Will is surrounded by suspicious circumstances. The plaintiff was beneficiary under the Will of the testator in the year 1962 but it was open to the testator to revoke his Will during his life time in sound disposing mind.

20. The argument of the learned counsel for the appellants that Yash Pai Singh, another attesting witness has not been produced is without any merit. Only one of the attesting witness is required to be produced for proof of execution of the Will.

Chaudhry Ram D.W. 3 is the attesting witness of the Will as well as a witness of the endorsement before the Sub Registrar. He has fully supported the execution of the Will. Hans Raj was the owner of the property and could bequeath his property in the manner he deem it appropriate. It is admitted by the plaintiff himself that Kul Bhushan Dutt and Chaudhary Ram were known to testator and to each other and they are respectable persons and the attesting witnesses and the scribe are not inimical towards him.

21. The evidence on record proves that the Will Ex.DI was executed by the testator in free disposing mind. The said Will was got registered. The learned first Appellate Court has discussed the entire evidence to dismiss the suit of the plaintiff-appellant.

22. I find no reason to take a different view than the one taken by the learned First Appellate Court. Consequently, the appeal is without any merit and the same is hereby dismissed.

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