

Prem Singh and ors. Vs. Gurdial Singh and ors.

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Court : Punjab and Haryana

Decided On : Mar-30-1999

Reported in : (1999)123PLR314

Judge : S.S. Sudhalkar, J.

Acts : [Registration Act, 1908](#) - Sections 59; [Evidence Act, 1872](#) - Sections 67 and 68; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 19

Appeal No. : Regular Second Appeal Nos. 1396 and 1918 of 1998

Appellant : Prem Singh and ors.

Respondent : Gurdial Singh and ors.

Advocate for Def. : Hemant Kumar, Adv. for Respondent No. 1

Advocate for Pet/Ap. : R.S. Longia, Adv.

Disposition : Appeal dismissed

Judgement :

S.S. Sudhalkar, J.

1. Both these Regular Second Appeals arise out of the common judgment and these are being disposed, of by this common judgment.

2. Amar Singh alias Amru is alleged to have made a will bequeathing the property to two of his sons viz. Prem Singh and Punjab Singh. The will is dated 1. 4. 76. Amru died on 30. 9. 84. Civil Suit No. 196 of 1989 was filed by another son of Amru viz Gurdial Singh challenging the said will. The suit was decreed and will and the consequent mutation were set aside. Plaintiff Gurdial Singh, Deep Kaur, Prem Kaur and Gobindi widow of Amru were held to be joint owners having 1/6th share each. The judgment and decree were challenged by Prem Singh and Punjab Singh who are beneficiaries of the will and also by Deep Kaur and Prem Kaur vide civil appeal No. 275 of 1997, which was dismissed. Against the appellate judgment and decree Prem Singh and Punjab Singh have filed RSA No. 1396 of 1998 and Deep Kaur and Prem Kaur have filed RSA No. 1918 of 1998.

3. I have heard Mr. R. S. Longia, counsel for the appellants and Mr. Hemant Kumar, counsel for respondent No 1.

4. The will dated 1. 4. 76 is a registered one. The attesting witnesses are (i) Ram Kishan and (2) Radha Kishan, Advocate. The attestation of the will by Radha Kishan has not been proved. The will which consists of 4 pages was written on one side of the paper. Thumb marks of the testator are in the margins of all the four pages. Witness Ram Kishan has also affixed his thumb marks in the margin of last page only while Radhya Kishan Advocate has signed in the margin of the first page only. The various endorsement made in the office of the Sub Registrar are on the back side of the first page of the will. Amru's thumb marks appear below the endorsement regarding submitting the will for registration and also below the endorsement of having admitted the document before the Sub Registrar. Attesting witnesses Radha Kishan, Advocate and Ram Kishan have affixed their signatures and thumb marks respectively below the said endorsement

5. It was argued by learned counsel for the appellants that the execution and the attestation of the will are duly proved and the will is also properly attested and no infirmity can be found in the same. The courts below have not accepted this argument. The thumb marks of the testator not being below the writing of the last page and being in the margins of the will is also held to be suspicious. Moreover, it has weighed with the courts below that Radha Kishan, Advocate who is said to be

one of the attesting witnesses has not signed on the last page of the will and, therefore, the will is not attested by two attesting witnesses as is required by law. The argument of learned counsel for the appellants is that though Radha Kishan, Advocate has not affixed his signatures on the last page of the will, his signatures appear before the Sub Registrar along with the thumb marks of attesting witness Ram Kishan and, therefore, the requirement of legal will have been fulfilled. He also argued that the requirement is also fulfilled by the signatures of Radha Kishan, Advocate in the margin of first page of the will. He also argued that the signatures of an attesting witness and if any lacuna was there, that was already cured at the time of registration.

6. Learned counsel for the appellant in support of his argument that the affixation of the signatures of the Registering Authority also amounts to an attestation has relied on the cases of *Lika Dhar v. Smt. Badho and Anr.*, (1994-1)106 Punjab Law Reporter 525 and *Subash Chander Kumar v. Prabhu Dayal and Anr.*, (1994-1)106 P. L. R. 484. They are the judgments of learned Single Judges of this Court. However, learned counsel for the respondent No. 1 relied on the case of *M. L. Abdul Jabbar Sahib v. H. Venkata Sastri and Sons and Ors.*, A. I. R. 1969 Supreme Court 1147 wherein it has been held as under:-

' Prima facie, the registering officer puts his signatures on the document in discharge of his statutory duty under Section 59 of the Registration Act and not for the purpose of attesting it or certifying that he has received from the executant a personal acknowledgement of his signatures. '

It is also held therein as under:-

'The relevant does not show that the registering officer D. W. Kittoo put his signatures on the document with the intention of attesting it. Nor it is proved that he signed the document in the presence of the executant. In these circumstances he cannot be regarded as an attesting witness, see *Surendm Bahadur v. Behari Singh*, 1939(2) Mad. L. H. 762. Likewise the identifying witnesses Senkaranarayana and Kaki Abdul Azis put their signatures, on the document to authenticate the fact that they had identified the executant. It is not shown that they put their signatures for the purpose of attesting the document. They cannot,

therefore, be regarded as attesting witnesses. '

The principles laid down by the Supreme Court are the complete answer to this argument of learned counsel for the appellant, and therefore, in view of the above reason, I do not find that the lower appellate court has erred in not considering the signatures of the registering authority as an attestation of the will.

7. Moreover the will being executed on 30. 6. 76, the endorsement of the Sub Registrar and his signatures thereon of the next date i. e. 1. 7. 76 cannot be said to be the signatures of an witness attesting the execution of the will.

8. The other circumstances relied on by the learned counsel for the respondent is that one of the witnesses i. e. Radha Kishan, Advocate has signed on the margin of the first page and has not signed on any other page including the last page except in the endorsement of Sub Registrar on the next day. Radha Kishan, Advocate, has not been examined as a witness. Learned counsel for the appellant argued that it is not necessary to examine both the attesting witnesses of the will. However, the fact remains that there is no reasons shown as to why witness Radha Kishan, Advocate, did not sign on the last page and signed only in the margin of the first page of the will and the other witness Ram Kishan affixed his thumb marks only on the last page and not on the earlier pages of the will. It is also to be noted that the executant has also not signed below the will on the last page. He has affixed his thumb marks only in the margin of four pages of the will. This creates a lot of suspicion. In these peculiar facts of the case non-examination of witness Radha Kishan, Advocate assumes importance. He was a literate witness and was knowing of the legal implications and also the formalities for the execution of a valid will. If he had acted as a witness, he could have explained these discrepancies much better than others. In view of the facts, the finding of learned Additional District Judge that Radha Kishan, Advocate was not an attesting witness of the will can be accepted.

Learned lower appellate Court has also held that the property originally belonged to Amru's father namely Basanta and, therefore, the suit property was ancestral and he was not competent to dispose of or to alienate the same by a will. This finding also is sound and no reason is shown as to why the same should be

interfered with.

9. Learned counsel for the appellant has also argued that Radha Kishan, Advocate is not examined as a witness though he has given his own affidavit. It is difficult to understand as to why this procedure is adopted for leading the evidence in this case. It is not shown that order of the Court was sought for proving the fact by affidavit as required under Order 19 of the Code of Civil Procedure. Moreover, in a contested matter like the present one, it will not be proper to consider any such evidence which may be tried to have been produced by way of affidavit. The case was tried in a regular manner.

10. In view of all the above reasons, the finding of the Court below does not require any interference. Both the appeals, therefore, deserve to be dismissed and they are dismissed as such.

11. A copy of this judgment be kept on the record of R.S. A. No. 1918 of 1998.

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