

**Mst. Gullan Devi Vs. Mst. Puna Alias Puran Devi and ors.**

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**Court :** Jammu and Kashmir

**Decided On :** Jul-12-1988

**Reported in :** AIR1989J& K51

**Judge :** M.A. Shah and; M.L. Bhat, JJ.

**Acts :** [Succession Act, 1925](#) - Section 59; ;[Evidence Act, 1872](#) - Section 68;  
;Jammu and Kashmir Evidence Act, 1977 - Section 68

**Appeal No. :** Letters Patent Appeal (Civil) No. 14 of 1979

**Appellant :** Mst. Gullan Devi

**Respondent :** Mst. Puna Alias Puran Devi and ors.

**Advocate for Def. :** D.P. Gupta, Adv.

**Advocate for Pet/Ap. :** S.D. Sharma, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**Shah, J.**

1. This Letters Patent appeal is filed by the defendant/appellant against the preliminary decree passed in a suit for partition in Civil Suit No. 22 of 1971 by learned Single Judge of this Court, as he then was, on June 6, 1979.

2. Mst. Puna alias Puran Devi, widow of Shri Kirpa Ram-respondent 1 in the present appeal filed a civil suit against the present appellant and respondents 2 to 6 praying for a decree for partition of the suit property and claim possession by metes and bounds. Respondent 1 and the appellant are admittedly the daughters of one Rasila Singh and respondents 2 to 6 are the Successors of the pre-deceased daughter of Rasila Singh. It is not necessary to detail the property in dispute as none of the parties have disputed that the suit property was left by Rasila Singh. It was alleged by Respondent No. 1 that Rasila Singh executed a 'Will' in her favour on Jan. 30, 1965 and in favour of the appellant, which was cancelled by him on July 8, 1966, and thereafter till his death on July 15, 1969, the deceased did not execute any 'Will'. On his death, he left a house comprised in Khasra No. 140 situated at Mohalla Rehari, Jammu consisting of 11 rooms, to which respondent No. 1/plaintiff and appellant/defendant No. 1 are entitled to half and half share, which she claimed in the partition suit.

3. It is also not disputed that the parties being Hindu are governed by the principles of Hindu Law, it is alleged that the children of a pre-deceased daughter have no right or claim on the property left by her father in the suit. Except appellant and respondent 5, all other respondents were set ex parte. The main contest was between the appellant and respondent 1. Appellant pleaded that a 'Will' was executed by Rasila Singh in her favour on July 15, 1969 bequeathing his entire property in her favour to the exclusion of respondent 1. Whereas respondent 5 claimed a share in the property of the deceased on the basis that Rasila Singh was his maternal grandfather without specifying the law under which the same was claimed, The learned trial judge on the pleadings of the parties framed the following issues on Nov. 1, 1973, as he then was : --

1) Did Rasila, the father of the plaintiff, defendant 1 and maternal grand-father of defendants 2 and 3 execute a valid and genuine will dt. 15-7-1969 enforceable in law in favour of defendant 1? O.P.D. No. 1.

2) In case, issue No. 1 is found in favour of defendant No. 1, is the plaintiff entitled to any relief? O.P.P.

4. Parties were allowed to lead their evidence on the issues noted hereinabove. Respondent 1 besides herself examined P.W. Karfar Chand, P.W. Anant Ram, P.W. Prem Dass and P.W. Maheshar Dass as her witnesses and produced in the documentary evidence 'Will' dated Jan. 30, 1965 and the cancellation deed of the said 'Will' dated July 8, 1966 and tried to prove the execution of the said documents as duly signed by the deceased-Rasila Singh. She also produced other documents, which shall be discussed hereinafter while the evidence is being appreciated.

5. To prove issue No. 1, appellant/ defendant 1 examined DW-Mahasha Nahar Singh, DW-Ram Krishan Petition Writer, DW-Babu Ram, DW-Kartar Singh, DW-Dr. T. R. Narang and also examined herself as her own witness. Other documents on record consist of the copy of the entries of death register maintained by the Municipality, a sale deed of 2nd March, 1991, a register maintained by Secretary Mahasha Sudhar Sabha and the 'Will' produced by the appellant alleged to have been executed on July 15, 1969. The learned-single Judge on appreciation of the evidence both documentary and oral produced by the respective parties found that the 'Will' set up by the appellant cannot be held to be a genuine or a valid 'Will' enforceable in law with a finding that appellant failed to prove that Rasila Singh had executed any valid and genuine 'Will' on July 15, 1969 and thus decided issue No. 1 against the appellant. In consequence of the decision on issue No. 1 in favour of respondent 1, issue No. 2 stood decided granting relief of partition of the property in dispute by dividing the property into three equal parts according to the principles of Hindu Law holding Successors of the pre-deceased daughter also entitled to get 1 /3rd share out of the property left by the deceased and by the preliminary decree impugned in the present appeal held the appellant and respondent 1 entitled to 1/3rd share each in the property instead of 1/2 as was claimed by respondent No. 1 and to respondents 2 to 6 collectively to 1/3rd of the share of the property left by the deceased-Rasila Singh on the ground that none of the parties succeeded in proving the testament, hence property devolved on the heirs of the deceased-Rasila Singh as intestate property.

6. The appellant being aggrieved against the said judgment and preliminary decree filed this appeal though registered as Letters Patent appeal, but in fact a

First Appeal attacking the findings on several grounds.

7. Heard learned counsel for the respective parties at length. We were taken through the evidence on record both documentary and oral. Learned counsel for the appellant hammered on the 'Will' set up by her in order to claim the property in dispute alleged to have been executed by Rasila Singh on July 15, 1969. It is further alleged that in fact Rasila Singh died on July 16, 1969 and had a disposing mind at the time when the said 'Will' was executed. It is further stated that the appellant stayed and served the deceased till his last breath and preponderance of the evidence is that there could not be any other choice with the deceased except to give away his entire property in favour of the appellant by executing the 'Will', which being the last 'Will' of the deceased supersedes the 'Will' and cancellation deed executed by Rasila Singh on January 30, 1965 and July 8, 1966 respectively.

8. Learned counsel for the appellant reiterated, by reading the statements of the witnesses, who according to him prove the execution of the 'Will' alleged to have been executed by the deceased Rasila Singh on July 15, 1969 and that he died on July 16, 1969. Learned counsel took us to the statements of DW-Mahasha Nahar Singh DW-Ram Krishan the scribe of the 'Will', DW-Babu Ram and Dr. T. R. Narang besides reading the statement of appellant Mst. Gullan Devi and tried to emphasise that the evidence of all these witnesses have not been correctly appreciated by learned Single Judge. When we examine the statements of the various witnesses produced by the respective parties, we find that none of the witnesses of the appellant prove the execution of the 'Will' in accordance with the provisions of Section 68 of the Evidence Act of the State of J & K. The Statements of the witnesses are so flimsy and contradictory that no credibility can be attached to them to rely on their evidence on the various circumstances as he has elaborately discussed by the learned single Judge and above all none of the witnesses prove the alleged 'Will' as duly executed and attested in his presence. Undoubtedly a 'Will' is a document, which is required by law to be attested. If the standard of proof as envisaged by Section 68 of the Evidence Act falls short of the legal requirement, a 'Will', which is neither registered nor proved to have been attested and executed in accordance with law cannot be taken into consideration

for the purpose of establishing the claim of the legatee.

9. None of the witnesses of the appellant are consistent with regard to the time, when the said 'Will' is alleged to have been executed. DW-Mahasha Nahar Singh, who is said to be the close relation of the parties states that he reached Jammu on the morning of July 14, 1969, Rasila Singh was an old man of 79 years of age executed the said 'Will' on the very day, i.e., July 14 and died on the following day July 15, 1969. His statement, therefore, runs counter and contradictory to the date alleged by the appellant herself, who states that the 'Will' was executed on July 15, 1969. The witness states that the 'Will' was executed between 7 and 8 a.m. DW-Ram Krishan the petition writer, scribe of the Will states that during those days, the court timings were between 7.30 a.m. to 12.30 Noon, he was in the court when he was called by Jagat Ram the husband of the appellant. According to DW-Kartar Singh, the time of the death of Rasila Singh is between 7 and 8 a.m, and at the time of execution of the 'Will' no doctor was present. Whereas DW-Babu Ram states that Rasila Singh died at about 10 a.m. Looking to the Statement of Dr. T. R. Narang, the suspicion attached to the execution of the 'Will' still deepens when he states that the deceased Rasila Singh had been under his treatment for about 12 days and on July 15, 1969, he executed the Will in his presence, which was scribed by the petition Writer and the testator affixed his finger prints on the 'Will' in his presence. Though he proved certificate Ex.DW/N by showing that the same is in his hand writing and bears his signatures, but the other witnesses of the appellant except she herself do not support Dr. T. R. Narang, who admits in his examination-in-Chief that before he had reached the place where Rasila Singh was ailing, the 'Will' had already been executed and signed by the marginal witnesses and thus he was confronted from the words in the certificate issued by him on July 15, 1969 Ex.DW/N that the 'Will' was executed in his presence. The said Certificate is neither signed by the patient nor the doctor is the signatory to the 'will'. Under these circumstances, we are unable to accept the arguments of the learned counsel for the appellant that the learned single Judge misread the evidence, the scrutiny of which by us does not support the case of the appellant.

Even regarding the date of the death of the deceased Rasila Singh, the evidence is not free from doubt. According to DW-Mahasha Nehar Singh, Rasila Singh died on

July 15, 1969; whereas appellant herself states that he died on July 16, 1969, which fact is not supported by the entry in the Municipal Record Ex.W/1, /Column No. 2 of which shows the date of death as July 14, 1969 which according to the learned counsel for the appellant be ignored. Dr. T. N. Narang is riot in a position to show when the patient Rasila Singh died. From the pleadings of the defendants also, we find that there is nothing in the written statement to suggest that when Rasila Singh died. Mst. Gullari Devi, the appellant states that the appellant was about 82 years of age and died on July 16, between 6 and 7 a.m. and admits that he was cremated at Jammu Shamshan Ghat. From this state of evidence, no reliance can be placed on the solitary statement of appellant-Gull an Devi to hold that Rasila Singh died on 16-7-1969. Coupled with the fact as stated by respondent No. 1 the plaintiff which is also not denied by the appellant that deceased Rasila Singh used to sign in Dogri; whereas the alleged 'will' contains the finger impressions numbering five on Ex. DI against the normal practice of putting only the thumb impression establishes more doubt on the genuineness of the 'will'. Though it was open to the appellant to prove the date of death by producing the documentary evidence of showing the entry in the register of Shamshan Ghat, which she has failed to do. The evidence, therefore, falls short of the legal requirement to discharge the burden of proving the exact date of death of deceased Rasila Singh.

10. Learned counsel for the appellant referring to an authority of their Lordships of the Supreme Court reported in AIR 1980 SC 1658 (D. R. Krishnaswamy v, Wesleyan Methodist Mission Trust Association) submitted that the findings arrived at by the learned Judge holding that the 'Will' is fabricated and not genuine has not considered the various aspects, which have been highlighted in the evidence adduced by the appellant, as we have re-appreciated the evidence noted hereinabove in the light of which it is difficult to hold that the 'Will' propounded by the appellant is a genuine 'Will' and free from doubts. The case cited hereinabove entirely differs on circumstances and the evidence, which was produced by the propounder in the said case. In the instant case admittedly the 'Will' is not signed by the Testator, who used to sign in Dogri. The explanation put forward about the illness and weakness of the testator to sign is neither cogent nor can be attached any importance for the want of proving the exact date of death of the deceased

and the possibility of getting the finger impressions on the 'Will' of a dead person cannot be ruled out. There are no admitted standard finger prints on record so as to get them examined by expert and to attach any importance as to form basis of the proof of a Will', which have not been duly proved to have been executed. The ratio of the case cited by learned counsel AIR 1980 SC 1658 (Supra) on facts cannot in our opinion be pressed into service and is thus distinguishable where the High Court of Karnataka reverse the findings on facts arrived at by the trial Judge. In the instant case even the marginal witnesses of the 'Will', namely, DW-Kartar Singh and DW-Babu Ram are unable to prove that the Testator, deceased Rasila Singh put his thumb impression in their presence and they signed before the Executant, which is a sine qua non for the attestation of a particular document, which is required by law to be compulsorily attested. Similarly on the face of the evidence as discussed by the learned trial Judge noticed above, the appellant having failed to prove that the Testator deceased Rasila Singh despite illness had a sound disposing mind and was not physically incapable of signing over the 'Will', the evidence so recorded falls short of the legal requirement of Section 59 of the Succession Act. The explanation 4 of which debars such a person to make a 'Will' and cannot be regarded to have a sound disposing mind. Explanation 4 to Section 59 of the Succession Act runs as follows : --

'59-Explanation 4. No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.'

When applied to the evidence in the instant case as is clearly stated by respondent No. 1 the plaintiff, that her father deceased Rasila Singh was so seriously ill that he was not in a position to dictate any 'Will' and when her witnesses including herself, who observed the illness of the deceased four or five times before July 15, they established that Rasila Singh was not in a fit state of mind and had not been able to recognise the witness whom he knew very well. The statement of the plaintiff to that effect as well as to the effect that Rasila Singh died on 31st of Mar. stood un-impeached and un-contradicted in cross examination In this state of evidence, it is apparent that the appellant failed to remove the suspicious circumstances surrounding the 'Will' and adds to the doubt

about the genuineness and the validity of the 'will'.

11. The other authority on which the reliance is placed by learned counsel for the appellant on the standard of proof of a Will under Section 59 of the Succession Act is reported in AIR 1978 SC 1202 (Brij Mohan Lal Arora v. Girdhari Lal Manucha). In this case a 'Will' was set up by the propounder, which was executed by a Hindu Widow of seventy years old. It was found in that case that Testatrix proved to be of sound disposing mind though physically incapable of signing her name at time of execution of 'Will'. On facts it was held that suspicious circumstances were not proved and hence the 'Will' was upheld. The facts as enumerated in the above noted authority cannot be equated with the facts in the instant case. As we have already pointed out that the appellant failed to prove that deceased Rasila Singh had a sound disposing mind on the alleged date of the execution of the 'Will'. Not even that she has also failed to prove that the deceased in fact died on July 16, and was capable of executing the 'Will' on July 16, 1969. The learned trial Judge before whom the witnesses were examined and who had the opportunity of watching their demeanour while discussing the evidence of Dr. T. R. Narang held thus : -

'It would, thus, be seen from the evidence of Dr. T. R. Narang, that the evidence of this witness bristles with improbabilities and is a picture of self-contradiction, the like of which one can hardly find in a witness who is called as an expert witness in a subject.'

On going through the statement of this witness, we have no doubt in our mind to hold that the entire statement of the witness appears to be based on contradictions and no credibility can be attached to the statement of such a witness to remove the clouds of suspicious circumstances to give credit of any kind to the appellant to hold that the circumstances do exist that the deceased instead of signing put his finger prints on the 'will'. Respondent 1 in her evidence has brought enough material on record to prove that the deceased on July 15, 1969 or even 4/5 days before, the said date did not even possess a sound disposing mind. In AIR 1965 SC 354 (Ramchandra Rambux, v. Champabai, on the standard of proof of a 'will' prepared under suspicious circumstances, their Lordships held : --

'In all cases in which a will is prepared under circumstances which- arouse the suspicion of the court that it does not express the mind of the testator, or that it was prepared under highly suspicious circumstances, it is for the propounder of the will to remove that suspicion.'

In this case the part played by Jagat Ram, husband of the appellant in getting the alleged 'will' prepared in favour of his wife the appellant and the evidence given by the scribe petition writer, the attesting witnesses of the 'Will', namely, Kartar Singh and Babu Ram and over all the statement of Dr. T. R. Narang are found so much contradictory to each other, that they instead of obliterating them strengthen the suspicious circumstances surrounding the 'Will'.

In this state of evidence, the suspicious circumstances surrounding the 'will' having not been removed by the appellant, the findings arrived at by the learned trial Judge in our opinion cannot be said to be either perverse or illegal requiring interference in the appeal.

12. In the result, the appeal fails, which is hereby dismissed. However, under the circumstances, parties are left to bear their own costs. The record be sent back.

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