SUPREME COURT OF INDIA

Rur Singh (D) Th. Lrs.

Vs.

Bachan Kaur

C.A.No.941 of 2009

(S.B. Sinha and Dr. Mukundakam Sharma JJ.)

12.02.2009

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. This appeal is directed against a judgment and order dated 11.07.2006 passed by a learned Single Judge of the Punjab and Haryana High Court whereby and whereunder a judgment and order dated 18.11.1998 passed by the Additional District Judge, Mansa in Civil Appeal No. 59 of 1996, dismissing the appeal preferred by the respondent herein from a judgment and decree dated 12.02.1996 passed by the Civil Judge (Junior Division), Mansa in Civil Suit No. 341 of 1983.

3. The basic fact of the matter is not in dispute. One Kehar Singh was the owner of the property. The parties hereto are his children. He is said to have executed a Will on or about 14.05.1969 in terms whereof he bequeathed all the agricultural properties in favour of his sons. The said Will is said to have been scribed by the Sarpanch of the village and attested by ten witnesses. He expired on 5.10.1969. Mutation in respect of the properties situate in the village Lohgarh in favour of his sons was allowed by an order dated 4.02.1970. Allegedly, order of the mutation in respect of the properties situated in the village Jhunir was passed in the year 1979.

4. Respondent herein filed a suit in the Court of Civil Judge (Junior Division), Mansa praying inter alia for a decree of possession contending that the said Kehar Singh died intestate. Appellants, on the other hand, claimed their right, title and interest in the suit property by reason of the said Will executed by Kehar Singh. The learned Trial Judge in view of the rival contentions of the parties inter alia framed the following issues:

> "1-C. Whether the suit property developed (sic for devolved upon) against heirs of Kehar Singh as mentioned in para no. 4 of amended written statement?"

5. The learned Trial Judge, keeping in view the order of mutation in respect of the properties in favour of the appellants herein which took place in the year 1970, the validity whereof was not challenged, and on the basis of the other materials brought on record, held the said Will dated 14.05.1969 to be genuine and, thus, dismissed the said suit. An appeal preferred thereagainst by the respondent was also dismissed.

6. Respondent herein preferred a second appeal thereagainst. A learned Single Judge of the High Court formulated the following substantial question of law for consideration:

> "Whether in the facts and circumstances of the case, the Will allegedly executed by Kehar Singh was free from all suspicious circumstances and whether the same conformed to the provisions of Section 63 of the Act?"

7. The concurrent findings of the Trial Court as also the first Appellate Court were reversed by the learned Single Judge of the High Court, stating:

> (i) As mutation of the properties had been ordered on 28.08.1979 in presence of the parties whereagainst no challenge was thrown, had the Will been in existence in 1969, the same should have been produced in the mutation proceedings.
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> (ii) The Will is surrounded by suspicious circumstances as all the beneficiaries had a role to play in execution thereof.
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> (iii) The Will has been scribed by Gurbachan Singh, Sarpanch in Urdu although he had chosen to sign in English at more than one place.
>
> (iv) The Will although was stated to be recorded in the panchayat register but the same was not produced. As regards the question as to whether the Will has been proved in terms of Section 63 of the Indian Succession Act, the High Court held:
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> "Section 63 of the Act lays down the manner in which a Will is to be executed. The Will in question which is Ex. D-1 dated 14.5.1969 is an unregistered Will. A perusal of the same shows that there is complete violation of Section 63 (c) of the Act. Kehar Singh, who was the testator, died on 5.10.1969. Cumulatively taken together, all these factors cast a dark shadow on the execution of the Will."

8. Mr. Narender Yadav, learned counsel appearing on behalf of the appellants, would submit that the High Court committed a serious error in interfering with the concurrent findings of fact in exercise of its jurisdiction under Section 100 of the Code of Civil Procedure. The learned counsel would draw our attention to the fact that the order of mutation was passed in the year 1970, as has been found by the learned Trial Judge, and thus, the High Court committed a serious error in opining that the order of mutation was passed in the year 1979. The learned counsel would further submit that out of ten attesting witnesses, only one of them is being the beneficiary and nine others being independent witnesses and the Will having been proved by three independent witnesses, the impugned judgment cannot be

sustained. Furthermore, as the testator was living jointly with the legatees, their presence at the time of execution of the Will was natural and not uncommon. The learned counsel would further submit that the witnesses having proved due execution of the Will both in terms of Section 63(c) of the Indian Succession Act and Section 68 of the Indian Evidence Act, the High Court must have committed a serious error in opining contra.

9. Mr. Vishal Mahajan, learned counsel appearing on behalf of the respondent, on the other hand, would contend:

> "(i) Kehar Singh being 80 years old and having executed the Will four months prior to his death, it must be held to be surrounded by suspicious circumstances.
>
> (ii) Had the Will been genuine, the same would have been produced before the Revenue Court in the mutation proceeding.
>
> (iii) The village panchayat record wherein the factum of the execution of the Will has been registered having not been produced, the Will cannot be said to be genuine."

10. The High Court while exercising its jurisdiction under Section 100 of the Code of Civil Procedure exercises a limited jurisdiction. It may interfere with a finding of fact arrived at by the Trial Court and/ or the first Appellate Court only in the event, a substantial question of law arises for its consideration.

11. The High Court framed only one substantial question of law, viz., whether the Will had been duly proved and/ or was otherwise genuine. It is essentially a question of fact. The learned Trial Judge as also the first Appellate Court in opining that the Will was genuine and free from suspicious circumstances inter alia took into consideration the existing materials on record, viz., the parties ordinarily do not want their agricultural land to go out from the family and in that view of the matter if Kehar Singh had bequeathed his agricultural land only in favour of his sons and excluding the daughters from inheritance, no exception thereto could be taken.

12. The learned Trial Judge as also the first Appellate Court also took into consideration the fact that the villagers in great numbers were present at the time of execution of the Will and in fact Sarpanch himself scribed the same. Furthermore, the fact that at least in respect of the properties situate in village Lohgarh the order of mutation was passed in favour of the sons in the year 1970 and the same was not challenged, also was taken into consideration that the Will must be held to be genuine.

13. As regards proof of Will, as statutorily required in terms of Section 63 (c) of the Indian Succession Act, it was categorically held by the learned first Appellate Court:

> "...The execution of the Will Ex. D-1, dated 14.5.1969, was proved by Rur Singh, DW-1, Kapoor Singh, DW-2, and Hema Ram, DW-3, attesting witnesses thereof. Their evidence goes to prove that the Will was scribed by GurbachanSingh, Sarpanch,

at the instance of Kehar Singh. After scribing the Will, the contents thereof were read over and explained to Kehar Singh, who admitted the same to be correct, and thumb marked the same, in the presence of Rur Singh, DW-1 & Kapoor Singh DW-2, Hem Raj DW-3,Prem Chand, Gurbachan Singh and Piara Singh, attesting witnesses. It is further proved from the evidence of Rur Singh, DW-1, Kapoor Singh, DW-2 and Hema Ram (DW-3) that Kehar Singh thumb marked the Will, in token of its correctness, in their presence and in the presence of other witnesses, whereas they signed and thumb marked the same, in the presence of the testator. It is also proved from the evidence of these witnesses, that Kehar Singh, was in sound disposing mind, at the time of execution of the Will dated 14.5.1969 Ex. D-1. In fact, the perusal of the Will, Ex. D-1, reveals that it was executed by Kehar Singh, in the presence of the entire Panchayat of the village. No doubt, Rur Singh, DW-1, is the son of Kehar Singh, and is one of the beneficiaries, residing with him, in the same house and serving him throughout his lifetime. That, however, does not make his evidence unbelievable. Since, he was residing, in the same house, with Kehar Singh, and was serving him, his presence at the time of the execution of the Will was natural and probable, and that was why he signed the same, as an attesting witness..."

As Bachan Kaur, respondent herein was comfortably married, if the testator thought it proper to exclude her from his agricultural property bequeathing the same in favour of his sons, as has been stated in the Will, no exception thereto could be taken.

14. The High Court essentially entered into the arena of appreciation of evidence. It interfered with the concurrent findings of fact arrived at by the courts below. Execution of a Will is required to be proved in terms of the provisions of Section 63(c) of the Indian Succession Act and Section 68 of the Indian Evidence Act. The statutory requirements to prove a Will in terms of the aforementioned provisions have been laid down in a large number of decisions. We may notice a few of them. In *Janki Narayan Bhoir v. Narayan Namdeo Kadam*[1] while dealing with the question elaborately, this Court held:

"8. To say will has been duly executed the requirement mentioned in Clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e., (a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place form which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator."

As regards compliance of the provision of Section 68 of the Evidence Act, it was opined:-

"In a way, Section 68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. to put in other words, if one attesting witness can prove execution of the will in terms of Clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attention of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act."(Emphasis supplied)

Following the said decision, as also the other decisions in *Benga Behera & Anr. v. Braja Kishore Nanda & Ors.*[2] this Court held:

"...Execution of a Will must conform to the requirement of Section 63 of the Succession Act, in terms whereof a Will must be attested by two or more witnesses. Execution of a Will, however, can only be proved in terms of Section 68 of the Indian Evidence Act. In terms of said provision, at least one attesting witness has to be examined to prove execution of a Will."

Yet again, recently in *Anil Kak v. Kumari Sharada Raje & Ors.*[3] it was opined :

"40. Whereas execution of any other document can be proved by proving the writings of the document or the contents of it as also the execution thereof, in the event there exists suspicious circumstances the party seeking to obtain probate and/ or letters of administration with a copy of the Will annexed must also adduce evidence to the satisfaction of the court before it can be accepted as genuine.

41. As an order granting probate is a judgment in rem, the court must also satisfy its conscience before it passes an order. It may be true that deprivation of a due share by

the natural heir by itself may not be held to be a suspicious circumstance but it is one of the factors which is taken into consideration by the courts before granting probate of a Will. Unlike other documents, even animus attestandi is a necessary ingredient for proving the attestation." [See also *Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria & Ors.*[4]].

15. The Will was scribed in the house of the testator. From the deposition of the witnesses, the learned Trial Judge as also the first Appellate Court came to the conclusion that he was in a sound disposing mind. The Will was scribed by the Sarpanch. As many as ten witnesses attested the Will; nine of them being independent witnesses. Execution of the Will as also attestation thereof by the witnesses was concluded in one go. The testator and all the witnesses were present throughout the said transaction. It is in the aforementioned situation, the learned first Appellate Court had arrived at a categorical finding of fact that the statutory requirements had been complied with as more than one witness had attested the execution of the Will not only in presence of the testator but also in presence of each other.

16. The High Court unfortunately even did not choose to assign any reason in support of its conclusion that the statutory requirements contained in Section 63(c) of the Indian Succession Act had not been complied with. The oral evidence adduced on behalf of the parties had not been discussed far less analysed. How and in what manner the statutory requirements had not been complied with was not stated.

17. The High Court omitted to notice that at least in respect of the properties situate in one village the order of mutation was passed in the year 1970, i.e., immediately after the execution of the Will. The High Court furthermore failed to take into consideration that at least in regard to the said order of mutation, the respondent did not carry the matter to the appellate court or question the validity thereof by filing a suit.

18. The suit was filed in the year 1983. It was also not the case of the respondent that she had been getting share of the yields from the said agricultural properties.

Only because one of the beneficiaries attested the Will, the same would not mean that he had taken active part in it. In any event, the learned Trial Judge as also the first Appellate Court found sufficient explanation therefor holding that as the Will was executed in testator's house and he had been living jointly with his sons, their presence in the house was natural.

19. We have noticed hereinbefore that the Will was attested by nine independent persons. Three of them in fact had been examined. The High Court while holding that a doubt is cast on its validity by reason of active participation of one of the sons, failed to notice that nine other independent witnesses attested the Will. We, therefore, fail to attach much importance to the fact that although Gurbachan Singh, Sarpanch scribed the Will in Urdu, he at more than one place signed in English. In a village, a person may be more proficient in the vernacular language than English although he may be able to sign his name in English.

20. If the Will was otherwise proved to be genuine and the statutory requirements therefor were satisfied, in our opinion, only because the panchayat register was not produced, the same by itself would not lead to the conclusion that the Will would be held to have not been executed, particularly when two courts competent to arrive at findings of fact held it otherwise.

21. For the reasons aforementioned, the impugned judgment cannot be sustained and is set aside accordingly. The appeal is allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

[1]*(2003) 2 SCC 91*
[2]*2007 (7) SCALE 228*
[3]*(2008) 6 SCALE 597*
[4]*2009 (1) SCALE 328*