Before Amit Rawal, J.

DARSHAN SINGH AND OTHERS—*Appellant*

versus

NASIB KAUR AND OTHERS—*Respondents*

RSA No. 1135 of 1992

April 23, 2018

Indian Succession Act, 1925—S. 63(c) —Execution of will—Proof—Plaintiffs sought possession of land alleging defendant forcefully took possession and got land mutated—Defendants claimed premise on will—Attested by witnesses, one died and another turned hostile—son of dead witness not supported will and could not state that his father appended signatures on will—register of deed writer did not bear thumb impressions of testator—Compliance of S. 63 (c) of 1925 Act conspicuously wanting—Even if other witness had deposed that he was present at time of execution, it did not suffice requirement of provisions of proving will.

Held, that even if, the other witness had been examined or deposed that the other witness was present at the time of the execution, it did not suffice the requirement of provisions for proving the Will.

(Para 15)

G.S. Gandhi, Advocate, *for the appellant(s)* in RSA-1135-1992.

Kanwaljeet Singh, Senior Advocate with N. K. Manchanda, Advocate, for the respondent No.2 in RSA-1135-1992 and for the appellant(s) in RSA-1501-1992.

AMIT RAWAL, J. (ORAL)

(1) This order of mine shall dispose of two regular second appeals bearing ***RSA No.1135 of 1992*** titled as ***Darshan Singh and others*** *versus* ***Nasib Kaur and others*** arising out of decision of Civil Suit No.116 of 1986 titled as ***Nasbir Kaur and others*** *versus* ***Bachittar Singh and others*** and appeal bearing ***RSA No.1501 of 1992*** titled as ***Nasib Kaur and others*** *versus* ***Bachittar Singh and others*** arising out of Civil Suit No.116 of 1988 titled as Nasib Kaur and others V/s Bachittar Singh and others.

(2) The facts are being taken from RSA No.1135 of 1992.

(3) The plaintiffs-Nasib Kaur and others, instituted the suit on

the premise that Avtar Singh, Bagher Singh, Bachittar Singh and Mukhtiar Singh were the sons of Aala Singh sons of Bishan Singh. Mukhtiar Singh was the owner of land measuring 66 kanals 0 marla comprised in Khewat Khatauni No.24/58 to 61 duly described in the head-note of the plaint. Mukhtiar Singh, was on 14.01.1976, murdered by Banta Singh, his son, who was convicted for his murder, therefore, in view of the provisions of Hindu Succession Act, not entitled for any share in the property. Mukhtiar Singh at the time of his death was having a living wife Kartar Kaur. After his death, Kartar Kaur (wife), Nasib Kaur (daughter-in-law) and Mohinderjit Singh (grandson) became the owners in equal share qua him. Kartar Kaur expired four years ago and thereafter, her 1/3rd share of land heir of Mukhtiar Singh was inherited by Banta Singh-plaintiff exclusively. It is, in that background of the matter, the plaintiffs claimed to be owner of the land in dispute in equal shares. Since Banta Singh was confined to jail and rest of the persons being ladies with minor were residing in the house, but the defendants forcibly took the possession of the land and in connivance with the revenue officials, got the mutation sanctioned on 30.01.1980 on the basis of the Will dated 10.01.1969 alleged to be executed by Mukhtiar Singh. The aforementioned Will was challenged on the premise that Mukhtiar Singh never executed the Will.

(4) In response to the notice of the aforementioned suit, the defendants had filed the written statement by taking various objections. The pedigree table depicted in the plaint was disputed on ground of incorrect particulars, for, the details of Melo widow of Avtar Singh, Surjit Kaur @ Sukhjit, Paramjit Kaur daughter of Avtar Singh had not been mentioned. The factum of murder of Mukhtiar Singh and conviction of Banta Singh, much less, his disentitlement to succeed to the estate of Mukhtiar Singh, was admitted. Even the death of Kartar Kaur had also not been denied. The defendants supported the sanction of the mutation on the basis of the Will on the premise that Katar Kaur wife of Mukhtiar Singh was not on good terms with her husband Mukhtiar Singh, for, she filed a maintenance application in forma pauperis against Mukhtiar Singh during her life time and even proceedings under Section 107/151 Cr.P.C., were also initiated. Only three brothers, namely, Bachittar Singh, Avtar Singh and Bagher Singh used to render services to Mukhtiar Singh, during his life time and it was on that account, he executed a Will in their favour. Replication was filed controverting the averments by reaffirming the averments made in the plaint.

(5) The Trial Court on the basis of the pleadings framed the following issues:-

1. Whether the plaintiffs are entitled to a decree for possession on the basis of succession as prayed for in the plaint? OPP.

2. Whether Mukhtiar Singh deceased executed a valid Will in favour of defendants Nos.1 and 2 and Avtar Singh deceased. If so to what effect/ OPD

3. What is the effect of non-filing of the latest Jamabadi w ith the plaint of the suit? OPD

4. Whether the suit is bad for non-joining of Surjit Kaur, Sukhjit Kaur, Paramjit Kaur, daugthers of Avtar Singh deceased?

5. Relief.

The plaintiff in support of the case examined the following witnesses:-

PW1 Banta Singh

PW-2 Angrej Singh

On the other hand, the defendants examined the following witnesses:-

DW-1 Baghera Singh,

DW-2 Duni Chand,

DW-3 Amir Singh

DW-4 Surjit Singh

DW-5 Ranjit Singh

DW-6 Avtar Singh

DW-7 Brish Bhan, Clerk of Judicial Record Room.

(6) Thereafter, an application for additional evidence was moved, for, in the previous evidence, the original Will was not located and in support of that, the defendants again examined DW-5 Ranjit Singh for proving that death of Naranjan Singh one of the attesting witnesses of the Will Ex.D-9. DW-4 Surjit Singh, Scribe of the Will Ex.D9 and DW-6 Avtar Singh attesting witness of the Will. DW-8 Mahesh Chander retired Tehsildar, who attested the Will (Ex.D-9) for

the purpose of registration of the Will. DW-9 Har Kaur, Handwriting Expert, to prove the thumb- impressions of Avtar Singh one of the attesting witnesses of the Will. DW- 10 Shri Ram Singh, Advocate, to prove the plaint. An application filed under Order 33 Rule 1 CPC filed by Kartar Kaur against Mukhtiar Singh. DW-11 Satwant Puri, Hand Writing Expert, who compared the disputed thumb impressions of Mukhtiar Singh with that of his thumb impression existing on a previous sale deed dated 07.03.1961. DW-12-Varinder Kumar and DW-13 Charan Dass, Clerk of Sh. IML Verma, Advocate were examined.

(7) The plaintiff No.3-Banta Singh stepped into the witness box in rebuttal as PW-1.

(8) The trial Court on the basis of the preponderance of evidence, by upholding the Will dated 10.01.1969 (Ex.D-9) dismissed the suit. In an appeal preferred by the plaintiffs, the lower Appellate Court partly decreed the suit to the extent that Nasib Kaur and Mohinderjit Singh were held to entitle for possession qua 1/3rd share of land measuring 66 kanals. Hence the regular second appeals.

(9) Mr. Gandhi, learned counsel appearing on behalf of the appellant(s) in RSA-1135-1992 submitted that Banta Singh was not entitled to succeed to the share of his father as he was disqualified under Section 6 of the 1956 Act owing to conviction for murdering his father. The provisions of Section 25 and 27 of the 1956 Act prohibits the inheritance of share of the property for the purpose of natural succession in view of the conviction. In support of his contentions, he relied upon the paragraph Nos.20 to 22 of the judgment rendered by the Hon'ble Supreme Court in ***Vallikannu*** *versus* ***R. Singaperumal and another***[1].

(10) It was next contended that the lower Appellate Court committed illegality and perversity in depriving the share of Avtar Singh son of Alla Singh, brother of Muktiar Singh, inherited by virtue of the Will, which has been upheld on the premise that he had pre-deceased Mukhtiar Singh, for, Avtar Singh had died on 09.03.1972, whereas Mukhtiar Singh on 14.01.1976. The Courts below had no occasion for depriving the right of Avtar Singh in view of the fact that Will had been proved in terms of the provisions of Section 68 of the Indian Evidence Act, 1872 (in short 'the 1872 Act') and Section 63(c) of the Indian Succession Act, 1925 (in short 'the 1925 Act'). The

[1] AIR 2008 SC 2587

respondents-plaintiffs did not implead the LRs of Bachittar Singh, who died in the year 1980, during the pendency of the proceedings, thus, the appeal was liable to be dismissed, on this ground, for, a specific objection was also taken with regard to the non-impleading of proper party. There was no occasion for the lower Appellate Court to grant 1/3rd share in favour of Nasib Kaur and Mohinderjit Singh, once it had been proved that Mukhtiar Singh and Kartar Kaur were at logger head. There was an litigation qua maintenance as well as under Section 107/151 Cr.P.C. In fact, Kartar Kaur dragged Mukhtiar Singh in many litigations, which compelled him to execute the will in favour of his brothers. Non-reference of a son and a wife in the Will, in view of the litigation, would not be a cause for taking out the share of Avtar Singh, therefore, the judgment and decree of the lower Appellate Court is liable to be set aside.

(11) On the contrary, Mr. Kanwaljit Singh, learned Senior Counsel assisted by Mr. N. K. Manchanda, learned counsel appearing on behalf of the respondent No.2 in RSA-1135-1992 and for the appellant(s) in RSA- 1501-1992 challenging the findings of the lower Appellate Court viz-a-viz upholding of the Will, submitted that the land measuring 66 kanals belonged to Mukhtiar Singh consisting of himself, his wife Kartar Kaur and son Banta Singh. On death of Mukhtiar Singh, on the basis of the notional partition, even if Will had to be accepted, Mukhtiar Singh would have got only 1/3rd share out of land measuring 66 kanals i.e. 22 kanals and therefore, Mukhtiar Singh could have executed valid Will in respect of land measuring 22 kanals and not beyond that. Since Avtar Singh predeceased Mukhtiar Singh on 09.03.1972, therefore, 1/3rd share, would go to the legal heirs of Mukhtiar Singh by way of natural succession and only 2/3rd share of remaining i.e. 22 kanals, would be inherited by the Will. It was exclusive property of Mukhtiar Singh, therefore, brothers did not have any right, for, they could have succeeded being collaterals, if Avtar Singh died unmarried and issueless. The Will had also not been proved in accordance with the provisions of Section 63(c) of the 1925 Act as DW4-Surjit Singh, Deed Writer, in cross-examination admitted that the name of Mukhtiar Singh was in his register not written in the column meant for appending thumb-impression. He could not depose without seeing the original Will with regard to its contents nor did he recollect name of the attesting witnesses of the Will. DW5-Ranjit Singh stated that his father knew the Punjabi and Urdu. DW-6 Avtar Singh appeared, but turned hostile and stated that he did not know whether he appended his signatures on the Will, in other words, he did not support

the Will. DW5-Ranjit Singh, after allowing the additional evidence, again appeared and in cross-examination stated that he did not identify whether the Will bore the signatures of his father or not. He did not have any instrument to identify the signatures of his father, even he could not identify whether the signatures of Naranjan Singh and that of Avtar Singh were of the same or not, in essence, in order to rebut the arguments, he submitted that since one of the attesting witnesses had turned hostile and other witnesses had died, there was no compliance of the provisions of Section 63(c) of the 1925 Act, for, DW-8 Mahesh Kumar, retired Tehsildar, even could not depose in terms of the aforementioned provisions of the Act, for, he stated that Mukhtiar Singh at the time of the execution Will was 40 years old and on understanding the contents of the Will, had appended his thumb-impressions, but the endorsement of the *wasiyat* was blank. The Will was most unnatural and surrounded by the suspicions circumstances as none of the parties had denied Kartar Kaur to be his wife and Mohinderjit Singh to be grandson. Once Avtar Singh had died before Mukhtiar Singh and he and his legal heirs could not inherit the property under the Will, therefore, they were not necessary parties, thus, the issue No.4 ought to have been decided in favour of the plaintiffs, but there is infirmity in allowing the suit to the extent of 1/3rd share of the land measuring 66 kanals, as submitted above. The plaintiffs filed suit for possession of land measuring 66 kanals on account of devolution of interest by survivorship upon the surviving members of the coparcenary, who happened to be daughter-in-law and grandson of the deceased- Mukhtiar Singh. It had already proved on record that there was some other ancestral property of Alla Singh which was sold and bought another property a part of which was in dispute in the present suit. The said property was partitioned equally among his four sons, Avtar Singh, Bagar Singh, Bachittar Singh and Mukhtiar Singh and the share fell to Mukhtiar Singh, thus, urges this Court for modification of the decreetal of the suit in toto and dismissal of the appeal preferred by the defendants.

(12) In support of his contentions, he relied upon the *ratio decidendi* culled out by the Hon'ble Supreme Court in ***Janki Naryan Bhoir*** *versus* ***Narayan Namdeo Kadam***[2] , to contend that the scribe of the Will cannot be considered to be attesting witnesses. The propounder of the Will has to prove the Will that it was validly and duly executed and not by simply proving the signatures on the Will that to be of a

[2] 2003(1) RCR (Civil) 409, 2003(2) SCC 91

testator, there must be an attestation as per the provisions of Clause 6 of Section 63(c) of the 1925 Act. The expression 'direction' as described in sub-Section 3 of Section 63(c) of the 1925 Act has not been complied. Also relied the *ratio decidendi* culled out by this Court in ***RSA No.5252 of 2012*** titled as ***Kanwaljeet Kaur*** *versus* ***Joginder Singh Badwal (deceased through LRs) and others*** decided on 13.12.2016 as well as in ***RSA No.5041 of 2011*** titled as ***Sadhu Singh (deceased through LRs)*** *versus* ***Gurdeep Singh and others*** decided on 01.03.2018.

(13) I have heard the learned counsel for the parties, appraised the paper book as well as the record of the Courts below.

(14) The question which arises before this Court is whether Mukhtiar Singh had executed a valid and genuine Will, for, in case the Will is proved, then the judgment and decree of the lower Appellate Court granting 1/3rd share to plaintiff Nos.1 and 2, namely, Nasib Kaur and Mohinderjit Singh, is justified and if otherwise, the entire estate of Mukhtiar Singh would be inherited by the plaintiffs being the Class-I heirs of Mukhtiar Singh depriving the right to Banta Singh, who could not succeed to the estate of his father on account of conviction/charges of murdering Mukhtiar Singh. It is a settled law that for proving the Will, the propounder is required to comply the provisions of Section 68 of the 1872 Act and Section 63(c) of the 1925 Act, which reads thus:-

> "**Section 68 of the Indian Evidence Act**
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> Proof of execution of document required by law to be attested.
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> — If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.
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> **Section 63 (c) of the Indian Succession Act**
>
> (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) The relationship of Nasib Kaur and Mohinderjit Singh, being wife and son of Banta Singh and daughter-in-law and grandson of Mukhtiar Singh as well as conviction of Banta Singh for murdering Mukhtiar Singh are not in dispute. The Will is registered. It was attested by Naranjan Singh, who died and Avtar Singh, who turned hostile. It had been drafted by Surjit Singh and Tehsildar, who registered the same, also has appeared as DW-8. DW5-Ranjit Singh son of Naranjan Singh did not support the Will or could state with regard to the fact that his father had appended the signatures on the direction of the testator or had received from the testator a personal acknowledgement of his signatures, which is one of the ingredients for the purpose of proving the execution of the Will. The other attesting witness, for the sake of repetition, did not support the case of the plaintiffs. The entire focus was drawn to the statement of DW4-Surjit Singh and DW8- Mahesh Kumar, Retired Tehsildar. On reading of the cross-examination of DW4-Surjit Singh, deed writer, it surfaced that his register did not bear the thumb-impressions of Mukhtiar Singh. DW8-Mahesh Kumar, retired Tehsildar, could not state a word with regard to the fact that the witnesses had appended signatures in his presence on the "Directions of the Testator" or his personal acknowledgement, therefore, the compliance of Section 63(c) of the 1925 Act is conspicuously wanting. Even if, the other witness had been examined or deposed that the other witness was present at the time of the execution, it did not suffice the requirement of provisions for proving the Will. For the sake of brevity, the paragraph Nos.8 and 9 of the judgment rendered in "Janki's case (supra) are produced hereinbelow:-

> "8. To say will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of Section 63of 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 from 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.
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> 9. It is thus clear that one of the requirements of due execution of will is its attestation by two or more witnesses which is mandatory."

(16) In ***Sadhu Singh's*** *case (supra)*, this Court while examining the provisions of Section 63(c) of the 1956 Act as well as the statement of the witnesses finds that the witnesses had not stated in terms of the provisions of the aforementioned Act. For the sake of brevity, the relevant paragraph reads thus:-

> "The provisions of Section 63 (c) of the Indian Succession Act provides three conditions to be complied with; (i) The Will should have been attested by two or more witnesses, each of whom had seen the testator either sign or affix his mark to the Will or seen some other person signing the Will in the presence; (ii) 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 (iii) 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. No doubt both the witnesses, PW3-Malkiat Singh and PW5-Nazar Singh, have been examined by the plaintiff-Gurdip Singh to prove the execution of the Will and have stated that they had signed the Will in the presence of the testator-Surjit Kaur, but the compliance of the 2nd condition i.e. by the "Direction" of the testator, is conspicuously wanting. The compliance of the aforementioned provisions had been point of debate and consideration before the Hon'ble Supreme Court in ***Janki's*** case (supra) and before this Court in ***Kanwaljeet's*** case (supra), wherein it has been held that all the ingredients of Section 63(c) of the Indian Succession

Act are required to be complied with. For the sake of brevity, the paragraph Nos.6 to 8 and 10 of ***Janki's*** *case (supra)* and the relevant portion of **Kanwaljeet's** *case (supra)*, read thus:-

"6. At the hearing the learned counsel for the respondent fairly submitted that Raikar was only the scribe and he was not the attesting witness. Even looking to the evidence of Raikar himself it is clear that he gave evidence as the scribe. There is nothing on record to indicate that he had any intention to attest the Will. The attesting witness Sinkar has not stated that the other attesting witness Wagle attested the Will in his presence. On the other hand, he has stated that he did not see Wagle present at the time of execution of the Will. Wagle, the other attesting witness, being alive ought to have been examined in order to prove the Will. Nothing is brought on record to show that any attempt was made to examine Wagle or there was any impediment in examining him. It is true that although will is required to be attested by two witnesses it could be proved by examining one of the attesting witnesses as per Sections 68, Indian Evidence Act.

7.We think it appropriate to look at the relevant provisions, namely, Section 63 of the Indian Succession Act, 1925 and Sections 68 and 71 of the Indian Evidence Act, 1872 which read:

Section 63 of the Succession Act "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) .....

(b) .....

(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 of 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."

Section 68 of the Evidence Act "68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving it's execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided ....."

Section 71 of the Evidence Act "71. Proof when attesting witness denies the execution.- If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

8.To say will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of Section 63of 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 from 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.

10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of

proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. 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 attestation 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."

Relevant portion of Kanwaljeet's case (supra)

I have heard the learned counsel for the parties and appraised the paper book and of the view that there is a merit and force in the submissions of Mr. Kanwaljit Singh, for, I cannot shut my eyes in not assuming the role of Expert by taking the aid of the provisions of Section 45 of the Indian Evidence Act. On bare glance of the Will (Ex.DW-1/1), Bhagwant Kaur had allegedly appended her signatures not above the typed name, but below. When the Will finishes, there is signature of someone which had scored off. It appears that it had been typed on blank paper. If actually Bhagwant Kaur had to sign the same, the defendant(s) should not have been circumspect, rather bold enough to get the same executed and registered, during her lifetime or even thereafter. I have also an occasion to examine the examination-in-chief of DW-1 Dr. Harsharan Singh, the attesting witness of the Will, who had not deposed in terms of the provisions of Section 63 (c) of the Indian Succession Act which reads thus:-

(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.
>
> There are two aspects of the matter that the Will has to be attested by two witnesses and signed by one of them and the witnesses must have been seen each other sign, but the expression on the "direction" of the testator is conspicuously wanting. The expression "desire" cannot be equated with the expression "direction" as per the plain and simple dictionary meaning, it does not in any way indicate that a person had actually intended a person to do it. "Desire" can be imaginary, but the "direction" has to be practical and specific. All these factors, in my view, have not been looked into, much less, seen from this angle, thus, there is a gross illegality and perversity."

(17) The Will also did not mention about existence of the wife and son, though according to the case set up by the defendants, there was an litigation drawn between the parties, but reasons were required to be assigned by the testator for dis-entitling the natural lineage or line of succession. All these factors have not been noticed by the lower Appellate Court while partly decreeing the suit by upholding the Will, therefore, in my view, there is an abdication. The question now further posed is with regard to the fact that the propounder had not discharged the onus in terms of statutory provisions of the Act *ibid*, decided in favour of the plaintiffs.

(18) For answering the other part of the question as to whether Banta Singh being son of Mukhtiar Singh would be entitled, I am in agreement with the arguments of Mr. Gandhi, for, in view of the law laid down by the Hon'ble Supreme Court in paragraphs 20 & 21 of the judgment rendered in ***Vallikannu's*** *case (supra),* Banta Singh/plaintiff No.3 would not be entitled to succeed to the share of his father, but the argument of Mr. Gandhi with regard to the taking away the right of Avtar Singh on the premise that he pre-deceased Mukhtiar Singh as he died in the year 1972 whereas, Mukhtiar Singh in 1976 would pale into insignificance, once I have held that the propounder has failed to prove the Will.

(19) No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the *ratio decidendi* culled out by five learned Judges of the Hon'ble Supreme Court in ***Pankajakshi (dead) through LRs and others*** *versus*

Chandrika and others[3], wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in ***Kulwant Kaur and others*** *versus* ***Gurdial Singh Mann (dead) by LRs and others***[4], on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

(20) For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in ***Pankajakshi 's case (supra)*** reads thus:-

> "Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of **Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]** cannot be sustained and is thus overruled." [at paras 27 - 29]"
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> 27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple

[3] AIR 2016 SC 1213
[4] 2001(4) SCC 262

> reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force."

(21) Therefore, I do not intend to frame the substantial questions of law while deciding the appeals, aforementioned.

(22) Resultantly, the judgment and decree of the lower Appellate Court is modified to the extent that plaintiff Nos.1 and 2, namely, Nasib Kaur and Mohinderjit Singh would be entitled to the share of Mukhtiar Singh and not Banta Singh. The decree sheet is ordered to be prepared, accordingly.

(23) Both the regular second appeals are allowed in part to the extent aforementioned.

Dr. Payel Mehta