

(2010) 12 DEL CK 0262

In the Delhi High Court

Case No : Regular Second Appeal No. 103 of 2003

Dina Nath Bakshi and Another (deceased) through L.Rs.	APPELLANT
Vs	
Madan Mohan Lal Majhu (deceased) through L.Rs.	RESPONDENT

Date of Decision : 08-12-2010

Acts Referred:

Evidence Act, 1872 — Section 68
Hindu Succession Act, 1956 — Section 15, 8
Specific Relief Act, 1877 — Section 42

Citation : (2010) 12 DEL CK 0262

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Ginny Jetley Rautray, for the Appellant; Vinay Sabharwal and Sanjay Goswami, for the Respondent

Final Decision : Allowed

Judgement

Indermeet Kaur, J.—This appeal has impugned the judgment and decree dated 15.1.2003 which had reversed the finding of the trial judge dated 28.8.1978. Vide the judgment and decree dated 28.8.1978 the suit of the plaintiff Madan Mohan Lal Majhu seeking declaration that he be declared as the legal representative of Lal Devi was dismissed. Vide the impugned judgment and decree dated 15.1.2003 the suit of the plaintiff was decreed in his favour.

2. The factual matrix of the case is as follows:

(i) uit property bearing quarter No. 1/15, Jheel Khuranja, Delhi had been allotted by the Rehabilitation Department to Badri Nath as a refugee for residential purpose.

(ii) Badri Nath died on 29.1.1964.

(iii) After the death of Badri Nath his widow Lal Devi was his only legal heir. She had paid a sum of Rs. 113.44 p. at the Nirman Bhawan pursuant to which a conveyance deed had been executed in her favour.

(iv) Lal Devi died in 1970. She was issueless; she had died intestate.

(v) plaintiff Madan Mohan Lal claimed interest in the suit property after the death of his aunt; contention was that he was the sole legal heir left by Lal Devi in the line of succession.

(vi) Suit was filed to the said effect that the plaintiff be declared as the legal heir of Lal Devi over and above the Defendants who were also claiming right in the suit property

(vii) The Defendants had relied upon a will dated 3.4.1960 executed by Badri Nath in terms of which Badri Nath had bequeathed all his movable and immovable property in favour of his widow Lal Devi; after her death the property would devolve upon the Defendants i.e. Dina Nath Bakshi and Ram Kakra, sons of Pt. Niranjana who shall in equal shares become the owners of the suit property.

(viii) On the pleadings of the parties, the following seven issues were framed by the trial judge; they read as follows:

1. Whether Smt. Lal Devi was the owner of disputed house in her own right before her death as alleged in the plaint? OPP

2. Whether the plaintiff is the legal heir of Lal Devi deceased? OPP

3. Whether deceased Badri Nath made any valid will in favour of the Defendants? If so, its effect? OPP

4. Whether the jurisdiction of the civil court is barred in view of Preliminary objection No. 2?

5. Whether the disputed property was allotted to Badri Nath against his individual claim in coparcenary property left in Pakistan?

6A. Whether the present suit is not maintainable in view of preliminary objection No. 1?

6. Whether the plaintiff is entitled to relief prayed for?

7. Relief.

(ix) In view of the oral and documentary evidence led before the trial judge, the suit of the plaintiff was dismissed. The court held that the present suit which had sought declaration alone without the consequential relief of possession is not maintainable in the present form. The will of Badri Nath dated 3.4.1960 Ex.DW1/1 stood validly proved; the attesting witness and the scribe had come in the witness box to testify to this effect. This will categorically established that after the death of Badri Nath the property would devolve upon his wife Lal Devi and in case she died intestate which she admittedly had done so, the property would thereafter devolve upon her nephews i.e. Dina Nath Bakshi and Ram Kakra. Suit of the plaintiff was dismissed.

(x) In appeal this was reversed by the impugned judgment. The impugned judgment had held that the suit in the present form is maintainable; the will Ex.DW1/1 was not validly proved; the rider in Ex.DW1/1 that after the death of Lal Devi in case she died intestate the property would devolve upon her nephews Dina Nath Bakshi and Ram Kakra was a repugnant clause. The court had relied upon Section 8 and Section 15 of the Hindu Succession Act laying down the rules of succession; it held that since the will had also not been duly proved it was established that Badri Nath had died intestate. After his death the property would devolve on his widow and thereafter in terms of Section 8(c) upon the agnates of her husband; the plaintiff being the nephew of Badri Nath falling in this category was entitled to a decree.

3. This is a second appeal. After its admission on 7.10.2004 the following substantial question of law was formulated which inter alia read as follows:

Whether the Will dated 4th March, 1960 executed by Dina Nath has been duly proved in accordance with law?

4. On behalf of the Appellant it has been urged that the findings of the appellate judge are perverse; the intention of the testator has to be given the primary importance which had to be gathered from the recitals in the will; applying this cardinal principle of the intention of the testator to the will the latter clause in Ex.DW1/1 bequeathing the properties to Dina Nath Bakshi and Ram Kakra clearly evidence the intention of the testator which was to give limited estate to his wife and thereafter to her nephews. Reliance has been placed upon AIR 2003 2528 (SC) as also another judgment of the Apex Court in 1991 383 S. Rajagopal Chettiar v. Hamasaveni Ammal and Ors. Reliance has also been placed upon Ramabai Padmakar Patil (D) through LRs. and Others Vs. Rukminibai Vishnu Vekhande and Others, It is pointed out that one attesting witness examined is sufficient to prove the will. It is submitted that in view of the judgment of the Apex Court in Navneet Lal alias Rangi Vs. Gokul and Others, , the true construction of the will must be adverted to and where one out of the two reasonable constructions leads to intestacy that should be discarded in favour of a construction which does not create any such hiatus. It is pointed out that the will dated 3.4.1960 executed by Badri Nath was a valid will. It is lastly submitted that a suit for declaration in the present form was not maintainable without seeking relief of possession as admittedly the plaintiff was not in possession. For this proposition reliance has been placed upon Vinay Krishna Vs. Keshav Chandra and another, .

5. Arguments have been countered by learned Counsel for the Respondent. It is submitted that the will Ex.DW1/1 which has a rider attached to it whereby it stated that after the death of the testator his widow would be the exclusive owner and after her death the property would be owned by her nephews; the principle effect was to make the widow an absolute owner of this property. Reliance has been placed upon AIR 1986 Punjab & Haryana 355 Mehma Singh v. Dhan Kaur and Ors. to support his submission that where the testator in the

earlier part of the will confer an absolute estate in favour of his wife, a subsequent clause repugnant to this must be regarded as invalid; it cannot cut down the estate. Reliance has also been placed upon AIR 1940 70 (Privy Council) . Reliance has been placed upon 2010 (9) Scale Subhan Rao and Ors. v. Parvathi Bai and Ors. Rajrani Sehgal Vs. Parshottam Lal and Others, Shantilal Babubhai and Others Vs. Bai Chhani and Others, (sic)ngavarapu Venkatasubba Rao Vs. (sic)arapu Krishnamurthy and others, AIR 1951 Ori 49 Bandura Ramamurty v. Koppula Vajram and Ors. AIR 1929 283 (Privy Council) and another judgment reported in AIR 1938 Lah 201 Umrao Singh v. Baldev Singh to support the said submission.

6. The question of law as aforementioned has to be answered. It relates to the will of Dina Nath dated 3.4.1960. This will has been proved before the court as Ex.DW1/1. This document has been witnessed by Sunder Singh and Dewan Raghy Ram; the scribe of the document is Harnam Singh, who had been examined as DW3; he had categorically on oath stated that Ex.DW1/1 had been written by him; the attesting witness Sunder Singh has been examined as DW4; he had stated that the testator Dina Nath had thumb-marked the will at Mark A in his presence and he can identify his signatures.

7. u/s 68 of the Indian Evidence Act a document required to be attested will not be used as evidence unless at least one attesting witness has been called to prove it. Sunder Singh as aforementioned had been examined as DW4. The impugned judgment has mis-appreciated that the examination of one attesting witness alone is not sufficient to prove a will. This finding in the impugned judgment being an illegality is set aside. Will Ex.DW1/1 stood proved.

8. The next question which has to be answered is as to whether Badri Nath was the owner of the property i.e. Quarter No. 1/15, Jheel Khuranja Colony, Ilaka Shahdara and was competent to bequeath the said property. Ex.DW1/1 categorically recites that this property is owned and possessed by the testator. He had been allotted this quarter from the Department of Rehabilitation and Compensation under Claim No. D/948/IVNTA/118 had been deposited by him; sale certificate was yet to be received. Para 6 to 9 of Ex.DW1/1 relevant for the controversy in issue read as under:

6. That the executant shall remain absolute owner of the properties from column 1 to 4 above till my life and shall occupy the said property as owner and the executant shall have rights to use and transfer the said property and to receive the money in my life time. After my death the movable and immovable properties which I own and possess, shall be owned and possessed by Smt. Lal Devi wife of executant and she will have rights to transfer the said property and to receive the pension amount from the post office.

7. In case Smt. Lal Devi died without executing the Will and transferring the said property in her life time, in such situation, the property remains indisposed of, will go to Shri Ram Kakra and Dinanath Bakshi Brahman sons of Pandit Niranjana

Late occupation service I.A.F. residents of Kanpur, Harihar Nath, Shastri Nagar, shall become the owners in equal shares and they shall have rights to transfer the said property and to receive the amount, Shri Ram Kakra, and Dina Nath Bakshi above said are the Bhanja/Maternal nephew of my wife Smt. Lal Devi and they used to serve me and my wife all the times and are my well wisher and helpful to me. My other legal heirs and relatives will have no right and concern with my said properties in any manner.

8. The executant have rights to revoke or cancel the said Will at all times.

9. That all my funeral ceremonies shall be performed by my wife and Shri Ram Kakra and Dinanath Bakshi and my Will shall be acted upon accordingly.

The intention of the testator has to be gathered not by reading any particular clause of the will but by reading the entire document. This document read in entirety clearly shows that while in a sound disposing mind, the testator had bequeathed the suit property in favour of his wife with all rights in the suit property including the right to transfer the property. It recites that in case Lal Devi transfers her property in her life time the property shall be disposed of in the said manner but in case she dies without executing a will, the suit property will devolve upon Dinanath Bakshi and Ram Kakra, Brahman sons of Pandit Niranjana who shall then become owners in equal shares and they will have the right to transfer the property and to receive all amounts therefrom. The relationship of Ram Kakra and Dina Nath Bakshi has been explained being the nephews of his wife Lal Devi. The intention to bequeath the property in their favour was for the reason that they were serving Badri Nath and Lal Devi at all times and were their well-wishers and helpful to them. The legal heirs of relatives of Badri Nath had been excluded.

9. The plaintiff in his plaint had set up that full price of the quarter had not been paid by Badri Nath; balance amount had been paid by his widow Lal Devi and conveyance deed had been executed in her favour in the year 1964. Admittedly, this conveyance deed had been executed in favour of Lal Devi after the demise of her husband Badri Nath. Contention of the Defendant was that this property had been allotted to Badri Nath as a compensation in lieu of the property which had been left by him in Pakistan; he had paid the amounts due on "the property.

DW6 S.B. Lal from the office of Settlement Commissioner, Jaisalmer House had deposed that quarter No. 1/15, Jheel Khuranja colony, Ilaka Shahdra, Delhi had been allotted to Badri Nath, the claimant; he was shown as claimant as per the record and this was evident from the order dated 26.4.1952; after the last payment made by Badri Nath no other payment was due from him; there was only one entry in the record which stated that the sale deed should be issued.

As per this record no amount was due from Badri Nath after the last payment received in the department; only direction was that the sale deed had to be issued. It was thus established that Badri Nath was the owner of this suit property and was competent to make a will qua this property.

The testator Badri Nath was fully competent to bequeath this property in the manner in which it had done so.

10. The guidelines for construing a will have been reiterated by the Supreme Court in the case of Arun Kumar (supra). The intention of the testator has to be given primary importance which had to be gathered from the recitals in the will; the surrounding circumstances disclosed from the will, underlying scheme of the disposition made under the will and also for the reasons for making such a bequest. The will must be construed objectively and the conclusion has to be deduced by a rational process of reasoning. In this case a lady S had executed a will in respect of a property of which she was absolute owner. In the will it was stated that after her death her husband shall be the heir and owner of the property but it was subject to a rider that such succession or ownership had to be "as detailed below". This was immediately followed by a recital and in accordance with the will three sons of her niece would be the owners of the suit property after the death of her husband. Will further stated that bequest "for the benefit and enjoyment of the property by my above husband and minors boys". The Supreme Court had held that this testament cannot be construed to bequeath the property absolutely in favour of the husband; if construed otherwise it would constitute violence to the language and defeat the very intention of the testator. Will was construed as having made the bequest in favour of her husband as one for life interest and the remainder bequeathed absolutely in favour of the three minor children after the life time of her husband. Provisions of Section 124 of the Indian Succession Act were held to have no relevance.

11. Applying the analogy and the ratio of the facts of the instant case, it is clear that a life interest only had devolved upon Lal Devi with right to transfer the property during her life time but in case she died intestate the property would devolve upon Dina Nath Bakshi and Ram Kakra; this was a valid bequest.

12. The present suit was a suit for declaration. The averments in the plaint nowhere state that the plaintiff was in possession of this property. The plaint in this case clearly deciphers that the plaintiff is not in possession of the suit property. The written statement had taken categorical stand that the Defendants are in possession thereof. This was not denied in the replication. Even then plaintiff did not choose to amend the plaint. In such an eventuality, the relief of possession ought to have been asked for. Court had arbitrarily granted the relief of injunction without the consequential prayer for possession. The suit was not maintainable on this count also.

13. A suit for declaration without seeking consequential relief of possession did not lie. In Vinay Krishna (surpa) where a suit had been filed for declaration of title to the property, the property admittedly not being in possession of the plaintiff, proviso of Section 42 of the Specific Relief Act, 1877 had come into operation and being a discretionary relief the court had held that this was a fit case where such a declaration should be refused.

14. Judgment of Subhan Rao (supra) is inapplicable; in this case, estate had been alienated during the lifetime of S by sales deeds which were held to be valid. The other judgments relied upon by the Respondent are also all distinct on facts.

15. The result of the aforesaid discussion is that appeal is allowed; suit of the plaintiff stands dismissed.