

(1986) 03 RAJ CK 0027

In the Rajasthan High Court

Case No : Civil Miscellaneous First Appeal No. 103 of 1972

Girdhari Lal

APPELLANT

Vs

Prem Prakash

RESPONDENT

Date of Decision : 20-03-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Succession Act, 1925 — Section 299, 63

Citation : (1986) 1 WLN 681

Hon'ble Judges : Inder Sen Israni, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Inder Sen Israni, J.—This is Civil Misc. First Appeal u/s 299 of the Indian Succession Act read with Section 96 CPC against the judgment of learned District Judge, Jaipur dated 6th September, 1971 by which a probate of Will was granted to the applicant-respondent.

2. The applicant-respondent filed an application for grant of probate on 17-1-1966 in the court of District Judge Jaipur in respect of the last Will of late Smt. Jamna w/o Ram Kumar, executed on 1-8-1960 in favour of the respondent. Smt. Jamna died on 30-12-1960. A caveat was entered and in the reply filed on 9-7-1966 it was alleged in para No 2 that no Will was made by Smt. Jamna on 1-8-1960 and alleged that it was forged document. It was also mentioned in para No. 7 of the same that Smt. Jamna had executed a Will dt. 12-12-59 in favour of the appellant which was duly registered and thereafter no Will had been executed by Smt. Jamna. Suraj Narain also filed a reply and took an objection that he is the reversioner of the property of deceased Smt. Jamna and she had no right to execute the Will to defeat his reversionary interest. Learned District Judge framed the following issues:

(1) Whether Mst. Jamna widow of Ram Kumar executed a Will on 1-8-1960 in favour of Prem Prakash and if so, whether she was of sound disposal mind?

(2) Relief?

3. There witnesses were examined on behalf of the appellant and the original Will dated 1-8-1960 (Ex. 1) was produced and a Register of the Script petition Writer was also produced. In rebuttal, the caveater examined himself.

4. Mr. S.K. Keshote, learned Counsel for the appellant has argued that since litigation was pending between Smt. Jamna and father of the respondent, she could not have made the Will in favour of the respondent. He has drawn my attention to a certified copy of the judgment dated 10-2-1966 of this Court in Prahlad v. Suraj Narain and Ors. in which Smt. Jamna was also a party. It is stated by the learned Counsel that in his statement Om Prakash has stated that he informed his father Suraj Narain about the second Will in August, 1968, whereas from the judgment mentioned above, it is evident that an application was filed by Suraj Narain father of the respondent-applicant on 21st January, 1966 stating therein that Smt. Jamna had executed 2 Wills one in favour of the appellant and second in favour of son Prem Prakash therefore, plaintiff Prahlad in that case had no claim over the property left by Smt. Jamna. It is, therefore, argued that Prem Prakash is not a reliable witness and the alleged Will made in favour of the respondent is a forged document and no Probate could be granted on the basis of the same.

5. Learned Counsel for the respondent, Shri D.L. Bardar on the other hand has urged that the Will in favour of the respondent has been proved to the hilt by producing the attesting witness as script of the same and that the appellant has not led any evidence to show that the Will was forged and has merely tried to cause baseless suspicion on the basis of a judgment which has no bearing on the matter. Late Jamna was well within her rights to execute a second Will and since by the evidence on record it is fully proved that she did execute this Will, therefore the respondent-applicant was entitled to issue of Probate on the basis of the same.

6. I have heard the rival contention of the parties and also gone through the evidence and documents on the record. It will be seen from the judgment of Prahalad v. Suraj Narain that Suraj Narain filed a suit as nearest reversioner of Ram Kumar husband of Jamna defendant No. 4 in that suit, who had died in the year 1899. It was alleged in the suit that Mst. Jamna in collusion with Mst. Bhuri, defendant No. 1 had got a mortgage deed registered in favour of Banna Lal and Prahalad, defendants No. 2 and 3 respectively of the properties of which she was a limited owner for consideration of some time. it was alleged, amongst other things, that Mst. Bhuri was not widow of Radha Vallabh son of Ram Kumar as he had never been adopted either by Ram Kumar or by his widow; It was, therefore, urged that Mst. Bhuri had no right to mortgage the property left by Ram Kumar. In that suit it was held by the learned Civil Judge, Jaipur City that Radha Vallabh was not the adopted son of Ram Kumar and, therefore, Mst. Bhuri had no right to mortgage the house in favour of defendants No. 2 and 3. Plaintiff Suraj Narain's suit was decreed and it was declared that the mortgage deed in the suit

was null and void against the plaintiff. Prahalad and Jamna, defendant No. 3 and 4 respectively preferred an appeal before this Court against the above decree, which was returned for presentation to the proper court, on 20-1-1959. The appeal was presented in the court of District Judge, Jaipur City, which was again returned for presentation to the High Court on 2-8-1959. It is important to note that the appeal was then presented in the High Court on 1st September, 1959 by Prahalad, defendant No. 2 alone as Mst. Jamna had withdrawn her appeal and she was joined as one of the respondents. As already stated above, Jamna died on 30th December, 1960. Therefore, it will be seen that Mst. Jamna did not prefer any appeal against the order of learned Civil Judge, by which Suraj Narain father of the petitioner was held to be the reversioner of the property and, therefore, the question of any strange relations between Mst. Jamna and Suraj Narain does not arise. Moreover, the mortgage deed was executed by Mst. Bhuri w/o Radha Vallabh, who was alleged to be the adopted son of Ram Kumar husband of Mst. Jamna. Mst. Jamna had limited rights in the property, therefore, Suraj Narain being the reversioner had done no wrong if he filed a suit against mortgage deed of the property executed by Mst. Bhuri, who had evidently no right to do so as decided by the Court. I am, therefore, of the opinion that it cannot be inferred from this judgment that Mst. Jamna and Suraj Narain had such strange relations on account of which she could not have executed any Will in favour of Prem Prakash, who happened to be his son.

7. It has further been argued by learned Counsel for the respondent that it was mandatory for the caveator to have filed an application in its support within 14 months' time as required by Rule 778 of the Rules of this Court. But this has not been done, therefore, the appellant has no right to file this appeal. He relies upon the judgment of this Court in Kalyan Singh v. Gaiind Kanwar 1961 RLW 163.

8. Learned Counsel for the appellant has pointed out that this objection was never raised in the trial court and the proceedings were decided finally by allowing the application of the appellant for grant of probate. Therefore, it should be considered that he had waived this objection and now he is precluded from taking the same in the appellate court.

9. I am inclined to agree with the learned Counsel for the appellant that since this objection was not raised in the trial court and the proceedings came to its logical conclusion, it will not be in the interest of justice to throw out the appeal on this technical ground.

10. Now it has to be examined whether Mst. Jamna had executed the last Will dated 1-8-1960 in favour of applicant Prem Prakash and whether she was of sound mind at that time and understood the contents of the Will. In H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, which has also been subsequently considered in the case of Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and Others, their Lordships have held that the mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special

requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act. The onus of proving the Will is on the prepounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof testamentary capacity and the signatures of the attester as required by the law is sufficient to discharge the onus. It has also been observed that when the caveator alleges undue influence, fraud, coercion, the onus is upon him to prove the same

11. Keeping the above position of law in view if we scrutinize the evidence produced by the applicant, it will be seen that the succession is fully proved. PW 1 Prem Prakash has examined himself and has stated that Mst. Jamna gave the Will (Ex. 1) to him a month or so before her death, which was executed 4 or 5 months before her death and that she was bodily and mentally sound at that time. He has also stated that he was not present at that time when the Will was executed by Jamna. He has also stated in cross-examination that he does not know why Mst. Jamna cancelled the Will executed in favour of Girdhari Lal and executed this last Will in his favour, neither he tried to know the reasons for the same. He has stated that he told his father about this Will about six months earlier from the date he was examined in the court. He has also stated he does not know whether any suit was filed by his father against Mst. Jamna, the reference of which has been made above. PW 2 Radhey Shyam is the scribe of the Will, who has stated in his statement that Mst. Jamna had come to his house for execution of the Will, Moti Ram and Ghanshyam had identified her and he had written the Will (Ex. 1) at the instance of Mst. Jamna and she had fixed her thumb impression on Ex. 1 at place "X" in his presence and the witnesses had also signed in her presence. He has also stated that Mst. Jamna was in sound mental condition at the time. He keeps the register of the documents written by him and an entry in the register was made at that time, which is at serial No. 725 (Ex. 2) and the thumb impression of Mst. Jamna is at place "X", which was fixed in his presence. The register has been produced in original by him. Ghanshyam Pareek (PW 3) one of the attesting witness of the Will has stated that another attesting witness Moti Ram had died and he has also stated that the Will was executed by Mst. Jamna, which was written by PW 2 at her instance and he had fixed his signatures in her presence and she had fixed her thumb impression in his presence and she was of sound mind and possession of full sense at that time.

12. D.W. 1 Girdhari Lal has stated in his statement that Mst. Jamna lived with him at Chomu and she came to Jaipur only 20 days earlier than her death. Earlier than that, she was living with him for six months" time at Chomu. He has admitted in his statement that Mst. Jamna, Suraj Narian and Prem Prakash are members of the one family. He has also stated that even though he has not produced the Will executed by Mst. Jamna in his presence, in the court, it is with him.

13. From the above evidence, it can be seen that |the applicant has been able to

fully discharge the burden of proving the Will (Ex. 1) in his favour.

14. In the result, I find no force in this appeal and the same is hereby dismissed with costs. The judgment of learned District Judge, Jaipur is up held.