

(2017) 07 UK CK 0009
In the Uttarakhand High Court
Case No : 3414 of 2016

GOVARDHAN SAHI

APPELLANT

Vs

JAGDISH SAHI AND OTHERS

RESPONDENT

Date of Decision : 05-07-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 9 Rule 13](#) -
[Evidence Act, 1872](#), [Section 69](#) - Proof where no attesting witness found

Citation : (2017) 07 UK CK 0009

Hon'ble Judges : U C Dhyani

Bench : Single Bench

Advocate : Lokendra Dobhal, Vikas Bahuguna

Final Decision : Dismissed

Judgement

1. By means of present writ petition, the petitioner seeks writ in the nature of certiorari setting aside the judgments and orders dated 29.04.2015 and 29.11.2016, passed by learned Tehsildar, Dehradun and learned Board of Revenue, Dehradun, respectively (Annexure nos. 12 and 14 to the petition).

2. Petitioner and respondent nos. 1 & 2 are real brothers. Their father executed a Will in respect of a property in favour of respondent nos. 1 & 2 to the exclusion of petitioner, who, as per the averments in the Will, did not live with the testator and had left for Nepal along with his family. The un-registered Will was executed on 20.06.1986. When the Will (Annexure no. 3 to the petition) was executed, registration was not compulsory. Mutation application in favour of petitioner and respondent no. 2 was allowed. When respondent no. 1 came to know of the same, he moved restoration application along with delay condonation application, which were allowed by learned Tehsildar, Dehradun and learned Board of Revenue, Dehradun. Aggrieved against the same, present writ petition has been filed.

3. One of the grounds which have been taken in the writ petition is that respondent no. 1 did not file any affidavit along with delay condonation application and learned Tehsildar as well as learned Board of Revenue committed illegality in granting injunction order in favour of respondent no. 2.

4. Learned counsel for respondent no. 1 drew attention of this Court towards the statements of attesting witnesses, namely, Sadanand Balodi and Upendra Dutt Bahuguna (Annexure no. 6 to the petition). Attesting Witness Sadanand Balodi stated before the revenue authorities that the Will was not scribed in his presence. Scribed Will was presented before him and he along with Upendra Dutt Bahuguna (another attesting witness) signed over the same. Upendra Dutt Bahuguna stated before the revenue authorities that since the testator of the Will was unable to move, the Will was prepared in his house and thereafter he along with Sadanand Balodi appended their signatures over the same.

5. It is the submission of learned counsel for respondent no. 1 that provision of Section 69 of the Indian Evidence Act (proof where no attesting witness found) was not complied with. Attention of this Court is drawn towards the application filed before Tehsildar on 21.08.2008 to show that application for restoration was accompanied by an affidavit. Thus, it cannot be said that no affidavit was filed along with delay condonation application. Affidavit was filed on behalf of private respondents along with application for condonation of delay as well as application for restoration.

6. In his rejoinder affidavit before the Tehsildar, in para 6 of the rejoinder affidavit, the petitioner admitted that the name of the three brothers was mutated as legal heirs of the deceased father on 13.06.1999. It is also admitted in para 12 of the rejoinder affidavit that summons were issued to respondent no. 1, but since he had left for Nepal in the year 1962, therefore, the same were not served upon him.

7. Thus, it is admitted that the names of three sons of the deceased father were mutated in respect of the property in question and it is also admitted that service of notice could not be effected, inasmuch as respondent no. 1 had left for Nepal. It is also clear that a joint affidavit was filed along with restoration application accompanied with delay condonation application.

8. At present, this Court is not deciding whether the property in question should be mutated in favour of all the legal heirs of the deceased father or in favour of petitioner and respondent no. 2 to the exclusion of respondent no. 1, who had left for Nepal. At present, this Court is only required to decide whether respondent no. 1 should also be afforded opportunity to contest the mutation proceedings or not? Whether his delay condonation application along with restoration application has rightly been decided by the learned Board of Revenue or not? The reply, in view of the aforesaid discussion, seems to be in the affirmative.

9. A Decision of Hon''ble Apex Court rendered in Government of Andhra Pradesh

vs Y.S. Parkashrao and another, 1982 2 SCC 385 has been placed before this Court. It is a case in which no affidavit was at all filed. Per contra, application for setting aside decree along with delay condonation application was filed with common affidavit in Bhagmal and others vs Kunwar Lal and others, 2010 12 SCC 159, which the Hon''ble Apex Court has approved.

10. Paras 12 and 13 of the decision so rendered by Hon''ble Apex Court in Bhagmal's case bear testimony to this fact. Said paras are reproduced here-inbelow for reference: "12. It is to be seen here that the question of delay was completely interlinked with the merits of the matter. The appellant-defendants had clearly pleaded that they did not earlier come to the court on account of the fact that they did not know about the order passed by the court proceeding ex parte and also the ex parte decree which was passed. It was further clearly pleaded that they came to know about the decree when they were served with the execution notice. This was nothing but a justification made by the appellant-defendants for making Order 9 Rule 13 application at the time when it was actually made. This was also a valid explanation of the delay. The question of filing Order 9 Rule 13 application was, in our opinion, rightly considered by the appellate court on merits and the appellate court was absolutely right in coming to the conclusion that the appellant-defendants were fully justified in filing the application under Order 9 Rule 13 CPC at the time when they actually filed it and the delay in filing the application was also fully explained on account of the fact that they never knew about the decree and the orders starting the ex parte proceedings against them. If this was so, the Court had actually considered the reasons for the delay also. Under such circumstances, the High Court should not have taken the hypertechnical view that no separate application was filed under Section 5.

13. The application under Order 9 Rule 13 CPC itself had all the ingredients of the application for condonation of delay in making that application. Procedure is after all handmaid of justice. Here was a party which bona fide believed the assurance given in the compromise panchnama that Respondent-plaintiff would get his suit withdrawn or dismissed. The said compromise panchnama was made before the elders of the village. Writing was also effected, displaying that compromise. The witnesses were also examined. Under such circumstances, the nonattendance of the appellant-defendants, which was proved in the further proceedings, was quite justifiable. The appellant-defendants, when ultimately came to know about the decree, had moved the application within 30 days. In our opinion that was sufficient."

11. Lastly, in Smt. Sushil Devi vs Tehsildar Alapur, Ambedkar Nagar and others, 2016 Supp CivCC 348 (Allahabad), the Hon''ble Allahabad High Court has observed as under: "5. My aforesaid view is fortified by a decision of this Court rendered in Pawan Kumar and Anr. Vs. Addl. Commissioner (J), Allahabad Division, 2006 101 RevDec 125, wherein the court held that in mutation applications next of kins of deceased should be impleaded as parties as is done

in probate proceedings, particularly when mutation is sought on the basis of Will or otherwise. By the aforesaid decision Naib Tehsildars were also directed to stop such practice but I am unable to understand as to why concerned authorities are not following the direction and has yet not stopped such practice."

12. The matter in hand is squarely covered by the aforesaid decision of Hon"ble Allahabad High Court as well as of Hon"ble Supreme Court in Bhagmal's case.

13. There is, therefore, no hesitation in coming to the conclusion that learned Board of Revenue has taken a correct stand by affording opportunity to respondent no. 1, real son of testator, for contesting the mutation proceedings. No interference is called for in the judgments impugned. Writ petition fails and is dismissed.