

(2006) 03 AHC CK 0096
In the Allahabad High Court
Case No : Second Appeal No. 488 of 1978

Mahendra Pratap Singh and Others

APPELLANT

Vs

Virendra Pratap Singh (Deceased) and Others

RESPONDENT

Date of Decision : 28-03-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 37, 68
Succession Act, 1925 — Section 63
Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 5(2)
Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 37, 68
Succession Act, 1925 — Section 63
Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 5(2)
Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 37, 68
Succession Act, 1925 — Section 63
Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 5(2)

Citation : (2006) 3 AWC 2567 : (2006) 100 RD 835 : (2006) 1 RD 835

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Advocate : K.S. Chauhan and V.K.S. Chaudhary, for the Appellant; B.D. Singh, D. Dalmia, R. Singh Sengar, R.C. Singh, S.S. Rathore, S.D.N. Singh, Sankatha Rai, S.P. Singh and Shyam Kumar Srivastava, for the Respondent

Final Decision : Dismissed

Judgement

Sunil Ambwani, J.—Heard Shri V.K.S. Chaudhary, learned Senior Advocate assisted by Shri K.C. Chauhan for appellants and Shri Sankatha Rai for respondents.

2. The substitution application No. 217329 of 2005 for recording the death of appellant No. 1 and for bringing his legal heirs on record is allowed.

3. The application for recalling the order dated 28.10.2005 is also allowed. The Second Appeal is restored to its original number, and was heard.

4. This defendants' Second Appeal arises out of Suit for recovery and possession over the disputed house and agricultural land and for restraining the defendants from realizing the compensation and rehabilitation bonds in respect of zamindari property of Surendra Pratap Singh. The Suit was decreed on 23.12.1967. The Civil Appeal No. 15 of 1968 arising thereof was partly allowed by the IInd Additional District and Sessions Judge, Mainpuri on 16.12.1977 only in respect of Suit for relief of possession over the well and Bagiya towards South of the disputed house. For the rest of the reliefs, the Appeal was dismissed and judgment and decree for possession over the two houses and injunction for the zamindari compensation bonds and R.C. bonds and the plaintiffs suit for recovery of possession over the house situated at Nagla Gokul was dismissed. The parties agree that in respect of agricultural plots, the Suit had abated u/s 5(2) of the Consolidation of Holdings Act, vide order dated 29.4.1971 of this Court, and that they are still litigating in consolidation courts over the agricultural lands. It is also admitted that the compensation bonds and rehabilitation bonds were released long ago in favour of plaintiffs and no dispute actually survives for these two properties and that the Second Appeal is now confined to the possession over the houses and validity of the Will, which may affect their rights before the consolidation courts in which a compromise was entered into, between the parties, and that an application to recall the order on the ground that the compromise was obtained by coercion is still pending. The compromise was almost in terms of the Will but it does not mention the execution of the Will.

5. The Second Appeal was admitted on 2.9.1978 on following substantial questions of law;

1. Whether the decision based on compromise before the consolidation authorities in respect of agricultural land will operate as *res judicata* on the question about the right and claim by the defendants-appellants, to inherit the house in suit on the basis of Will in favour of defendant-appellants Mahendra Prasap Singh?

2. Whether the claim in respect of Zamindari Abolition Compensation Bonds and the Rehabilitation Grants was barred by limitation?

3. Whether the finding on the question about the want of due execution of the will is vitiated in law?

4. Whether the judgment is vitiated by a refusal to allow the defendant-appellant to amend the written statement by urging that the position of mother of the plaintiff respondents was that of stepsister and not that of full sister?

6. At the time of hearing of Second Appeal, the appellant requested that following questions may also be considered as substantial question of law and the Appeal be heard and decided on these issues.

5. Whether the registered will was proved in accordance with Section 68 of the Evidence Act?

6. Whether the will is vitiated by any suspicious circumstances?

7. The scope of hearing of a Second Appeal has been narrowed down by Section 37 of the Act No. 104 of 1976 amending the Section 100 of the CPC 1908 w.e.f. 1.2.1977. The Second Appeal can be heard only if the High Court is satisfied that the case is involved a substantial question of law. The memorandum of appeal is required to precisely state the substantial question of law involved in the Appeal and the High Court has to be satisfied that a substantial question of law is involved in the case. It has to be formulated and if necessary the proviso gives powers to High Court to hear for reasons to be recorded, the Appeal on any substantial question of law not formulated by it.

8. In *Govindaraju Vs. Mariamman*, the Supreme court held that the substantial question of law is "sine qua non" for exercise of jurisdiction u/s 100 of the CPC and relied upon the judgments in *Kshitish Chandra Purkait Vs. Santosh Kumar Purkait and others*, *Panchugopal Barua and others Vs. Umesh Chandra Goswami and others*, *Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others*, and traced out the background and reasons for adding such on restriction in Section 100 CPC. It referred to *Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs.*, , in which the purpose which necessitated and persuaded the Law Commission of India to recommend for the amendment of Section 100 was referred, to and the meaning of "Substantial question of law" is explained as follows.

14. As to which would constitute a substantial question of law, it was observed : SCC pp. 187-88, para 14.

14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the high Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.

9. The judgment was followed in *Thiagarajan and Others Vs. Sri Venugopalaswamy B. Koil and Others*, . In *Phool Pata and Another Vs. Vishwanath Singh and Others*, , the Supreme Court held that the High Court could have heard the second appeal on any question not formulated by it, only

after formulating such question, for reasons to be recorded, and not otherwise.

10. After going through the concurrent judgments of the courts below and the submissions of learned Counsel of the parties, I am not satisfied that the questions No. 1, 2, 4, 5 and 6 raise any such question of law which are still debatable or have not been previously settled by law of the land as a binding precedent. Though, even the due execution of Will is also not a substantial question of law, but since the counsels appearing for the parties insisted and made lengthy arguments, I find it appropriate to answer the questions.

11. Brief facts giving rise to this Second Appeal are that Virendra Pratap Singh and Mahendra Pratap Singh, son of Kunwar Prag Singh Thakur filed a Suit for ejectment of defendant-appellant from bhumidhari plots situate in village Bansarmau and Bhadaee and from house situate in Nagla Gokul, a hamlet of village Bhadaee and another in village Bansarmau and from withdrawing the compensation and rehabilitation bonds in respect of Zamindari properties of Surendra Pratap Singh (deceased). The plaintiff alleged in plaint that Kripal Singh had no male issue. He adopted Surendra Pratap Singh son of Ambika Pratap Singh defendant No. 2 and brother of Mahendra Pratap Singh defendant No. 1. Kripal Singh died some times in the year 1941, after which Surendra Pratap Singh was adopted by him on 12.3.1935 but was looked after by Ambika Pratap Singh, his natural father. His properties were also looked after by natural father. Surendra Pratap Singh (deceased) was not married and died on 26.10.1954 at the age of 20 years. The plaintiffs are daughter's sons of Kripal Singh and are the sister's son of Surendra Pratap Singh (deceased) and claimed succession to the properties of Surendra Pratap Singh as legal heirs. They contend that during the mutation proceedings, they learnt of a will dated 10.9.1954, registered on 15.11.1954 executed by the deceased in favour of defendant No. 1 Mahendra Pratap Singh, his natural brother. The plaintiffs do not admit the genuineness and due execution of the will. In their applications, the plaintiffs denied the contention that the house at Nagla Gokul of village Bhadaee belonged exclusively to Ambika Pratap Singh that it lies in Khasra plot No. 242 and was constructed by Kripal Singh, adoptee father of the deceased.

12. The defendants, who are real brothers and natural father of the deceased, alleged that Surendra Pratap Singh had executed the disputed will in favour of the defendant No. 1 of his free consent. He was fully competent to execute the will. After the death of the deceased, the defendant No. 1, is in possession of the properties. The deceased used to look after the properties himself and had become major. The plaintiff No. 2 used to look after the work of deceased as his father and that the house situate in Nagla Gokul; the well and bagichi belonged to defendant No. 2 Ambika Prasad and is situate at Khasra plot No. 242. It was further alleged in the written statement that defendant No. 1, real brother of the deceased, is bhumidhar of the plot in dispute and is entitled to rehabilitation grant and compensation bonds. In the additional written statement the defendant denied that the plaintiff had any right, title or interest in amended

Khasra numbers 185, 265, 296 or 297 and that they are in possession.

13. The parties joined issues on due execution of the Will in favour of plaintiff. The appellate court upheld the findings of the trial court with regard to due execution of the will and held that the will in question was not executed by Surendra Pratap Singh (deceased). The appellate court, found that Surendra Pratap Singh (deceased) was found suffering from rheumatic heart disease in July 1953 and was under treatment of Doctors at Patna. In October, 1953 his health improved but there was no evidence to the effect that he was confined to bed since after July 1953. It was found that the deceased was keeping normal health at that time, otherwise he would not have strained himself to go out of his house and to stay at Bhogaon to executed the will. The medical condition of the deceased was not such as which could have affected the due execution of the will. The execution of will was not approved for following reasons;

1. Shri Sheo Bux Singh, Shri Nathu Ram and Shri Bhagwat Narayan were examined in a summary way without any opportunity to cross examine the witnesses. The scope of their statement ended with the registration of the will after death of the deceased. Non-production of these witnesses is to be judged independently and their presence, if it was at all necessary, cannot be excused on the ground that they had given their statements before the Registrar. Sheo Bux Singh was not a chance witness and he was specifically called to adduce the will and as such his version would have been more reliable. His non-production that he was not willing to face the test of cross examination.

2. The recital in the will that Mahendra Pratap Singh, defendant No. 1 and real brother of the deceased may get the correction of revenue papers done after the death of the deceased shows that after the life time of the deceased it was not possible to apply for mutation and correction of revenue papers in the name of possession over 1/4 share in the plots situate in village Bansarmau. The recital was wholly unnecessary as there was no impediment for the deceased to apply for the said correction of the revenue record. The appellate court found that mention of this fact indicated that the will of scribed after the death of Surendra Pratap Singh. The will was registered after the death of the deceased, where as the evidence of DW-3 Nathu Ram and DW-6 Mahendra Pratap Singh showed that the deceased wanted to execute the registered will. He was financially well placed and that the Sub Registrar could have been easily called on commission to register the will. The theory that the deceased had expressed to execute the will one year before and then two or four days before actually execution of the will was not proved.

3. The attesting witnesses were of different villages. Shri Sheo Bux Singh, Ex MLA was resident of Mainpuri proper and Arjun Singh of village Sathni which is five miles from Mainpuri, Nathu Ram of village Todarpur a village still farther. The will was executed at Bhongoan despite the fact that registration office at the time was situate at Mainpuri.

5. The attesting witnesses Nathu Ram who actually come to purchase cloth had overstayed with the deceased at Bhogaon without caring to inform his family members and that he did not know anybody at Bhogaon. The executor and the witnesses were acquainted with some lawyer and petition writers at Mainpuri but still they stayed at Bhogaon and executed the will in a Dharmshala and not at the house or the seat of the petition writer. These are unnatural circumstances, which coupled with the fact that the best evidence of Sheo Bux Singh was withheld, do not prove the will.

6. The expert evidence and genuineness of the specimen signature on the order sheet of Civil Suit No. 361 of 1951 dated 11.2.1952 has little importance firstly, because Ambika Prasad Singh, natural father of the deceased was in a position to have the signature of Surendra Pratap Singh on blank papers, and secondly the due execution and attestation was not proved.

7. The genuineness of the specimen signature of the deceased on the order sheet dated 11.1.1952 of Suit No. 386 of 1951 was presumed to be genuine. The trial court, however, came to a conclusion that it was difficult to believe that the signatures appearing on the order sheet dated 1.1.1952 are of the deceased taken on 11.1.1952, and that it appears that some one had put his signatures after 11.1.1952 with sinister motives. Sequence of events in which the order sheet was alleged to have been signed and the fact that the signatures on the application were in Hindi, and on the order sheet in English, created doubt over the genuineness of the signatures of the deceased on the order sheet.

8. The signature and admission form sought to be relied upon are not the signatures but writing of name in the column provided in the name of the candidate and that hand writing experts Y.M. Khan PW-2 and R.A. Gregory PW-8 recorded that the two signatures widely defer in shape, design or measurements and that in their opinion the disputed signatures were traced forgeries and that the period of ink of specimen signatures on the admission form and the disputed signatures widely deferred.

14. Shri V.K.S. Chaudhary, learned Senior Counsel for the appellant vehemently submitted that due execution of the will was proved in accordance with Section 68 of the Evidence Act and Section 63 of the Succession Act. All the suspicious circumstances were duly and properly explained by the propounder of the will. He submits that Bhongaon falls on the way to Mainpuri and it was natural for those who were present at the Dharmshala to have attested the will. One of these witnesses was produced, and according to the expert report, the signatures tallied with the signatures on the order sheet of the suit in which the deceased had after he became major given an application to be represented by himself after dispensing with the guardian. He has relied upon the judgments in Major Singh Vs. Rattan Singh (Dead) by LR's. and others, in which the question of due execution of will and the removal of suspicious circumstances and features was found to be substantial question of law to be considered by the High Court; Madhukar D. Shende Vs. Tarabai Aba Shedage, and Ramabai Padmakar Patil (D)

through LR.s. and Others Vs. Rukminibai Vishnu Vekhande and Others, in which principle of law about due execution of the will have been reiterated. He has also relied upon the judgment in Pt. A.K. Misra v. Pt. Ram Chandra Sharma Trust 2003 (94) RD 437 in which a Division Bench of this Court held that the Court itself is empowered to compare the signatures of the testator from the proven document and that the non-production of remaining witnesses and scribe after one of the attesting witnesses was examined, does not amount to suspicious circumstances. The High Court relied upon the judgment in Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others, laying down the law with regard to proof of due execution of the will when it is shrouded in suspicion and judgment in P.P.K. Gopalan Nambiar Vs. P.P.K. Balakrishnan Nambiar and others, in which Supreme Court held that there must be real germane and valid suspicious circumstances shrouding the will, and not fantasy of the doubting mind.

15. Shri V.K.S. Chaudhary, Senior Advocate has also cited cases on the assessment of evidence in Emperor Vs. Jhabbar Mal and Others . The practice of concealing the defence to the plaintiff or complainant in course of examination was deprecated and it was held that the plaintiff or complainant has an absolute right to know exactly the allegations or charges upon which the opposite side are going to rely and they must be put to improve to him or to his appropriate witness clearly specifically and an utmost clarity so that he may have an opportunity of admitting them wholly or in part or denying them wholly or in part and of calling witnesses to rebut such allegations or charges as he denies

16. In Chhote Narain Singh v. Ratan Kaur 1894 ILR (20) 519 22 (P.C.); Lord Watson opined that to outweigh, the strong and satisfactory evidence by which the affirmative and due execution rested, and to dispute the execution of his will, by testator's relations on the theory of improbability of its having not been executed under circumstances existing at the time and in the presence of the witnesses alleged to have attested, it is necessary that in improbability should be cogent and clearly made out.

17. Coming to the present case, the appellate court while considering the circumstances shrouding the testament, relied on the pronouncement in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, and Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another, where it was held that onus of removing the suspicious circumstances lies heavily on the propounder, and relying upon the principles of proving a will u/s 68 of the Evidence Act, dealt with the evidence adduced by the propounder who could not prove the will. The executer was only 20 years old at the time of execution of the will and had died on 26.10.1954 i.e., within one and half months of execution of the will. His presence as well as the presence of attesting the witness at Dharmshala and the attestation by total stranger who had come to purchase cloth in a local market were strong suspicious circumstances operating against the will. Shri Sheo Bux Singh Ex MLA and resident of Mainpuri and other attesting witnesses were not produced. Shri Nathu Ram and Shri Bhagwat

Narayan the other attesting witnesses were not admitted to cross examination by the plaintiff respondents. Non production of the material witnesses was rightly found to be suspicious circumstances surrounding the will. Both the trial court and appellate court perused the record of Suit No. 366 of 1951 and compared the signatures appearing on the order sheet dated 11.1.1952, and came to conclusion that somebody had put his signatures after 11.1.1952, with which the signatures on original will were compared and thus no reliance could be placed upon such report. The other specimen signatures namely on admission form did not relate to the deceased. Ambika Pratap Singh Defendant No. 2 examined as DW-7 admitted in his examination-in-chief that the signatures on the admission forms (ext. 18 to 19) were his signatures.

18. In the circumstances, I do not find any good ground to interfere with the findings recorded by the Courts below that the will in question was not executed by Surendra Pratap Singh and was not proved.

19. On the above discussion question Nos. 3 and 5 are answered in and negative and question Nos. 6 is answered in positive. The remaining questions were not pressed by the appellant.

20. The Second Appeal is consequently dismissed with cost through out against the defendant-appellant.