
(2002) 09 AHC CK 0069
In the Allahabad High Court
Case No : Special Appeal No. 9 of 1987

Ram Chandra Sharma Educational Trust	APPELLANT
Vs	
Pt. A.K. Misra	RESPONDENT

Date of Decision : 27-09-2002

Acts Referred:

Evidence Act, 1872 — Section 47, 68, 73
Succession Act, 1925 — Section 63

Citation : (2002) 5 AWC 4242

Hon'ble Judges : S.K. Sen, C.J;R.K. Agrawal, J

Bench : Division Bench

Advocate : P.K. Mukherjee and S.P. Gupta, for the Appellant; Tarun Agarwal, Manoj Misra and V.S. Saxena, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Sen, C.J.—This special appeal arises out of judgment and order dated 3rd April 1987 passed by the learned single Judge Hon"ble V. K. Mehrotra (as his Lordship then was) granting probate in consequence of Will dated 25th August, 1978.

2. Briefly narrated, the facts of the present case are that late Pandit Ram Chandra Sharma (hereinafter referred to as "Pt. Sharma"), an advocate, had married one Smt. Shanti Devi. Out of this wedlock, a daughter, namely, Smt. Snehlata, and a son, namely Pradeep were born in 1941 and 1942 respectively. Smt. Snehlata died in 1946. In 1947, Pt. Sharma remarried Smt. Raj Kumari Sharma. Out of this wedlock, a son, namely, Anil and a daughter, namely, Usha alias Shami were born in 1948 and 1952 respectively. Differences arose between Pt. Sharma and Smt. Raj Kumari Sharma. Latter instituted suit No. 32 of 1959 for custody of children. In the said litigation, Pt. Sharma had sworn an affidavit, wherein he candidly admitted that it was joint Hindu Family. In 1961, a divorce decree was passed.

3. One A. K. Misra, on the death of his first wife, married Snehlata daughter of

Pt. Sharma on 19.4.1962. Likewise, Pradeep son of Pt. Sharma married to one Abha Sharma on 6.5.1965. On 7.7.1965, Anil son of Pt. Sharma (from his second wife) died. Thereafter, on account of some family dispute, Pradeep left Moradabad for Delhi in 1965-66. With the passage of time, when Pt. Sharma was left alone and he was feeling loneliness, he created "Ram Chandra Sharma Educational Trust, Moradabad, (hereinafter referred to as "the Trust") through a registered deed on 18th November, 1966. This trust was also running an institution, known as Ram Chandra Sharma Balika Vidyalaya. There were eight trustees ; Pradeep and Abha Sharma, children of Pt. Sharma, were two amongst them. In 1968, one Sudama Kulshreshtha was appointed as a teacher of the institution. In April, 1969, Pradeep along with his wife, came back from Delhi. On 3rd August, 1970, Sri R. S. Pathak brother of Pt. Sharma was inducted as a trustee. Pradeep and Abha Sharma were removed from trusteeship. Thereafter, on 7th August, 1970, Pt. Sharma executed a registered Will. Sri R. S. Pathak was one of the attesting witnesses of the said Will. Then, Pt. Sharma served a notice dated 30th October, 1970 on Pradeep to vacate his house. On 6th October, 1971, Sri R. S. Pathak was removed from the trust. On account of the strained relationship between Pt. Sharma and Pradeep, Pt. Sharma had to lodge criminal complaints against Pradeep between 1971-78. On 25.4.1977, a suit was instituted by Pt. Sharma against Pradeep in the Court of Civil Judge, Moradabad, for his eviction from the portion of the house of Pt. Sharma, in his occupation. On August 18, 1978, Pt. Sharma went to Bombay. The case of the Respondent in this appeal is that he executed another Will on 25th August, 1978. On the basis of this Will, the Respondent in this appeal sought probate in respect of the assets left by late Pt. Sharma. He claimed that he was named as executor of the Will. This Will was subject matter of challenge in Testamentary Suit No. 10 of 1982, which was ultimately decided by the impugned judgment and order dated 3rd April, 1987 of the learned single Judge. Learned single Judge, after going through the entire record of the case, and discussing entire material brought before him, came to the conclusion that the execution of the Will dated 25th August, 1978, was fully established and applicant (Respondent herein) was entitled for grant of probate. Feeling aggrieved by this judgment and order dated 3rd April, 1987, the Trust through its Secretary Sri R. S. Pathak has approached this Court by means of instant special appeal.

4. Heard Sri P. K. Mukherjee learned Counsel for the Appellant and Sri Tarun Agarwal, learned Counsel for the legatees.

5. Sri P. K. Mukherjee, learned Counsel for the Appellant vehemently urged that the learned single Judge has erred in law in holding that the execution of the Will dated 25th August, 1978, has been duly proved. According to him, learned single Judge did not take into consideration the vital requirements to prove execution of the Will. Will was non-est on account of the fact that the witnesses and scribe were not produced, in evidence. Moreover, according to Sri Mukherjee, the signatures in the Will were forged. According to him, the learned single Judge miserably failed to consider the suspicious circumstances. That apart, the learned

Counsel tried to justify that the Will dated 25th August, 1978, was a fraudulent document and the judgment of the learned single Judge deserves to be quashed.

6. Sri Tarun Agarwal vehemently contended that the judgment under appeal passed by the learned single Judge is just, apt and legally sound. The learned single Judge has rightly held that the Will dated 25.8.1978, was the last testament of the testator, namely, Pt. Sharma. That being so, it was genuinely and validly executed in a sound disposing state of mind. Pt. Sharma had put his signatures on the testament on his own freewill in the presence of witnesses. Learned single Judge rightly concluded that there were no suspicious circumstances surrounding the execution of the Will. Even otherwise, the suspicious circumstances, if any, as alleged by the Trust-Appellant, have been properly explained by the propounder.

7. Sri Tarun Agarwal, further submitted that the learned Counsel for the Appellant, in his argument, has assailed the judgment of the learned single Judge on absolutely new grounds, which are neither mentioned in the memorandum of appeal nor were argued before the learned single Judge. Thus, they are absolutely false, concocted, erroneous and misconceived. Sri Agrawal contended that law, in this behalf, is firmly settled that a propounder has to show that the Will was signed by the testator ; that he was, at the relevant time, in a sound disposing state of mind ; that he understood the nature and effect of the dispositions ; that he put the signatures on the testament on his own freewill and that he had signed it in the presence of each other. Where due execution and attestation of the Will has been proved and suspicious circumstances surrounding the execution of the Will has been refuted, the onus which rests upon the propounder stands discharged. Sri Agrawal, therefore, pointed out that so far as the present case is concerned, signatures in the Will have been clearly proved to be that of the testator by several witnesses, namely, the executor, A. K. Mishra and Badri Prasad Mishra (an attesting witness). Learned Counsel took us through page 186 of the paper book to show that Badri Prasad Mishra, in his statement, had stated that the testator had signed the Will in his presence and in the presence of two other witnesses. This witness had also proved due execution of the Will. Thus, the requirement of Section 63 of the Indian Succession Act has been duly complied with. According to Sri Agarwal, the propounder had discharged the onus and had proved due execution of the Will. The onus regarding suspicious circumstances rests upon the Appellant and the Appellant has miserably failed to prove its case on the facts and in the circumstances of the present case. Sri Agarwal vehemently contended that Section 68 of the Evidence Act deals with proof of execution of documents required by law to be attested. It provides that such document shall not be used in evidence until at least one attesting witness has been called upon to prove the execution of the document. However, Section 63 of the Succession Act requires that a Will has to be attested by two or more witnesses. Thus, in the present case, Section 68 of the Evidence Act is relevant and its provisions shall come into play. Badri Prasad Mishra being one of the witnesses has clearly proved execution of the Will in his

capacity as an attesting witness. This satisfies the requirement of Section 68 of the Evidence Act. According to the learned Counsel, it is not, at all, necessary for all the attesting witnesses to appear and prove due execution of the Will. Therefore, Badri Prasad's evidence clearly indicates that he and the other two witnesses personally saw the testator putting his signatures on the Will at the time of its execution and that all the witnesses had signed in the presence of each other. Sri Agarwal strongly refuted the allegation of the learned Counsel for the Appellant that the Will, in question, was a forged document. An attempt was made by the Appellant to compare the signatures in the Will dated 25.8.1878 with those in the Will dated 7.8.1970. According to the Appellant, letter "C" in the signatures of testator in the Will dated 25.8.1978 is small whereas in the Will dated 7.8.1970, it was capital. Shri Agarwal pointed out that the flow in the signatures tends to change over a period of time. There was a gap of eight years in between execution of the first Will dated 25.8.1978 and earlier Will dated 7.8.1970. There is absolutely no change or difference in the signatures of the testator in the two Wills. Comparison of his signatures can also be made from Ex. R-4, R-5 and R-7 (Post cards written by the testator to his brother R. S. Pathak on 30.4.1977, 9.5.1977 and 3.6.1977). The signatures of the testator in all those letters have been produced and proved by the Appellant himself. A bare perusal of the signatures in the disputed Will dated 25.8.1978, clearly indicates that signatures on this Will tally with the signatures in those letters. At this stage, the learned Counsel urged that Section 47 of the Evidence Act contemplates that the Court while forming an opinion can take the opinion of any person who is acquainted with the handwriting of the testator. In the instant case, the Appellant itself has proved that the trustees in Appellant-Trust are well acquainted with the signatures contained in the aforementioned letters (post cards). Therefore, Section 73 of the Evidence Act will come into play and in the light of the provisions of Section 73 of the Evidence Act, the Court itself is empowered to compare the signatures of the testator from the proven documents. Since learned single Judge has recorded a categorical finding of fact after comparing the proven signatures that the signatures in the Will dated 25.8.1978, are that of testator, the same cannot be interfered with and the present appeal is liable to be dismissed on this ground alone. So far as the case of the Appellant that Badri Prasad Misra is an interested witness being in the employment of Sri S. N. Misra is concerned, Sri Agarwal pointed out that if this plea is accepted, then the other witnesses as well as the scribe too cannot be relied upon as they were also juniors to Sri S. N. Misra. That being so, non-production of the remaining two witnesses and the scribe does not amount to suspicious circumstances. In reply to the allegation that the Will was hatched at Allahabad in May, 1979, when Pradeep and Abha visited Allahabad and stayed with Sri S. N. Misra, Sri Agarwal contended that the factum of the presence of the testator at Allahabad at the relevant point of time has been proved by the witness-Badri Prasad Misra stating that the testator had signed the testament in his presence at Allahabad. The presence of the testator at Allahabad is also proved by four photographs, paper numbers P-10, P-11, P-12 and P-13. These photographs were very recently

taken at the residence of Sri S. N. Mishra. These photographs show the picture of the testator with Sri S. N. Misra. These photographs were sent by the testator to Sri S. N. Misra through his letter dated 12.10.1978 (Ex. P-14/P-22). Signatures of the testator in this letter (dated 12.10.1978) have been proved not only by the executor but also by the Appellant. Therefore, it is crystal clear that the testator came to Allahabad from Bombay and executed the Will at Allahabad at the residence of Sri S. N. Misra, senior advocate. Presence of the testator is proved, beyond doubt, by the evidence of Badri Prasad Misra as well as by the four photographs. Apart from the above arguments, Sri Agrawal replied to all other allegations of the Appellant in his argument, such as the allegation that the children of Sri Pradeep and Abha used to abuse the testator ; and that there was no cordial relation between Pt. Sharma and Pradeep-his elder son. About the conduct of Sri R. S. Pathak, Sri Agarwal vehemently urged that he wanted to usurp the property of the testator for his personal benefit and learned single Judge has rightly discarded his evidence. Lastly, Sri Agarwal urged that though the judgment of learned single Judge does not require any interference but, in the interest of justice, it is expedient and necessary that the letters of administration be granted to the legatee, namely Smt. Abha and to this extent, the judgment may be modified.

8. We have considered the submissions made by the learned Counsel for the parties. In order to prove execution of the Will, it is well-settled that the propounder has to show that the Will was signed by the testator ; that he was, at the relevant time, in a sound disposing state of mind ; that he understood the nature and effect of the dispositions ; that he put the signatures on the testament on his own freewill and that he had signed it in the presence of each other. In this connection we may take note of decision of the Supreme Court in Seth Beni Chand (Since Dead) Now by L.Rs. Vs. Smt. Kamla Kunwar and Others, . In the present case, the signatures in the Will has been proved to be that of the testator by several witnesses, namely, by the executor-A. K. Mishra and also by Badri Prasad Mishra, who is an attesting witness in the Will. Badri Prasad Mishra in his statement stated that the testator signed the Will in his presence and in the presence of two other witnesses. He has proved due execution of the Will. Accordingly, in our view, the propounder had discharged the onus and had proved due execution of the Will. The onus regarding suspicious circumstances rests upon the Appellant, which it appears to us, would not be proved, in the facts and circumstances of the case.

9. In this behalf, following observation of the Apex Court in Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others, , is irrelevant for the purposes of the present case:

"In cases where the execution of a Will is shrouded in suspicion, its proof ceases to be a simple lis between the Plaintiff and the Defendant. What generally, is an adversary proceeding becomes in such cases a matter of the Court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the Will is such as to satisfy the conscience of the Court

that the Will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the Will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the Will.

In the case, on hand, the evidence led by the propounder of the Will is sufficient enough to satisfy the conscience of the Court that the Will was duly executed by the testator. The Plaintiff-Respondent has been able to offer cogent and convincing explanation of the suspicious circumstances surrounding the making of the Will dated 25.8.1978. In this regard, the contention of the learned Counsel for the Appellant that the proof of the execution of Will was incomplete on account of non-production of the scribe and two attesting witnesses is wholly erroneous. Section 68 of the Evidence Act deals with proof of execution of documents required by law to be attested. It provides that such document shall not be used as evidence until at least one attesting witness has been called upon to prove the execution of the document. u/s 63 of the Succession Act, a Will has to be attested by two or more witnesses. Badri Prasad Mishra being one of the witnesses has proved the execution of the Will as an attesting witness, which is sufficient requirement u/s 68 of the Evidence Act. It is not, at all, necessary for all the attesting witnesses to appear and prove the execution of the Will. The evidence of Badri Prasad Mishra shows that he and the other two witnesses saw the testator putting his signatures on the Will by way of execution and that all the witnesses had signed in the presence of each other. The relevant portion of Section 68 of the Evidence Act, in this connection, is set out hereinbelow:

68. 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:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the (Indian Registration Act, 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

10. It has been alleged that the signatures of the testator on the Will is forged and to prove this, an effort was made by the Appellant to compare the signatures in the Will dated 25.8.1978 with that of the first Will dated 7.8.1970. It is alleged that the letter "C" in the signature of testator in the Will dated 25.8.1978, is small and, therefore, different as compared to the letter "C" in the Will dated 7.8.1970. It is relevant to mention here that the flow in the signature tends to change over a period of time. There is a gap of 8 years between the first Will dated 7.8.1970 and the second Will dated 25.8.1978. Therefore, keeping in view this aspect of the matter, it appears to us that there is no change or difference in the signatures of the testator in the two Wills. Comparison of his signatures can also be made from exhibits R-4, R-5 and R-7 which are post cards written by the

testator to his brother R. S. Pathak, dated 30.4.1977, 9.5.1977 and 3.6.1977. The signatures of the testator in these letters have been produced and proved by the Appellant himself. Perusal of the signatures clearly indicates that the signatures on these letters R-4, R-5 and R-7 are the same as contained in the Will and the letter "C" is the same.

11. Section 47 of the Evidence Act contemplates that the Court while forming an opinion, can take the opinion of any person, who is acquainted with the handwriting of the testator. The Appellants themselves proved that they are acquainted with the signatures contained in Exhibits R-4, R-5 and R-7. u/s 73 of the Evidence Act, the Court can compare the signatures of the testator from the proven documents. In the present case, the learned single Judge has given a categorical finding of fact by comparing the proven signatures to the effect that the signatures on the Will are that of the testator. In the circumstances, we are of the view that the formality required to prove the Will has been discharged and there was no need for examination of an expert, as contended by the learned Counsel for the Appellant.

12. The learned Counsel for the Appellant tried to make out a case of suspicious circumstances and it has been contended on behalf of the Appellant that non-production of the two witnesses is suspicious, especially when the two witnesses are advocates practicing in this Court and could be easily produced. Therefore, non-production of the remaining witnesses is suspicious. As stated earlier, the requirement of law is that one witness is sufficient to prove the execution of the Will, which in the present case has been done by production of one attesting witness, namely, Badri Prasad Mishra. The allegation made on behalf of the Appellant that Badri Prasad Mishra was an interested witness since he was in the employment of Sr. S. N. Mishra does not appear to us to be correct. The allegation is that Badri Prasad Mishra being an interested witness, the remaining witnesses ought to have been produced. If this is a suspicious circumstance, then production of the remaining two witnesses and the scribe would not make much difference, inasmuch as, the remaining two witnesses were also the juniors of Sri S. N. Mishra and the scribe was also in the employment of Sri S. N. Mishra who is in direct control of Sri S. N. Mishra. In our view, therefore, non-production of two witnesses and scribe does not amount to be suspicious circumstance. In any event, Badri Prasad Mishra, being not a beneficiary under the Will, there is no reason to hold that he is an interested witness. The other two witnesses and also Sri S. N. Mishra, not being beneficiaries under the Will and having no ulterior motive, in our view, were sufficient enough in proving the Will. The other two witnesses, in our view, cannot be treated to be interested witnesses.

13. It may, however, to be noted that Pradeep, the elder son of the testator never got along with his father-the testator, and on account of his drinking problem, there was no cordial relationship between the testator and his son. Be that as it may, the testator in his Will did not make Pradeep his beneficiary. The testator had no grudge or ill-feeling against his daughter-in-law or the grand-

children and, therefore, made them the beneficiaries under the second Will. On the other hand, the intention of the testator has to be seen and considered. In order to understand what the testator intended and why he intended so, one has to get into his arm-chair to ascertain his frame of mind and circumstances in which he made the Will. The testator was a self-made man. He was the most successful in his father's family and became a successful and leading advocate in Moradabad. However, he had to lead an unhappy family-life. He divorced his first wife in the year 1961. His second son, Anil died in a car accident on 7.7.1965. His elder son Pradeep left Moradabad and took a job in Delhi on account of differences between the testator and his son. R. S. Pathak, who was earlier working in the Railways, was brother of the testator. R. S. Pathak started poisoning the mind of the testator and with Pradeep and Smt. Abha being out of the house, he got himself made a trustee after removing Pradeep and his wife Smt. Abha as trustees on 3.8.1970. Four days later on 7.8.1970, the first Will was executed by the testator bequeathing all his movable and immovable properties in favour of the trust. Even though the testator's relationship with his son Pradeep was never cordial and their differences could never be settled, however, the testator had no grudge against his daughter-in-law Smt. Abha. His attitude further changed when the grand son was born in 1972 and the grand daughter in 1977. Knowing that his brother R. S. Pathak was out to ruin his family-life, coupled with the fact, that he wanted to leave something to his grand children, the testator executed the second Will dated 25.8.1978. In view of the aforesaid facts, the execution of the first Will seemed unnatural being made under certain influence. The second Will is natural being executed out of sheer love and affection for his grand children.

14. After the death of the testator, R. S. Pathak made efforts to implicate Pradeep as an accused in the murder of the testator. R. S. Pathak got himself appointed as the Secretary of the trust and started pursuing the case opposing the execution of the second Will for vested personal benefits. It has also come on record that he was a witness of a Will of Smt. Parvati Devi and the genuineness of the Will of Smt. Parvati Devi is being contested. From the conduct of R. S. Pathak, it is clear that he wanted to usurp the property of the testator for his personal benefit.

15. At this juncture, it would not be out of place to mention that the learned single Judge has very carefully scrutinized the Will dated 25th August, 1978. Judgment of the learned single Judge is well discussed and it runs into 38 pages. Learned single Judge painstakingly considered each and every aspect of the matter. While discussing the contention of the Appellant (herein) that on the relevant date, when the disputed Will dated 25th August, 1978, was allegedly executed, Pt. Sharma was not at Allahabad but he was at Moradabad, the learned single Judge observed that "..... In August, 1978, 24th was Thursday and 25th was a Friday. The High Court was closed for janmashami on August 16, 1978. This lends circumstantial guarantee to the statement that Ram Chandra Sharma was not at Moradabad on August 25 as claimed by R. S. Pathak.

It tends to show that the version that he was, in all probability, at Allahabad on that date is believable....." During the course of argument, while challenging the impugned judgment of the learned single Judge in the instant appeal, the learned Counsel for the Appellant has, in the forefront, taken the grounds, such as, discrepancies in the signatures of the testator ; conduct of son of the testator ; non-production of the two witnesses and scribe named in the Will ; genuineness of the photograph and the suspicious surrounding circumstances leading to the execution of the Will. However, all these grounds do not exist in the memorandum of appeal. We have carefully gone through the entire documents, such as, memorandum of appeal, affidavits exchanged between the parties in this appeal, writ petition, affidavits exchanged between the parties in the writ petition, as well as the impugned judgment of the learned single Judge. On careful scrutiny, surprisingly enough, we find that neither the aforesaid grounds were taken nor argued before the learned single Judge. That being so, the Appellant is now estopped to raise such grounds. It is alleged by the Appellant that the children of Pradeep and Smt. Abha used to abuse the testator and, therefore, testator was adamant not to give any share in his property to Pradeep and Smt. Abha or their children. This contention of the Appellant too cannot be accepted for a simple reason that "blood is thicker than water". From the record, it is evident that at the time of death of the testator, the son of Sri Pradeep was only 6 years old and the daughter was 1 year old. This fact alone is enough to disbelieve that the grandchildren could abuse the testator. It is normally expected that the testator would bequeath his properties in favour of his heirs and bequeathing the property in favour of the trust would have been an unnatural act of disposition. Moreover, the learned single Judge, in his judgment, has considered all these aspects of the case and came to a right conclusion, which requires no interference by us in this appeal.

16. An application has been filed by Smt. Abha Sharma for her appointment as executor of the Will dated 25.8.1978. Her claim has been supported, on affidavit, by the other legatees. Since A. K. Mishra, who was executor appointed in the Will, in question, died on 13.10.2000 and the administration of the estate is required to be completed, we are of the view that letters of administration with the copy of the Will annexed thereto be issued in favour of the Smt. Abha Sharma.

17. Accordingly, the appeal fails and is dismissed without any order as to costs. Stay order dated 11.5.1987 is hereby vacated.