
(1997) 11 AHC CK 0005
In the Allahabad High Court
Case No : Second Appeal No. 630 of 1987

Ram Vishal Misra

APPELLANT

Vs

Ram Sumer Misra

RESPONDENT

Date of Decision : 17-11-1997

Acts Referred:

Evidence Act, 1872 — Section 154, 67, 68, 71
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 21

Citation : (1997) AWC 662 Supp

Hon'ble Judges : D.C. Srivastava, J

Bench : Single Bench

Advocate : S.N. Gupta and K.N. Rai, for the Appellant; A.K. Srivastava and Deepak Jaiswal, for the Respondent

Final Decision : Dismissed

Judgement

D.C. Srivastava, J.—This is Defendant's second appeal.

2. Plaintiff-Respondent, Ram Sumer Misra, filed a suit against Defendant-Appellant (his own real brother) for his eviction from a portion of the disputed premises No. 124/B/689 Govind Nagar, Kanpur. and for recovery of damages and pendent lite and future mesne-profits. The allegations in the plaint were that Deen Dayal Misra, father of the Plaintiff, was absolute owner of the above house. He had four sons, namely, Ram Sumer Misra, Plaintiff, Ram Bishal Misra, Defendant, Ram Sewak and Ram Ashrey. Deen Dayal Misra also left his widow. Deen Dayal Misra executed his last will on 7.6.1966 which was registered on 8.6.1966. He expired on 5.3.1980. The Plaintiff thus became absolute owner of the house. The Defendant was occupying a portion of the said house from his father as licensee. His licence initially stood terminated on the death of Deen Dayal Misra. Thereafter the Appellant occupied the said portion as licensee of the Plaintiff-Respondent. The Appellant promised to vacate the portion but ultimately resided from the same. The licence of the Defendant was revoked through a

notice dated 26.4.1981 which was served on 30.4.1981. Again the premises was not vacated, hence, suit for eviction and damages etc. was filed.

3. The suit was resisted on the ground that the will in question is a forged document. It was never executed by Deen Dayal Misra nor the Plaintiff is absolute owner of the house. It was pleaded that the Defendant-Appellant occupied the disputed portion from the time of his father and he is one of the co-owners of the house along with the Plaintiff-Respondent. It was also pleaded that the suit is not maintainable because in the garb of ejectment the Plaintiff wants declaration of his title.

4. The trial court found that the will was properly executed by Deen Dayal Misra. Due execution and attestation and registration of the will was upheld by the trial court. The Plaintiffs case of licence was also accepted and finding that the licence was revoked the suit for eviction and recovery of damages and mesne-profits was decreed.

5. An appeal was preferred. The appellate court affirmed the findings of the trial court and dismissed the appeal, hence, this second appeal.

6. The appeal was admitted on the following substantial questions of law:

(i) Whether the execution and attestation of the will dated 7.6.1966 has been proved in accordance with law?

(ii) Whether the will can be acted upon without obtaining the probate under the Indian Succession Act?

7. The learned Counsel for the Appellant did not advance his argument on the second substantial question of law. It was a suit for eviction after terminating the licence. The title of the Plaintiff was set up on the basis of a registered will. In such a suit, there was no necessity for obtaining a probate on the strength of will under the Indian Succession Act. The will, therefore, could be acted upon without obtaining probate under the Indian Succession Act. If due attestation and execution of the will is proved, there is no necessity for obtaining probate and the suit cannot be dismissed on this ground. There is thus no merit in this substantial question which is answered in affirmative.

8. The only substantial question of law remains to be answered is whether due execution and attestation of the will is proved. The learned Counsel for the Appellant vehemently argued that two attesting witnesses have not proved either due execution or due attestation of the will, hence, the suit was liable to be dismissed and the two Courts below fell in error in decreeing the same. It was not disputed that it was a registered will. Of course, the Appellant disputed the attestation and execution of the will, There should be no dispute that the will is a document which is required by law to be attested. Section 68 of the Evidence Act provides that 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. The proviso to this section makes no exception in not calling for an attesting witness in proof of the execution of registered will.

9. The only requirement of law u/s 68 of the Evidence Act, therefore, is that if execution and attestation of a will has to be proved, at least one of the attesting witnesses must be called for the purposes of proviso its execution provided such attesting witness is available and is capable of giving evidence. This requirement of law has been complied with by the Plaintiff-Respondent. He summoned two attesting witnesses, but unfortunately both of them turned hostile. The learned Counsel for the Appellant, however, vehemently contended that no attesting witness turned hostile nor the trial court declared either of the attesting witnesses hostile. Hence, since two attesting witnesses did not support the Plaintiff, due attestation and execution of the will was not proved.

10. P.W. 2, Salig Ram Misra is one of such witnesses and P.W. 3 Aditya Kant Tripathi is another witness. Their entire statements were read over before me. They were examined and cross-examined. Apparently, they did not prove the execution as well as attestation of the disputed will as required by law. However, subsequently an application, 43C, was given for resummoning these witnesses for cross-examination. The application was supported by an affidavit in which averment was made that these witnesses have turned hostile. Objection. 46C, was filed against the said application and by order dated 8.8.1994 the trial court permitted recalling these two witnesses for the purposes of cross-examination. The trial court in its order observed that u/s 154 of the Evidence Act, it was necessary to permit the Plaintiff to cross-examine these two witnesses.

11. The law relating to hostile witnesses is contained in Section 154 of the Evidence Act, which provides that the Court may in its discretion permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. It is under this section that a hostile witness is permitted to be cross-examined by a party who has summoned the said witness in support of his case. The trial court specifically made a mention of Section 154 of the Evidence Act in its order dated 8.8.1984. This read with the allegation in application 43C and accompanying affidavit leaves no room for doubt that these two witnesses, Salig Ram Misra and Aditya Kant Tripathi, were declared hostile. They were permitted to be cross-examined by the Plaintiff. There is thus no merit in the contention that these two witnesses were not declared hostile.

12. The hostile witnesses are not per se unreliable. Their testimony has to be examined with care and caution and if on a point they are found reliable, they can be relied upon to that extent only. It may, however, be mentioned that in the case before me, Salig Ram Misra, who was a typist in the civil court has turned hostile for the obvious reason. P.W. 3 Aditya Kant Tripathi was a practising Advocate of Kanpur. He had occasion to work with Pandit Babu Lal Misra in his chamber. Pandit Babu Lal Misra was a senior and top civil lawyer of Kanpur. He

admitted that he knew the distinction between attestation and identification. It is difficult to believe that a lawyer enrolled in 1962 would have so easily signed the will as attesting witness as has been innocently stated by him. Likewise Salig Ram Misra, a professional typist in the civil court, who was also doing Pairvi as a general attorney of a party and was attending his several cases would have been so innocent as to sign the will without understanding that he was signing as an attesting witness. Not only this, these two witnesses also appeared before the Sub-Registrar and confirmed their signatures on the will. For detailed and cogent reasons, the trial court as well as the lower appellate court rightly observed that these witnesses have turned hostile and have not supported the Plaintiff.

13. The learned Counsel for the Appellant argued that even if these witnesses are considered to be hostile witnesses, execution and attestation of the will could not be proved by any other evidence like the statements of P.W. 4 Surendra Pratap Singh and P.W. 5 Laxmi Narain. It may be mentioned that these witnesses were present at the time of execution and attestation of the disputed will. From their statements, attestation and execution of the will as required by law have been proved. The question is whether aid of such witnesses can be taken for proving execution and attestation of the will where attesting witnesses were called by the Plaintiff and they turned hostile.

14. Section 71 of the Evidence Act provides that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. This section, therefore, permits proof of execution of attestation of a document by other evidence when attesting witness denies execution and attestation or takes excuse of failing memory and does not recollect execution.

15. Section 71 of the Evidence Act is one of the exceptions to stringent rule of proof of attested document u/s 68 of the said Act. The fate of an attested document is not necessarily at the mercy of attesting witnesses. In the event of an attesting witness being declared hostile, the propounder of the will can cross-examine him and also rely upon other evidence to prove proper execution. Likewise, when all the attesting witnesses turn hostile, other evidence may be given to prove execution and attestation. The force of the rule is spent when the attesting witness is called. It is not necessary that he should speak favourably. If he positively denies execution, or his memory fails or he pretends not to recollect, it entitles the party to give other evidence of execution. In that event, such document may be proved in the manner of documents not required by law to be attested within the meaning of Section 67 of the Evidence Act. Section 71 will, however, come into play only when all the attesting witnesses are alive and have been called or every attempt made to enforce their attendance and they deny or do not recollect execution.

16. In view of the above discussions, it is clear that propounder of the will called two attesting witnesses, examined them and since they did not support the propounder, the later again summoned them for cross-examination and in cross-examination, specific suggestion was given to them that for ulterior motive and

allurement they have given false statement.

17. Thus, the statements of Surendra Pratap Singh, P.W. 4, and Laxmi Narain P.W. 5, prove due execution and attestation of the disputed will.

18. The learned Counsel for the Appellant further contended that the propounder should have removed all the suspicious circumstances likely to create suspicion in the genuineness of the will and since the suspicious circumstances still exist, the will cannot be said to be a genuine document.

19. The genuineness of the will on the facts and circumstances of the case cannot be doubted simply because no family member of the deceased was a witness. It has come on record that deceased, Deen Dayal Misra was pleased with his one son, the Plaintiff-Respondent. He was not happy with the remaining three sons. Consequently, he could not have taken the risk of calling the remaining sons to be witnesses of the will. They would have created all hindrances in execution and registration of the will only in favour of the Plaintiff.

20. Another circumstance pointed out was that Deen Dayal Misra filed an application u/s 21(a) of U.P. Act No. 13 of 1972 for eviction of a tenant in a portion of his house to give that accommodation to the Defendant-Appellant after his retirement. If he had intention to exclude the Appellant from his share in the house under the will, he should not have moved the application u/s 21(a) of the U.P. Act No. 13 of 1972. This is actually no suspicious circumstance. A father might have had soft corner for his retired son to give shelter after retirement. But that did not mean that he should have given share in the house under the will to the Appellant. It has come in evidence that the father, namely, Deen Dayal Misra was pleased only with the Plaintiff-Respondent because of the services rendered and monetary help given by him. Consequently, execution of the will in favour of the Plaintiff-Respondent excluding the other sons of the deceased is not a suspicious circumstance. Other cogent reasons have been given by the lower appellate court why other sons of Deen Dayal Misra were not given any share in the house under the will.

21. Another circumstance pointed out was that the Plaintiff-Respondent is bachelor. There was no reason why the entire house would have been given to a bachelor son excluding other three married sons. This is no ... suspicious circumstances specially in view of the clear findings of the two Courts below that Deen Dayal Misra was pleased with the services of the Plaintiff-Respondent alone. There is also no suspicious circumstance that the Plaintiff-Respondent contributed some money towards construction of the house. If he was supporting Deen Dayal Misra, he could have contributed some amount for completion of the house. Such contribution will not render the Plaintiff-Respondent to be co-owner along with his father.

22. The will was prepared in the chamber of D. V. Singh, Advocate of Kanpur. It is in evidence that D. V. Singh, Advocate, was also a leading civil lawyer and he has no reputation of preparing forged documents. Preparation of the will in the

chamber of D. V. Singh, Advocate, in the premises of civil court, Kanpur in the presence of professional typist, Salig Ram Misra, of civil courts, Kanpur and another witness, namely, Aditya Kant Tripathi, who was also Advocate and attached subsequently to the chamber of D. V. Singh rules out the possibility of forgery and manipulation. The will was duly registered.

23. For the reasons given above it is clear that due execution and attestation of the will is proved in accordance with law. Suspicious circumstance allegedly surrounding the will have been removed by the propounder beyond all doubts. On the basis of such registered and genuine will, the Plaintiff-Respondent became owner of the house. Grant of licence and its revocation was also properly and duly proved. After revocation of the licence, decree for ejectment and mesne-profits could be passed. The two Courts below, therefore, committed no illegality in decreeing the suit of the Plaintiff-Respondent. The mesne-profit awarded by the trial court is also not excessive. There is no merit in this appeal, which is hereby dismissed with costs.