
(2009) 01 AHC CK 0147
In the Allahabad High Court

Rama Pati Tiwari

APPELLANT

Vs

District Registrar and Others

RESPONDENT

Date of Decision : 23-01-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Registration Act, 1908 — Section 17, 18, 40, 41, 71
Succession Act, 1925 — Section 276

Citation : AIR 2009 All 102 : (2009) 2 AWC 1203 : (2009) 3 CivCC 65 : (2010) 7 RCR(Civil) 2602 : (2009) 106 RD 53

Hon'ble Judges : Pankaj Mithal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Pankaj Mithal, J.—I have heard Sri V.K.S. Chaudhary, senior advocate assisted by Sri Deo Prakash Singh learned Counsel appearing for the appellant and Sri M.D. Singh "Shekhar", senior advocate assisted by Sri P.K. Kesari learned Counsel for the respondent No. 3, the main contesting party. The other respondents are only formal in nature.

2. The suit/appeal owes its origin to a dispute relating to ownership of a plot of land 22B Church Lane, Allahabad on which a huge house was constructed by one Tribhuwan Sukh Tiwari who was an Assistant Commissioner of Excise, U.P. On his death the said property had devolved upon his wife Smt. Ram Lalli who died on 21.3.1979. They had no issue. The two nephews of late Tribhuwan Sukh Tiwari set up two contradictory unregistered "Wills" of Smt. Ram Lalli. One dated 20.2.1979 by Rama Pati and the other dated 11.3.1979 by Girja Prasad, both sons of Param Sukh one of the elder brothers of late Tribhuwan Sukh Tiwari, Girja Prasad presented the "Will" dated 11.3.1979 of Smt. Ram Lalli which is said to be in his favour for registration before the registering authority on 25.4.1979. The registration of the said "Will" was refused to him by an order dated 10.11.1980 against which he preferred an appeal u/s 72 of the Registration Act, 1908. It was dismissed on 27.3.1982. Therefore, he instituted Original Suit No.

289 of 1982 on 21.4.1982 u/s 77 of the Registration Act, 1908 for a decree directing the registering authority to register the "Will". In the suit the other nephew Rama Pati was impleaded as one of the defendants as he had set up a different "Will" dated 20.7.1979. The suit after due contest was dismissed vide judgment and order dated 24.9.1994, passed by the Court of first instance. However, in appeal the judgment, order and decree of the Court of first instance has been set aside and the suit has been decreed vide judgment and order dated 17.10.2007 with the direction to the registering authority to register the "Will". The present second appeal as such has been preferred by one of the defendants, i.e., Rama Pati assailing the judgment, order and decree passed by the lower appellate court.

3. Whether a suit u/s 77 of Registration Act, 1908 for posthumous registration of a "Will" is maintainable is the core question of substance which has been raised in the present appeal.

4. However, apart from the above, on the preliminary objection raised, another important substantial question of law arises in this appeal, i.e., whether the appellant has any legal right to oppose the registration of the "Will" and in turn to maintain the appeal?

5. Both the above legal questions are substantial in nature as they are debatable and have not been settled previously by any decision of the Supreme Court (at least none has been brought to my notice). They may also ultimately affect the rights of the parties in the immovable properties covered by the "Will". Besides, the above questions are pure questions of law which can be decided effectively on the admitted facts alone without the aid of any evidence. Learned Counsel for the parties on being made known of these two questions, have eloquently addressed the Court on merit and therefore, I have ventured to proceed and decide the appeal on the above aspects finally at the admission stage.

6. The maintainability of the suit is a pure question of law which goes to the root of the jurisdiction rendering the decree so passed in such a suit to be a nullity. Therefore, even if such an objection/ground was not raised in the courts below in so many words it can certainly be raised and considered in second appeal before the High Court.

7. The Registration Act, 1908 (hereinafter in short as an "Act") contemplates two types of documents for the purposes of registration. First, the documents of which registration is mandatory under law. These documents have been enumerated u/s 17 of the Act. The other are documents of which registration is optional. The list of such documents is given in Section 18 of the Act. Registration of "Wills" is not compulsory and it is only optional in nature in view of Section 18(e) of the Act. The Act does not prescribe any penal consequences for nonregistration of documents mentioned in Section 18 of the Act including "Wills".

8. The general procedure required to be followed by the registering authority for

registering a document is provided in Sections 71 - 76 of Part XII of the Act. The registering authority is not obliged to register every document and it has power to order for refusal of registration by recording reasons in a book kept for the purpose. Section 72 of the Act provides for an appeal to the Registrar against the order of refusal so passed by the registering authority provided the refusal is not on the ground of denial of execution. Simultaneously, in certain circumstances where the registering authority refuses to register a document a provision for an application to the Registrar has been made in Section 73 of the Act. By virtue of Section 76(2) the order passed by the Registrar is final as no further appeal has been provided against the order of the Registrar so passed either on appeal or on the application. However, a suit within 30 days of such refusal by the Registrar for a decree directing the document to be registered has been provided u/s 77 of the Act.

9. The aforesaid provisions contained in Part XII from Sections 71 - 77 are of general nature. They are applicable to all documents presented for registration. However, in so far as registration of "Wills" is concerned, the Act contains separate special provisions under Part VIII, i.e. Sections 40 and 41 of the Act.

10. Section 40 read with Section 41 of the Act provides that the testator or after his death any person claiming as executor or otherwise may present a "Will" for registration before the Registrar or Sub-Registrar and it shall be registered if the registering officer is satisfied that the "Will" was executed by the testator; the testator is dead; and the person presenting the "Will" is entitled to present the same. Therefore, for the registration of "Will" on the death of the testator following three conditions are required to be satisfied;

(i) Execution of the "Will" by the testator;

(ii) Death of the testator; and

(iii) The person presenting the "Will" for registration is entitled to present the same.

11. It is only on the satisfaction of the registering authority that all the above three conditions have been satisfied that a "Will" can be registered after the death of the testator, otherwise the registering authority can refuse its registration.

12. A combined reading of the provisions of Part VIII and Part XII of the Act indicates that the Legislature has intentionally placed the "Wills" into a separate docket distinguishing "Wills" from other documents of which registration is either mandatory or optional. The purpose of keeping "Wills" aloof from other documents is simple. The genuineness and the due execution of the "Wills" is normally required to be established by a probate case by a petition for probate u/s 276 of the Indian Succession Act, 1925 or in a regular civil suit before a civil court where such a "Will" is produced for claiming rights and is disputed. In such a probate proceedings or a suit a definite "Its" is required to be adjudicated

which is generally done after notices to the authorities and the public including the parties concerned. The due execution of the "Will" so presented or its genuineness is thereupon decided in accordance with the provisions of the Succession Act. All this is not done in a suit u/s 77 of the Act wherein no "Issue" with regard to the "Will" is decided but the matter is confined only to the registration or nonregistration of the "Will". Therefore, it appears that the intention of the Legislature by providing special provisions regarding registration of "Wills" u/s 40/41 of the Act is to keep the "Wills" out of the purview of Section 77 of the Act for the purposes of registration. There appears to be no need to subject "Wills" to proceedings before civil court twice: first for registration and then with regard to its genuineness and due execution when the registration has no impact whatsoever on the document itself.

13. Since the registration of "Wills" is optional in nature and there is no obligation upon the registering authority to register "Wills", it does not appear to reason to compel the registering authority to register the same when the Act does not provide for its mandatory registration. The person presenting a "Will" for registration as such has no legally enforceable right to get a "Will" registered. Therefore, logically the provisions of Section 77 of the Act enabling a party presenting a document for registration to maintain a suit in the event its registration is refused by the registering authority and the District Registrar, would not be applicable where the document presented for registration is a "Will". Therefore, by a necessary implication Section 77 of the Act providing for a suit for a decree directing for the registration of documents is confined only to documents which are set out for compulsory registration u/s 17 of the Act and not to any other document covered by Section 18 of the Act.

14. This view of mine finds complete support from a Full Bench decision of the Andhra Pradesh High Court in Padala Satyanarayana Murthy Vs. Padala Gangamma and Others, In the aforesaid decision it has been categorically and in unequivocal terms laid down that Section 77 applies only to instruments falling within ambit of Section 17 and can have no application to the "Wills". I have no reason to deviate from the above Full Bench decision and to take a different stand. The lower appellate court has passed the decree in complete ignorance of the law laid down by the aforesaid Full Bench decision of the Andhra Pradesh High Court and as such where such a decree has been passed in ignorance of settled law/ precedent there is no reason to deny its correction in appeal or second appeal. Accordingly, I answer the first substantial question of law in favour of the appellant and hold that a suit u/s 77 of the Act for a decree directing to register a "Will" is not maintainable.

15. It is another thing that a party aggrieved may take recourse to proceedings under Article 226/227 of the Constitution of India to challenge the orders of the registering authority or the Registrar or to establish his rights on the basis of such a "Will" either through a probate petition or in a civil suit when occasion arises.

16. In support of the second question learned Counsel for the respondent has placed reliance upon a decision of the Division Bench of this Court in Kwnari Sushila Saxena v. Sub-Registrar Sahajahanpur and Ors. 1997 (1) AWC 346, wherein while considering the provisions of Section 40/41 of the Act the Court held that registration of a document is merely a notification of the fact that such a document has been executed. It has nothing to do with the legality of the transaction covered by the document which may be open to challenge by the affected person in appropriate forum. Therefore, the matter of registration of a "Will" is basically one between the presenter and the registering authority and no other person is legally entitled to object to its registration.

17. The authority of Kumar Sushila Saxena (supra), relied upon by the learned Counsel for the plaintiff respondent operates in a totally different facts and set of circumstances. It is in the proceedings u/s 40/41 of the Act which are of administrative or a quasi-judicial nature that it has been held that the matter of registration of a "Will" is between a party presenting it for registration and the registering authority. It would have no application to judicial proceedings of a suit of a civil nature issuing a decree. Accordingly, the above authority is of no assistance to the plaintiff respondent.

18. In a civil suit of any nature there has to be a contesting party. In the event it is held that the appellant has no right to oppose a registration of a "Will" in a suit u/s 77, if at all it is maintainable, it would mean that the suit would go uncontested as naturally the authorities enjoined upon to register a document have no interest in the subject-matter and would not therefore, like to put up any resistance thus, allowing the suit to be decreed virtually ex parte. In other words, it would mean that any suit filed u/s 77 of the Act for a decree for getting a "Will" registered would in all probabilities be decreed in the absence of any opposition. This cannot be the intention of the Legislature therefore, the dictum of law as laid down by the Division Bench in Km. SusMa Saxena (supra), has to be confined to proceedings u/s 40/41 of the Act and not where the matter has been agitated in a suit.

19. Moreover, in the instant suit the appellant was impleaded as one of the respondents and was allowed to contest the proceedings. He was a party to the suit. The order of allowing his implement became final and conclusive as it was neither challenged earlier nor is being assailed by any cross-objection or an appeal. Therefore, a person who is a party to the suit naturally has a right to prefer an appeal against the decree passed in such a suit/appeal.

20. Accordingly, the contention of the respondents that the appellant had no right to oppose the registration of the "Will" in the suit and to prefer this second appeal, has no merit and is rejected.

21. Above all, the second question of law as formulated loses all significance once the first question has been answered and it is held that the suit itself was not maintainable.

22. In the totality of the facts and circumstances of the case the two substantial questions of law formulated above are answered by me as under:

1. Whether a suit u/s 77 of the Registration Act, 1908 for posthumous registration of a "Will" is maintainable?

The answer to this question as discussed above is that the suit is not maintainable as the provisions of Section 77 of the Act are applicable only in respect of the documents of which registration is mandatory u/s 17 of the Act.

2. Whether the appellant has any legal right to oppose the registration of the "Will" and in turn to maintain the appeal?

In view of the answer to question No. 1 this question loses its significance. Nonetheless, it is held that though a person like appellant has no right to oppose the registration of a "Will" in proceedings u/s 40/41 of the Act but he certainly has a right to defend the suit.

23. Thus, the Court is of the opinion that his second appeal deserves to be allowed and is accordingly allowed. The decree passed by the lower appellate court dated 17.10.2007 in Civil Appeal No. 298 of 1994 decreeing the Original Suit No. 289 of 1982, Girja Prasad Tiwari v. Zila Nibandhak and Ors. is set aside.

24. The parties are directed to bear their own costs.