

(1911) 11 AHC CK 0020
In the Allahabad High Court

Shankar Lal and Another

APPELLANT

Vs

Saruplal and Another

RESPONDENT

Date of Decision : 10-11-1911

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22
Specific Relief Act, 1877 — Section 42

Citation : 13 Ind. Cas. 19

Hon'ble Judges : Karamat Husain, J;Chamier, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. Roshan Lal, the owner of certain property in the Saharanpur District, died of plague in May 1907. After his death his step-mother applied for a succession certificate, and thereupon the defendants to this suit produced a Will in their favour which they alleged had been executed by Roshan Lal. The plaintiff in this suit and his brother, who is the father of one of the defendants, appear to be the heirs of Roshan Lal. Mansa Debi, the stepmother, is admittedly not an heir. But she is in possession of the property. The plaintiff asks for a decree declaring that the Will is a forgery and void against him and that it should be delivered up and cancelled. The first Court found that the Will was not proved to have been executed by Roshan Lal. But it dismissed the suit on the ground that it was governed by Section 42 of the Specific Relief Act, and that the claim for a declaration was not maintainable as the plaintiff was entitled to claim possession of the property. In the decree of the first Court dismissing the suit the finding that it was not proved that Roshan Lal had executed the Will 13 distinctly set out. The defendants fearing, apparently, that this Aiding would prejudice them hereafter filed an appeal. The plaintiff filed an objection under Order XLI, Rule 22, to the effect that the suit was not one for a declaration of title u/s 42 of the Specific Relief Act, but was a suit u/s 39 of the same Act. The Additional Judge dismissed the defendants' appeal, and on the plaintiffs' objections held that the suit was one u/s 42 of the Specific Relief Act, and that the plaintiff was not under

the necessity of claiming any relief other than the cancellation of the Will. He, therefore, allowed the cross-objections and decreed the plaintiffs' claim. This is a second appeal by the defendants. The first question for consideration is, whether the lower Appellate Court had power to set aside the decree of the first Court on the cross-objections filed by the plaintiff. According to the decisions of this Court, the defendants were not entitled to file an appeal against the decree of the first Court for that decree was entirely in their favour. A question was raised as to whether a respondent is entitled to file cross-objection where the appellants' appeal is not maintainable at all. We are of opinion that a respondent is entitled to do so in such a case as this. The respondent in the lower Appellate Court had a right to appeal, and we think that he did not lose his right to file cross-objections merely because his opponents filed an appeal which was found to be not maintainable. On the question on which the Courts below have differed, namely, whether the suit is governed by Section 39 or Section 42 of the Specific Relief Act, we think there can be no doubt that the suit is governed by Section 39. The plaintiff nowhere seeks a declaration of his title. He asks only that the Will may be declared void and delivered up to be cancelled. The language used in the prayer for relief leaves no doubt that the plaintiff intended to rest his claim upon Section 39. That Section provides that any person against whom a written instrument is void...may sue to have it adjudged void...and the Court may in its discretion so adjudge it and order it to be delivered up and cancelled. It seems to us that, ordinarily, where a plaintiff is out of possession and he is in a position to claim a decree for possession, he should not be permitted to obtain merely a decree for the cancellation of an instrument according to which, if genuine, he has no title to the land, ordinarily a Court would, we think, exercise its discretion wisely if it declined to adjudge such an instrument void, and will do well to leave the plaintiff to a suit for possession. The result of allowing a suit to be maintained u/s 39 and another suit for possession to be brought immediately afterwards is that the defendant is put to unnecessary expense. In the present case though the Additional Judge does not say very much about it, we think we must hold that; he has exercised his discretion, and inasmuch as he has decided that the document is, void, and both the lower Courts agree that the Will has not been proved, we do not feel called upon to set aside his decree. The appeal is dismissed with costs which, in this Court, will include fees on the higher scale.