

(2014) 08 AHC CK 0121
In the Allahabad High Court
Case No : Consolidation No. 317 of 2011

Shiv Mangal

APPELLANT

Vs

D.D.C.

RESPONDENT

Date of Decision : 22-08-2014

Acts Referred:

Contract Act, 1872 — Section 16(3)
Evidence Act, 1872 — Section 63, 68, 71
Succession Act, 1925 — Section 63
Transfer of Property Act, 1882 — Section 3
Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 9A(2)

Citation : (2014) 125 RD 178

Hon'ble Judges : Ram Surat Ram (Maurya), J

Bench : Single Bench

Advocate : Anoop Srivastav-II, Aslam Khan and M.A. Khan, Advocate for the Appellant; Anand Awasthi and D.C. Mukerjee, Advocate for the Respondent

Judgement

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Ram Surat Ram (Maurya), J.—Heard Sri Mohd. Arif Khan, Senior Advocate, assisted by Sri Anoop Srivastav, for the petitioner and Sri D.C. Mukerjee, Senior Advocate assisted by Sri Anand Awasthi, for the contesting respondents. This writ petition has been filed against the orders of Consolidation Officer dated 20.5.2005 and Deputy Director of Consolidation dated 30.3.2011, passed in the title proceeding under U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as the Act).

2. Dispute is in respect of the land recorded in basic consolidation year khata 89 of village Patkapur, tehsil Hasanganj, district Unnao, which was recorded in the name of Smt. Saraswati widow of Ram Swarup. Shiv Mangal (the petitioner) filed an objection (registered as Case No. 384/1528/12278 of 2004-05) under section 9-A(2) of the Act for recording his name over the land in dispute, on the basis of registered Will dated 7.4.1980 allegedly executed by Smt. Saraswati in his favour. Shiv Pal, brother of the petitioner filed another objection under section 9-

A(2) of the Act for recording the names of Shiv Pal, Sri Ram and Shiv Mangal sons of Ram Swarup, claiming inheritance under section 171 of U.P. Act No. 1 of 1951. Consolidation Officer, by an ex-parte order dated 20.9.2001, directed for recording the name of the petitioner over the land in dispute. Thereafter order dated 20.9.2001 was recalled on 25.5.2004 and the case was tried by Consolidation Officer. The petitioner filed will dated 7.4.1980 and examined himself and Chheda Lal, attesting witness of the Will. The respondents examined Babadeen, Sri Ram and Shiv Pal. The Consolidation Officer, by his order dated 20.5.2005 held that in the Will other sons were not mentioned nor any reason has been given to disinherit them. One of the attesting witness namely Shiv Pal has stated that the Will is a forged document and there was contradiction in the statement of the other attesting witness as such due execution of the Will was not proved. On these findings the Consolidation Officer by order dated 20.5.2005 directed for recording the names of Sri Ram and Shiv Mangal as the heirs of Smt. Saraswati.

3. The petitioner filed an appeal (registered as Appeal No. 425) from the aforesaid order. The appeal was heard by Settlement Officer Consolidation who by order dated 12.5.2008 held that Sri Ram, in his statement, admitted that the disputed land is in possession of Shiv Mangal and he had 18-20 bigha land. As he was having separate land as such Smt. Saraswati executed Will dated 7.4.1980 in favour of Shiv Mangal. Execution of the will was proved by the attesting witness Chheda Lal, who has also proved the signature of Shiv Pal on the will. The Consolidation Officer has illegally rejected the Will. On these findings the appeal was allowed and order of Consolidation Officer dated 20.5.2005 was set aside and the name of Shiv Mangal was directed to be recorded over the land in dispute.

4. Sri Ram (respondent-4) filed a revision (registered as Revision No. 505) from the aforesaid order. Deputy Director of Consolidation, by order dated 30.3.2011 held that Shiv Pal, one of the attesting witness of the Will had denied execution of the Will. No reason has been assigned for executing Will in favour of one son only although the deceased was having three sons. The Will is surrounded with suspicious circumstances and the propounder could not remove the suspicious circumstances. On these findings the revision was allowed and order of Settlement Officer Consolidation was set aside and order of Consolidation Officer was affirmed. Hence this writ petition has been filed.

5. The Counsel for the petitioner submitted that Sri Ram (respondent-4) in his statement admitted that Smt. Saraswati was living along with Shiv Mangal (the petitioner) and her others sons were living separately and also admitted that after death of Smt. Saraswati, land in dispute was in possession of the petitioner. He also admitted that he had 18-20 bighas land separately. Father of the petitioner was three brothers namely Lakshmi Narain, Ram Swamp and Ganga. Shiv Pal, elder brother of the petitioner was issueless. Shiv Mangal was given land of the share of Lakshmi Narain and Ganga and was living separately. The

petitioner alone was taking care of his mother, who was living with him. Therefore, she executed the Will dated 7.4.1980 in favour of the petitioner. Shiv Pal, elder brother of the petitioner, was an attesting witness of the Will. Due execution of the Will dated 7.4.1980 was proved by Chheda Lal, other attesting witness of the Will. Only for the reason that it was not disclosed in the will that Smt. Saraswati had three sons or reason for disinheriting the other sons, Will not make the will as suspicious. In any case, the petitioner has fully explained the circumstances for deprivation of other sons in the will and the Will could not be ignored. He relied upon the judgments of Supreme Court in Rabindra Nath Mukherjee and another Vs. Panchanan Banerjee (dead) by L.Rs. and others, P.P.K. Gopalan Nambiar Vs. P.P.K. Balakrishnan Nambiar and others, Ramabai Padmakar Patil (D) through LRs. and Others Vs. Rukminibai Vishnu Vekhande and Others, and Uma Devi Nambiar and Others Vs. T.C. Sidhan (Dead), in which it has been held that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in some cases partly.

6. In reply to the aforesaid arguments, the Counsel for the respondent submitted that the old and aged mother was residing with the petitioner and he was in position to exercise undue influence on the mother. Section 16(3) of the Contract Act, 1872 proves that where a person who is in a position to dominate the Will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the Will of the other. From the statement of Chheda Lal, it is proved that the petitioner had taken active role in execution of the Will dated 7.4.1980. On his dictation, the will was executed by the scribe. Chheda Lal in his statement had stated that Shiv Pal was a man of integrity. Shiv Pal, who was issueless and his statement was recorded in the age of 70 years. There was no reason for him to deny his signature on the Will dated 7.4.1980 as he was knowing well that he would be inherited by his brothers. The petitioner could not adduce any evidence showing that the respondent was having any land. Due execution of the will is required to be proved according to the provisions of section 68 of the Evidence Act, 1872. Chheda Lal, in his statement has not deposed that he had animo attestandi although under section 68 he was required to prove execution and attestation of the Will. He relied upon the judgments of Supreme Court in Ispahani Ltd., Calcutta Vs. Ispahani Employees' Union, Niranjan Umeshchandra Joshi Vs. Mrudula Jyoti Rao and Others, K. Laxmanan Vs. Thekkayil Padmini and Others, Lalitaben Jayantilal Popat Vs. Pragnaben Jamnadas Kataria and Others, and S.R. Srinivasa and Others Vs. S. Padmavathamma, in which it has been held that in every case the Court must be satisfied that the names were written animo attestandi". Evidence is admissible to show whether the witness had the intention to attest. "The attesting witnesses

must subscribe with the intention that the subscription made should be complete attestation of the Will, and evidence is admissible to show whether such was the intention or not, the Court held that the two persons who had identified the testator at the time of the registration of the Will and had appended their signatures at the foot of the endorsement by the sub-Registrar, were not attesting witnesses as their signatures were not put "animo attestandi". He also relied upon the judgment of this Court in Jai Kumar Singh Vs. Kallu Singh and others, in which it has been held that where propounder had taken active role in execution of the Will, then it is a suspicious circumstance.

7. I have considered the arguments of the counsels for the parties and examined the record. Mode of execution of the Will has been prescribed under section 63 of Indian Succession Act, 1925, which is quoted below:--

63. Execution of unprivileged Wills.--Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:--

(a) The testator shall sign or shall affix his marks to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

8. The word "attestation" has been defined under section 3 of Transfer of Property Act, 1882 as follows:--

"attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary;

9. Section 63 of the Succession Act, 1925 requires that testator shall sign or

shall affix his marks to the Will, or it shall be signed by some other person in his presence and by his direction. Section 68 of Evidence Act, 1872, requires for proving execution of the Will which means the attesting witness has to prove that Will was executed according to the modes prescribed for its execution. Sections 68 and 71 of the Evidence Act, 1872, which are relevant are as follows:--

68. Proof of execution of document required by law to be attested.--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 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

71. Proof when attesting witness denies the execution.--If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

10. Supreme Court in Janki Narayan Bhoir Vs. Narayan Namdeo Kadam, and M.B. Ramesh (D) by L.Rs. Vs. K.M. Veeraje Urs (D) by L.Rs. and Others, held that section 71 is permissive and an enabling section permitting a party to lead other evidence in certain circumstances. But section 68 is not merely an enabling section. It lays down the necessary requirements, which the Court has to observe before holding that a document is proved. Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility, cannot be let down without any other means of proving due execution by "other evidence" as well. At the same time section 71 cannot be read so as to absolve a party of his obligation under section 68 read with section 63 of the Act and liberally allow him, at his will or choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the Court concerned and confer a premium upon his omission or lapse, to enable him to give a go-by to the mandate of law relating to the proof of execution of a Will.

11. A three Hon'ble Judges Bench of Supreme Court in Yumnam Ongbi Tampha and Ibemma Devi Vs. Yumnam Joykumar Singh and Others, after reviewing earlier judgments held that as per provisions of section 63 of the Succession Act, for the due execution of a Will:

- (1) the testator should sign or affix his mark to the Will;
- (2) the signature or the mark of the testator should be so placed that it should appear that it was intended thereby to give effect to the writing as a Will;
- (3) the Will should be attested by two or more witnesses, and

(4) each of the said witnesses must have seen the testator signing or affixing his mark to the Will and each of them should sign the Will in the presence of the testator.

The attestation of the Will in the manner stated above is not an empty formality. It means signing a document for the purpose of testifying of the signatures of the executant. The attested (sic attesting) witness should put his signature on the Will *animo attestandi*. It is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary. Since a Will is required by law to be attested, its execution has to be proved in the manner laid down in the section and the Evidence Act which requires that at least one attesting witness has to be examined for the purpose of proving the execution of such a document.

Therefore, having regard to the provisions of section 68 of the Evidence Act and section 63 of the Succession Act, a Will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the Will. The attesting witness should speak not only about the testator's signature or affixing his mark to the Will but also that each of the witnesses had signed the Will in the presence of the testator.

12. Supreme Court in *Bhagat Ram and Another Vs. Suresh and Others*, held that according to section 68 of the Evidence Act, 1872, a document required by law to be attested, which a Will is, shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if available to depose and amenable to the process of the Court. The proviso inserted in section 68 by Act 31 of 1926 dispenses with the mandatory requirement of calling an attesting witness in proof of the execution of any document to which section 68 applies if it 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. However, a Will is excepted from the operation of the proviso. A Will has to be proved as required by the main part of section 68. It is true that section 63 of the Succession Act does not specifically speak of codicils and that omission has prompted the learned Counsel for the appellants to urge that the applicability of section 63 abovesaid should be treated as confined to the execution of Wills only.

13. According to the definition, attestation in relation to an instrument, means attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant. In this case, Chheda Lal, attesting witness, was examined to prove execution and attestation of the Will. He had not stated that Smt. Saraswati had put her thumb impressions on the will before him. He stated that when he had signed the Will at that time Shiv Pal, Rajju, Shiv Mangal and Smt. Saraswati were present. He had witnessed the Will on the asking of Shiv Mangal. Shiv Mangal asked the scribe to

write the will of the land in his name. Before the Sub-Registrar, thumb impressions of himself and Shiv Pal were taken. Thus at no where he had stated that Smt. Saraswati had put her thumb marks on the will in his presence and he had attested her thumb impression on her asking. Thus execution of the will was not proved. Settlement Officer Consolidation merely on the basis of statement of Chheda Lal held that execution of the Will was proved without analyzing the fact that he had nowhere stated that Smt. Saraswati had put her thumb marks on the Will in his presence and he had attested her thumb marks on her asking.

14. It is also proved from his statement that Shiv Mangal took active part in execution of the Will dated 7.4.1980. Supreme Court in *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, *S.R. Srinivasa and Others Vs. S. Padmavathamma*, and *M.B. Ramesh (D) by L.Rs. Vs. K.M. Veeraje Urs (D) by L.Rs. and Others*, held that in case, the propounder has taken active part in execution of the Will, then it create a suspicious circumstance. In this case, the petitioner took active part in execution of the will, which is a suspicious circumstance. The Counsel for the petitioner stated that as Smt. Saraswati was an old and rustic woman and the petitioner was her son and was taking her care as such it was a natural conduct for the petitioner to take active part in execution of the Will. The argument in this respect is not liable to be accepted as it is alleged that Shiv Pal, who was elder son of Smt. Saraswati, was also present. In any case, it was necessary to prove that Will was voluntarily executed by Smt. Saraswati. The attesting witness has not stated that Smt. Saraswati had voluntarily executed the Will.

15. Supreme Court in *Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee* since deceased and after him his legal representatives and Others, *Pushpavathi and Others Vs. Chandraraja Kadamba and Others*, and *K. Laxmanan Vs. Thekkayil Padmini and Others*, held that when there are suspicious circumstances regarding the execution of the Will, the onus is also on the propounder to explain them to the satisfaction of the Court and only when such responsibility is discharged, the Court would accept the Will as genuine. Even where there are no such pleas, but circumstances give rise to doubt, it is on the propounder to satisfy the conscience of the Court. Suspicious circumstances arise due to several reasons such as with regard to genuineness of the signature of the testator, the conditions of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the will to show that the testator's mind was not free. In such a case, the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator. In view of the aforesaid discussion, there is no illegality in order of Deputy Director of Consolidation. The writ petition has no merit, it is dismissed.