

(1983) 09 AHC CK 0047

In the Allahabad High Court

Case No : Second Appeal No's. 950, 1604 and 1605 of 1978

Shri Ram and Another

APPELLANT

Vs

Smt. Kasturi Devi and Another

RESPONDENT

Date of Decision : 20-09-1983

Acts Referred:

Evidence Act, 1872 — Section 100, 104
 Succession Act, 1925 — Section 63
 Transfer of Property Act, 1882 — Section 105

Citation : AIR 1984 All 66

Hon'ble Judges : B.D. Agarwal, J

Bench : Single Bench

Advocate : K.C. Saxena, R.S. Misra, D.P. Singh and S.P. Srivastava, for the Appellant; Santosh Kumar and A.K. Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

B.D. Agarwal, J.—These three connected second appeals are directed against the judgment and decree of the VI Additional District Judge. Meerut, dated February 28, 1978.

2. The following pedigree will serve to elucidate the relevant facts of the case.

Jwala Prasad	_____		_____			Mool Chand
Nanuwa Singh	=	Kastoori Devi		_____		
_____		_____				Smt. Prakashwati
Dhapo Malloo	=	Sri Ram	=	Kanchchi	_____	
_____		_____				Smt.

Kamla Devi Chatrapal Chetan Pal Satya Pal

The dispute relates to house No. 46 situate in Mohalla Chatta, Delhi Gate. Ghaziabad. Mool Chand was admittedly the exclusive owner of this house. He died on 2nd September, 1968. Smt. Kastoori Devi, the widow of Mool Chand, contends that prior to his death, Mool Chand executed a will in her favour on

August 30, 1968, in respect of this house. She instituted Original Suit No. 319 of 1971 on March 17, 1971 for eviction of Sri Ram and his son Satya Pal alleging that they were her tenants on rent at the rate of Rs. 20/- per month besides Rs. 4/- per month for electricity charges and that she is the exclusive owner landlady. The rent was in arrears since October 1, 1968. The tenancy was determined by a combined notice u/s 3 of the U. P. Act III of 1947 read with Section 106 of the Transfer of Property Act dated 7-11-1970. The relief sought was for eviction from the house and recovery of arrears of rent besides damages for use and occupation at the rate of Rs. 24/- per month. Nanuwa Singh was arrayed as pro forma defendant No. 3 to the suit since he had made purchase of half share in the house from Smt. Kastoori Devi by a registered deed dated 26th October. 1963.

3. Original Suit No. 1017 of 1971 was instituted on August 20, 1971 by Salva Pal against Smt. Kastoori Devi contending that he is the adopted son of Mool Chand deceased. He had been living, it was said, in a portion of House No. 46 aforesaid in capacity as the adopted son, but Smt. Kastoori Devi threatened and intended to evict him and hence the relief sought for perpetual injunction. This Suit has given rise to Second Appeal No. 1005 of 1978.

4. Original Suit No. 154 of 1971 was brought by Smt. Kamla Devi, daughter of Sri Ram on August 31 1971 claiming partition of the house abovementioned. She asserts that she has 19th share in the house and that her brother Satya Pal had been adopted by Mool Chand deceased. Second Appeal No. 1604 of 1978 has arisen from this suit.

5. In defence to the suits instituted by Satya Pal and Smt. Kamla Devi, it was pleaded by Smt. Kastoori Devi that Mool Chand executed will in her favour dated August. 30, 1968 whereby she is the absolute and exclusive owner of the said house. It was refuted that Satya Pal had been adopted by Mool CHAND. It was denied that the children of Sri Ram have no share in the house. In the suit which Smt. Kastoori Devi filed, the defence raised by Satya Pal and Sri Ram has been that there was no will made by Mool Chand and that Satya Pal had been adopted by the deceased. It was refuted by them that Smt. Kastoori Devi is the exclusive owner on the death of her husband.

6. The three suits were tried together and dismissed by the Additional Civil Judge. Ghaziabad. on March 31, 1971. It was held that Mool Chand executed the will dated August 30, 1968 in favour of his wife. Satya Pal is not the adopted son of Mool Chand. Smt. Kastoori Devi is the exclusive owner of the house by virtue of the said will; there was no relationship of landlord and tenant between her on one hand and Satya Pal or Sri Ram on the other and Smt. Kamla Devi or other children of Sri Ram did not have any interest in the house. In appeal against this decision, the Additional District Judge confirmed the finding that the will relied upon by Smt. Kastoori Devi was duly executed in her favour and also that Satya Pal had not been adopted by Mool Chand. The appellate court, however, found that there was relationship of landlord and tenant between Smt. Kastoori Devi

and Sri Ram and that Satya Pal lived in a portion of the said house being the natural son of Sri Ram. On this basis Original Suit No. 319 of 1971 instituted by Smt. Kastoori Devi for eviction and recovery of arrears etc. was decreed while the appeals arising from the two other suits were dismissed. The decision by the appellate court was given on February 28. 1978.

7. Aggrieved, Sri Ram and Satya Pal have preferred Second Appeal No. 950 of 1978 from Original Suit No. 319 of 1981. Second Appeal No. 1604 of 1978 has been filed by Smt. Kamla Devi and Second Appeal No. 1605 of 1978 is by Satya Pal. With the consent of the parties counsel they were heard together.

8. The central question raised for the appellants by the learned counsel is whether the will dated 30th August, 1968 is genuine and was duly executed and attested in the lifetime of Mool Chand. The law is settled in regard to the principles to be borne in mind in deciding such a question. The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstance surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Ordinarily, thus, when the evidence in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of mind of the testator and his signature as required by law, the Courts would be justified in making a finding in favour of the propounder. When, however, there are suspicious circumstances such as suggest that the alleged will is unnatural, improbable or unfair the onus is on the propounder to explain them to the satisfaction of the Court. Where it appears that the propounder has taken a prominent part in the execution of the will which confers substantial benefits on him that itself is generally treated as a suspicious circumstance and the propounder is required to remove the suspicion by clear and satisfactory evidence. The ultimate test is the balance of probabilities as in other cases and it is very well recognised that "as in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters." *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, *Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee* since deceased and after him his legal representatives and Others, *Ramchandra Rambux Vs. Champabai and Others*, .

9. The respondent, Smt. Kastoori Devi placed reliance on the testimony of herself, Kanchhi Mal and Nanuwa Singh in proof of the execution of the will. Kanchhi Mal is the attesting witness to the Will. I will pass on to detailed comments relating to their testimony a little later but before so doing, reference may appropriately be made to certain material circumstance? surrounding the execution of the will in Question :

(i) Smt. Kastoori Devi in whose favour the will in dispute was executed was the widowed wife of Mool Chand living under the same roof:

(ii) All the three daughters of Mool Chand had pre-deceased: Mool Chand had no natural son.

(iii) Sri Ram the father of Satya Pal is a witness to the will aforesaid;

(iv) Mool Chand had one other house in Raghupura. District Bulandshahr, besides share in another house at Raghu-nathpur in district Bulandshahr. The entire house in Raghupura was requested by him on the same day that is. August 30, 1968, in favour of the children of Sri Ram including Satya Pal. The will in favour of Smt. Kastoori Devi--the wife is confined to the house of the testator in Ghaziabad,

10. In relation to the will dated August 30, 1968, executed by Mool Chand in favour of the children of Sri Ram, there is the testimony of Kanchhi Mal. Smt. Kastoori Devi herself and Nanuwa Singh. They have given at length the details thereof: and Kanchhi Mal was also an attesting witness to that other will to which he has referred. It has also been urged for the respondent that the will in question was not produced for obvious reasons by Sri Ram or his children. Satya Pal admitted in cross-examination that he had executed a mortgage in respect of 1/3rd of that house in Raghupura proportionately to his share, he states, in favour of one Kanchhi Lal to raise money for the marriage ceremony of Smt. Kamla Devi his sister and further that the remaining 2/3rd belongs to his brothers. The trial court has referred to the evidence in this connection including the testimony of Satya Pal and held that the execution of that other will in favour of the children of Sri Ram is established. The lower appellate court has not dealt with that aspect of the matter. The learned counsel for the appellants could not point to anything on the basis of which this finding of the trial court be discarded. The execution of that other will shows that Mool Chand has not been unfair to the children of Sri Ram. It is admitted in the course of evidence that Kanchhi Mal had no issue male or female from his wife, namely, the daughter of Mool Chand who is dead, in the circumstances Mool Chand thought fit to make the will of the house in village Raghupura in favour of the children of one of his deceased daughters no will was made in favour of Mool Chand (sic) since, obviously, he has had no children or the wife living and the other will was executed in favour of Smt. Kastoori Devi. It is not, therefore, that the daughter's children have been altogether excluded. There is no evidence on record in relation to the size or situation of the two houses or the market value thereof to enable it being said that on comparison, it is highly disproportionate. as was sought to be urged for the learned counsel for the appellants. Of no less importance in my view, is the fact that Sri Ram, the son-in-law of the testator, is a signatory appearing as an attesting witness to the will in dispute. Sri Ram does not refute his signature on this instrument. By way of explanation, it was given out by him that on the 13th day subsequent to the death of Mool Chand a blank paper was put before him by Kanchhi Mal, the other son-in-law of Mool Chand. deceased, saying that he had

obtained thumb-impression of Mool Chand subsequent to his death and that Sri Ram may also sign in order that the interest of Smt. Kastoori Devi is not prejudiced. Kanchhi Mal refuted that there was anything of this sort and it is maintained by witnesses from the side of the respondents that Sri Ram duly attested the will in question. The theory put forward by Sri Ram has been discarded by the courts below and rightly, in my view, since, it would appear clearly to be a Cock-and-Bull story. It is difficult to accept that Kanchhi Mal would have taken Sri Ram into confidence, in case there was some design behind obtaining the thumb-impression of Mool Chand subsequent to his death: and it was also highly unlikely that Sri Ram will have submitted to this and put his signature without taking care to safeguard the interest of his own children. On the contrary, it was natural to have associated Sri Ram in the execution of the said will and the fact that he is a signatory to it as well is a pointer strongly in the direction of the will being a genuine transaction. Satya Pal has claimed to be an adopted son of Mool Chand. As will presently appear, it is not necessary for purpose of this case to adjudicate whether he was adopted, which is disputed from the side of the respondent. But assuming that adoption did take place, the will in question does not become unnatural since provision was made by Mool Chand for the children of Sri Ram also by another will made on the same day in respect of another immovable property. In my opinion, there is nothing relating to the will in question that may be classed as unnatural, improbable or unfair in the circumstances.

11. Sri S.P. Srivastava, learned counsel for the appellant, urged that there are the following circumstances which raise suspicion against the due execution of the will in dispute :

(a) The death of Mool Chand took place on September 2, 1968: the will was executed shortly before this on August 30, 1968:

(b) Mool Chand was literate and used to sign but on the will there are his thumb-impression and not the signature.

(c) In the will there are five attesting witnesses including Kanchhi Mal but others were not examined nor was the scribe of the will produced.

(d) Smt. Kastoori Devi, respondent, is the propounder of the will and she took an active part in the execution thereof:

12. A little scrutiny serves to indicate fairly that the contention of the learned counsel is devoid of substance. Mool Chand, as the evidence shows, suffered from tuberculosis and piles. He was weak physically and required aid while on the cot. All the same, he was alert mentally and in sound mental condition to understand the nature and the effect, of the transaction in question. All this is borne out strongly from the evidence placed on record considered by the courts below. It is true that Mool Chand was literate and he used to sign in the ordinary course, but both Kanchhi Mal and Smt. Kastoori Devi had specified that he had developed tremors in his hands on account of which there was difficulty in

holding even a cup or a glass and this explains why it did not become practicable to obtain his signature. Smt. Kastoori Devi was aged about 65 when her husband died. She is an illiterate and pardanashin village woman who resided in the same house along with her husband. Her presence on the spot that is where the instrument came to be executed is, by no means, unnatural: nor may this in itself give rise to suspicion. It would be unrealistic to maintain that she should have been asked to walk out of the house, merely because her husband intended to make provision in her favour by executing the will in respect of part of his immovable property. In so far as the non-production of the other attesting witnesses or the scribe is concerned, that fades into insignificance when considered in the light of fact, as would presently appear, that the attestation to the will is clearly made out and also that testator was in sound disposing mind at the relevant time.

13. P.W. Kanchhi Mal the attesting witness, is one of the sons-in-law of Mool Chand. deceased. His wife is dead. He has had no issues alive from her. There is no axe to grind so far as this witness is concerned. He is a common relation and has had no reason to be biased against Sri Ram or his children, There is nothing to be gained by him personally by deposing in favour of the due execution of the will. Mool Chand was in Ghaziabad, being ill during the relevant time. Kanchhi Mal had been to the place of his father-in-law to see him. He deposes that Mool Chand expressed a desire to him to execute a will. This was done in the evening of August 29, 1968. Mool Chand asked him also to get in a scribe for the purpose of the will being made out. On the 30th morning which means a gap of nearly 12 hours, in any case, Kanchhi Mal brought the scribe, namely, Om Prakash to the residence of his father-in-law. Mool Chand gave instructions to the scribe, whereupon a draft was prepared. The scribe read over the draft to the testator. On this being approved by Mool Chand, the scribe took the instrument for the purpose of being typed out. Om Prakash, the scribe returned with the document duly typed after half-an-hour and it was then again read over to all those present. Mool Chand affirmed the same and put his thumb-impressions at two places on this instrument in the immediate presence of Kanchhi Mal and the four other attesting witnesses, including Sri Ram. Kanchhi Mal has stated this in express terms and also that he himself and those four other witnesses signed in the immediate presence of Mool Chand. There is nothing in the cross-examination made of this witness to raise doubt in regard to the authenticity of his deposition on the point either. It was argued by the learned counsel for the appellant that there is contradiction between his statement and the testimony of Smt. Kastoori Devi. I have scrutinised their statements with care but did not find any contradiction existing that may be said to be worth notice. It is pointed that Smt Kastoori Devi said that Kanchhi Mal had also gone with Om Parkash when the latter, the scribe, took the document for the purpose of getting it typed. It cannot be overlooked that she maintains in the same breath that they were back a little afterwards and, therefore. there is no doubt that thumb-impressions of Mool Chand were obtained in the immediate presence of Kanchhi Mal and other

attesting witnesses who in their turn signed in the immediate presence of Mool Chand. The evidence placed on record, thus, fulfills the requirements of Section 63(c) of the Indian Secession Act read with Section 68 of the Evidence Act as also explained by the Supreme Court in *Girja Datt Singh Vs. Gangotri Datt Singh*, ; and Division Bench in *Roda Framroze Mody Vs. Kanta Varjivandas Saraiya*, , Kanchhi Mal was, obviously, in position to see closely Mool Chand appending his thumb-impression to his instrument and it is to this that he testifies. In *Sadachi Ammal Vs. Rajathi Ammal and Others*, . cited for the appellants, the will was shown to have been made under suspicious circumstances and in this context it was observed that the failure to examine five out of six witnesses and the writer of the will made suspicion surrounding the will much stronger than it otherwise would be. In that case two wills had come to be executed within a short interval: there was no dispute that the first will was made when the testator was in sound disposing mind there was a material change in favour of the bequeath made in the first will; the testator suffered from serious illness and died within 40 hours of the execution of the alleged second will. Two of the alleged attesting witnesses had been examined from the other side and it was in the totality of these suspicious surrounding circumstances that the High Court attached weight to the non-examination of the other attesting witnesses and the scribe of the instrument. Those considerations cannot be imported into the transaction under consideration before us. As I have mentioned above, the testimony of Kanchhi Mal gives no room for reasonable doubt that he has proved the due attestation of execution of the instrument. In 1957 ALT 667 (*Januava Dasi v. Hari Dasi*), learned single Judge of our High Court referred to the decision in *Sadachi Ammal Vs. Rajathi Ammal and Others*, and observed that if there were many other suspicious circumstances then it may have been one of the facts which could have been taken into consideration, namely, that the scribe and other attesting witnesses had not been produced. Smt. Kastoori Devi has stood the test of cross-examination in testifying clearly and unequivocally that her husband had mentioned that he would like to make a will in her Favour and another in favour of the children of Sri Ram and it is upon his instructions that the wills were executed the same day and the scribe brought by Kanchhi Mal. Nanuwa Singh. the brother of Mool Chand, deceased, has also been examined. Ho was not in station during the day time on the 30th, when the execution took place, but he points that on his return in the evening that day. Mool Chand mentioned to him that he had made the will and he also got the same read out All this speaks not merely to the fact that there was no undue influence of any kind brought to bear upon Mool Chand, but also that he was in sound disposing mind. The statement of the witnesses concerned have to be taken as a whole. We have not be governed by stray sentences here or there. The entire setting in which the instrument came to be executed, namely, that Mool Chand ex-pressed the wish to Kanchhi Mal and asked him to fetch the scribe, the fact that the scribe was brought the next morning and instructions were given to him by Mool Chand and further that the document was read over to him before the same was typed and the thumb-impressions/signatures made,

go a long way to show that Mool Chand understood the nature and character of what he was about and the effect thereof. In *Bur Singh v. Uttam Singh* ILR (1911) Cal 355 (PC) cited for the appellants, it was held that where there are suggestions of undue influence, the court has to scrutinise with special care the evidence of those who propound the will: but in order to set that aside, there must be clear evidence that undue influence was in fact exercised or that illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property. The presumption ordinarily is that the executant knows and approves all the contents of the will. But where the mental capacity is challenged and it is shown that it is very doubtful whether the state of mind was such that he could have duly executed the will as he is alleged to have done the court ought to find whether upon the evidence the testator was of sound disposing mind and whether he knew and approved all the contents of the will vide *Woomesh Chunder Biswas v. Rasmohini Darsi* ILR (1894) Cal 279 the court has to judge the cumulative effect of the direct evidence placed on record along side with the surrounding circumstances such as may be relevant to ascertain whether the will in dispute is proved to be a genuine transaction; and upon the application of this test, in the light of the circumstances and the evidence referred to above, the courts below cannot, in my opinion, be said to have erred in arriving at the finding that the execution of the will, including attestation, is established.

14. Learned counsel for the appellants submitted then that Satya pal is the adopted son of Mool Chand, deceased, and the finding arrived at to the contrary by the courts below on this point may not be sustained. The respondent, Smt. Kastoori Devi, disputed the alleged factum of adoption. In my opinion, it is not necessary to decide the question of adoption of Satya Pal in the present case. It is true that in the suit brought by her. Smt. Kamla Devi has claimed 1/9th share in the disputed house both Satya Pal and Smt. Kastoori Devi are arrayed as defendants in that suit. There is dispute between them on the point whether Satya pal was adopted by Mool Chand. deceased. But this dispute is not required to be adjudicated in the present case, for the obvious reason, that the suit brought by Smt. Kamla Devi fails on ground that the house has been requested by Mool Chand to his wife and the plaintiff Smt Kamla Devi, consequently has no share at all in the same. I would therefore, leave the issue relating to alleged adoption of Satya Pal undecided.

15. Lastly, it was argued for the appellants that there is no relationship of landlord and tenant as between Smt. Kastoori Devi on the one hand and Sri Ram or Satya Pal. on the other. The trial court was of the view that no such relationship has been made out. This finding was, however, reversed by the lower appellate court and not without cogent basis. Sri Ram admits that one Desh Rai was the tenant in this part of the house who vacated. Sri Ram thereafter came in the said portion of the house. In cross-examination, he admitted also that it was agreed between him and Smt Kastoori Devi what would be treated as the rent for the said portion. Further the case of the appellants is

that on January 20. 1970, Sri Ram got this portion allotted in his name. All these are pointers in the direction that there was relationship of landlord and tenant and not that Sri Ram has been residing in that portion of the house as licensee of Smt. Kastoori Devi. This apart the suit for eviction brought by Smt. Kastoori Devi against them does not fail even if it is assumed that there was no relationship of landlord or of tenant or that Sri Ram was in the position of a mere licensee. The licence has been determined by registered notice given by Smt. Kastoori Devi already. In the plaint. Smt. Kastoori Devi referred expressly to her title to the house by virtue of the will executed in her favour by the husband. The law is settled that even if Sri Ram was the licensee, Smt. Kastoori Devi can, on the basis of title claim eviction even though she has set up the case that there was the relationship of the landlord and tenant and assumed that the same is not established, vide *Bhagwati Prasad Vs. Shri Chandramaul*, . *Abdul Ghani v. Mst. Babni* ILR (1903) All 256 (FB) *Bal Mukund v. Dalu* ILR (1903) All 498 (FB).

16. Consideration being had to the above, the appeals, in my opinion, are devoid of merit and are dismissed accordingly. Costs in these appeals shall be on parties.