
(1988) 12 AHC CK 0045
In the Allahabad High Court
Case No : Second Appeal No. 1075 of 1981

Smt. Chandania	Vs	APPELLANT
Gyan Chand and Others		RESPONDENT

Date of Decision : 22-12-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 101
Specific Relief Act, 1963 — Section 34
Succession Act, 1925 — Section 74, 75

Citation : AIR 1989 All 75 : (1989) AWC 214

Hon'ble Judges : Amarendra Nath Varma, J

Bench : Single Bench

Advocate : Rajeshji Verma, M.G. Agarwal, G.C. Bhattacharya and Kamini Mohan, for the Appellant; V. Sahai and B. Dayal, for the Respondent

Final Decision : Dismissed

Judgement

Amarendra Nath Varma, J.—This is a defendant's second appeal arising out of a suit for declaration that the plaintiff is the owner of house No. 1206 Mohalla Devipura, Bulandshahr and entitled to realize rent in respect thereof from the defendants Nos. 2 to 6 who are residing in the house in suit as tenants thereof. The suit was dismissed by the trial court. On appeal, the decree of the trial court was reversed and the suit was decreed. Hence this second appeal.

2. The plaint case was that the plaintiff's husband Munshi Nathan Singh was the owner of the house in suit and other movable and immovable properties. He executed a will bequeathing all his immovable properties including the house in suit in favour of the plaintiff who was his nephew and his movable assets in favour of his wife Smt. Chandania, the defendant No. 1. On the death of Nathan Singh, the plaintiff became the owner of the house entitled to realize rent from the tenants, viz., defendants Nos. 2 to 6. Nathan Singh also left revenue paying landed property which too had devolved on the plaintiff under the aforesaid will for which he reserved his right to institute appropriate proceedings in the

competent court. Smt. Chandania, the widow, even though having no right, title or interest in the house, started realizing rent from the defendants Nos. 2 to 6. Hence the suit.

3. The suit was contested by defendant No. 1, the appellant herein. Her defence was that the will set up by the plaintiff was forged and fictitious and the same had been fabricated by the plaintiff in collusion with the typist and marginal witnesses in order to grab the property of Nathan Singh. Nathan Singh had no occasion to execute any will in favour of the plaintiff as the former had great love and affection for the defendant No. 1 and besides the plaintiff was not related to Nathan Singh. The plea of bar of Section 34 of the Specific Relief Act was also raised in the written statement.

4. It is not necessary to set out the defence of defendants Nos. 3 to 6. Suffice it, however, to say that they supported the claim of defendant No. 1, though they also asserted that they have been unnecessarily impleaded in the suit.

5. The Trial Court dismissed the suit holding that the will set up by the plaintiff had not been proved to have been executed by Nathan Singh. Indeed the finding was that the will was a piece of forgery having been concocted by the plaintiff. It also held that the suit was barred by Section 34 of the Specific Relief Act inasmuch as the plaintiff had not claimed the relief of possession.

6. The lower appellate court on appeal by the plaintiff reversed the findings recorded by the trial court. It held that the plaintiff had successfully proved the due execution of the will by Nathan Singh. The plea that the suit was barred by Section 34 of the Specific Relief Act was also rejected. As a result, the appeal was allowed and the suit of the plaintiff-respondent was decreed, declaring the plaintiff to be entitled to realize the rent from the defendants Nos. 2 to 6 as the owner of the house.

7. For the defendant-appellant, the first point urged in support of the appeal by Sri G.C. Bhattacharya was that the lower appellate court has erred in law in holding that the suit was not barred by Section 34 of the Specific Relief Act. The contention was that the plaintiff-respondent was admittedly out of possession. A mere relief for declaration that the plaintiff was the owner of the house in suit without asking for the relief for actual possession hence brought in the bar of Section 34 of the aforesaid Act.

8. I find no merit in the contention. The lower appellate court has rightly observed that the plaintiff could not have claimed actual possession in view of the undisputed fact that the house was in possession of the tenants arrayed as defendants Nos. 2 to 6. The view taken by the lower appellate court is in accord with the view expressed by the Lahore High Court in the case of *Gian Chand v. Bhagwan Singh* reported in AIR 1932 Lah 97. In this case the Lahore High Court held that where the property in dispute is in possession of tenants and the plaintiff who is claiming to be the lawful owner, is obstructed from realizing the rent from the tenant by another, a suit for mere declaration without asking for

possession against the person denying the plaintiff's right to realize the rent would not be barred by Section 42 of the Specific Relief Act (corresponding to Section 34 of the present Specific Relief Act). With respect, I entirely agree with this opinion. The proviso to Section 34 would not be attracted to the present case because on the cause of action on which the present suit was brought, namely, that the defendant appellant was wrongfully preventing the plaintiff from realizing the rent from the tenants, a relief merely for a declaration that the plaintiff was entitled to realize the rent from the tenants, would be sufficient because on that cause of action the plaintiff could not be said to have been able to seek any further relief which he has omitted to do. The present was not a suit between landlord and tenant. There was hence no occasion to ask for the relief of possession. The grant of a decree in the terms prayed for by the plaintiff in the suit would have given him all the necessary reliefs as on the basis of such a decree he would be free to realize the rent from the tenants thereby removing the obstacle created by the defendant-appellant in the exercise of that right by the appellant.

9. The next point urged by Sri Bhattacharya was that the lower appellate court has committed an error of law in not applying the standard of proof which was necessary for proving the due execution of a will which is surrounded by suspicious circumstances. He invited my attention to paragraph 20 of the judgment in the case of H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, , in which their Lordships stressed that the person propounding a will and seeking to establish the due execution thereof must remove all legitimate doubts which surrounded the will. Calling in aid this dictum, learned counsel submitted, the will in the present case being surrounded by a number of suspicious circumstances and the doubt created by which not having been removed by the plaintiff-respondent, the suit should have been dismissed. It was urged the lower appellate Court committed a serious error of law in ignoring the principle enunciated by the Supreme Court in the above decision.

10. As an abstract proposition of law, the submission seems unexceptionable supported as it is by the decision of the Supreme Court cited above. The question, however, is whether, firstly, there were such suspicious circumstances surrounding the will and, secondly, if so, whether the same have been successfully removed by cogent evidence led by the plaintiff.

11. The first suspicious circumstance pointed out by the learned counsel for the appellant was that it is un-natural that Nathan Singh would have disinherited his wife Smt. Chandania, the defendant-appellant, as the plaintiff had not even asserted that the relations between the husband and wife were estranged. Not leaving anything for his wife by-way of immovable property hence created legitimate doubt regarding the genuineness of the will set up by the plaintiff.

12. I am unable to agree. In the first place, the testator has not totally disinherited his wife. He has under the will left his entire movable assets to his wife, the appellant in this appeal. Further even while bequeathing his immovable

properties in favour of the plaintiff he has cast upon the plaintiff the duty to look after his wife, and, if she needs any money for her maintenance, to give the same to her. The premises, therefore, that Nathan Singh was disinheriting his wife is wrong. On the contrary, the testator seems to have been anxious to make full provision for the maintenance of his wife. But at the same time he appears to have decided to keep the property within his family. This has been made explicit by the recital in the will to the effect that Prem Singh and Chandrabhan, the two brothers-in-law (wife's brothers) of the testator shall have no concern with the immovable property left by the testator. The plaintiff has led evidence to show that there was apprehension in the mind of the testator that after his death his brothers-in-law would usurp the immovable property of the testator. It is not surprising, therefore, that the testator left the immovable property in favour of the plaintiff so that the same may not go out of his family and pass into the hands of the wife's family. Sri Rajeshwari Prasad appearing for the plaintiff-respondent, rightly pointed out that among the Hindus it is not uncommon that if the owner of the property has no issues he wills his immovable property in favour of some member of his family in whom he has implicit confidence so as to the property from being passed on by his widow to the members of her own family.

13. In addition, the plaintiff has also led evidence which has been believed by the lower appellate court to show that Gyan Chand (the plaintiff) was nursing and looking after the testator and his wife.

14. Under these circumstances, there was nothing unnatural or abnormal in the testator leaving the immovable property to the plaintiff so as to render the execution of the will open to doubt or question.

15. The next circumstance pointed out by Sri Bhattacharya as rendering the due execution of the will suspicious and doubtful was that the plaintiff who was the direct beneficiary under the will played an important role in the execution of the will. He submitted that active participation in the execution of the will by a person who stands to gain thereunder has been recognized as a ground raising legitimate suspicion about the due execution of the will.

16. While active participation or taking undue interest in the execution of the will by a person who is a beneficiary under the will may raise legitimate suspicion, in the present case beyond mere presence of the plaintiff at the time of the execution no further role has been established against the plaintiff. I am firmly of the opinion that mere presence of such a person without more cannot be a ground for suspecting the genuineness of the will.

17. Learned counsel next submitted that even by a bare comparison of the signatures of the testator appearing on the will as well as on admitted documents, it would be apparent to the naked eye that the signatures appearing on the will are not those of Nathan Singh. In order to satisfy myself, I examined the signatures appearing on the original will with the admitted signatures of

Nathan Singh existing on the record and I find myself in complete agreement with the finding of the lower appellate court that the signatures on the will are those of Nathan Singh. It is not necessary to encumber this decision with the reasoning which the lower appellate court has offered in support of its finding that the signature of Nathan Singh appearing on the will are those of Nathan Singh himself. The finding of the lower appellate court is based on a careful consideration of the reports of the handwriting experts examined by the two parties as well as of their testimony besides the other evidence led by the parties and I see no reason to take a different view. The stray sentence appearing in the judgment of the lower appellate court that the trial court went out of its way in playing the role of an expert in recording the finding that the signatures of Nathan Singh appearing on the will was not tallying with the admitted signatures, has to be read in the context in which it appears. As mentioned above, the finding of the lower appellate court on this issue is based on an exhaustive discussion of the entire evidence led by the parties and its opinion not having been demonstrated to be vitiated in law, cannot be reviewed in second appeal.

18. Sri Bhattacharya next assailed the finding of the lower appellate court on the issue whether the plaintiff was able to establish that he was the great grandson of Kanhaiya, the grandfather of Nathan Singh. The issue sought to be raised by the learned counsel is undeniably one purely of fact, and what the learned counsel really wanted this Court to undertake was reappraisal of evidence which is obviously not permissible in a second appeal. However, I find that the lower appellate court has examined this issue exhaustively in paragraphs 17 and 18 of the judgment and has rightly come to the conclusion that the plaintiff had successfully established that he was the son of Khubi Singh and grandson of Khacharu who was the son of Kanhaiya aforesaid and the case of the defendant that the plaintiff was the son of one Kishori remained totally unsubstantiated by any reliable evidence.

19. Reliance was also placed on the decision of the Supreme Court in the case of Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another, but I find that this decision merely reiterates the principles stated" in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, . The findings recorded by the lower appellate court are fully in accord with the principles enunciated in these decisions.

20. In my opinion, the lower appellate court has committed no error either of fact or of law in holding that the plaintiff has successfully proved due execution of the will propounded by him.

21. There is no merit in this second appeal and the same is dismissed. But I make no order as to costs.