

(1966) 10 RAJ CK 0003
In the Rajasthan High Court
Case No : Second Appeal No. 733 of 1961

Smt. Ladhi Bai

APPELLANT

Vs

Thakur Shriji and Others

RESPONDENT

Date of Decision : 19-10-1966

Acts Referred:

Hindu Succession Act, 1956 — Section 14
Succession Act, 1925 — Section 63

Citation : AIR 1968 Raj 41 : (1967) RLW 363

Hon'ble Judges : V.P. Tyagi, J

Bench : Single Bench

Advocate : J.S. Rastogi, for the Appellant; M.M. Kasliwal, for the Respondent

Final Decision : Dismissed

Judgement

V.P. Tyagi, J.—This is plaintiff's second appeal against the judgment and decree dated 31st July, 1961 passed by the District Judge, Jaipur District, Jaipur, setting aside the judgment of the Munsiff, Jaipur District, Jaipur in a suit for possession and mesne profits of the disputed shop.

2. The plaint was filed in this case jointly by three persons Kesarlal, Maganlal and Mst. Ladhi Bai. Kesarlal claimed himself to be the adopted son of Chhaganlal, while Maganlal joined as one, who claimed the succession to the property of Chhaganlal after the death of Mst. Godawari Bai, widow of Chhaganlal and Mst. Ladhi Bai as the daughter of Chhaganlal. The disputed shop was rented out by Mst. Godawari Bai in her life time to Sunderlal, who happened to be the manager of the temple of Beespanthiyan. It is alleged that Sunderlal did not pay any rent to Mst. Godawari Bai till her death, and, therefore, after Goda-wari's death, a notice was served on defendant Sunderlal by Kesarlal to pay the rent to him.

While replying to this notice Sunderlal intimated to Kesarlal that he was no longer the tenant of deceased Godawari Bai as the property was long back bequeathed by Mst. Godawari to the temple of Beespanthiyan. On receipt of this

reply the suit was filed by the three plaintiffs against both Sunderlal and the temple Shriji Beespanthiyan praying that a decree for possession of the shop may be passed in their favour, and defendant No. 1 Sunderlal may be ejected therefrom, and he should be held liable for the payment of arrears of rent amounting to Rs. 260 and for the mesne profits for retaining the possession of the suit property till it is vacated.

The defendants contested the suit. It was pleaded on behalf of the temple Beespanthiyan that the shop was bequeathed by Mst. Godawari by executing a will Ex. A. 1 dated 24-4-1956, and that after the death of Mst. Godawari, who died on 17-8-1956. the temple treated itself the owner of the property and therefore it was prayed that the suit of the plaintiffs be dismissed. After trial the suit was decreed by the learned Munsiff, Jaipur District, Jaipur, on 30th April, 1960 taut on an appeal the learned District Judge of District Jaipur reversed the decree and held that the disputed shop vests in the temple by virtue of the will executed by Mst. Godawari who died on 17-8-56 when the Hindu Succession Act had come into force and she being the absolute owner thereof had the authority to bequeath the same in favour of the temple. It was also held by both the courts below that Kesarla] failed to prove himself to be the adopted son of Chhaganlal and therefore he had no right to file the suit. Kesarlal did not challenge this finding against him and therefore Mst. Ladhlbai, daughter of Chhaganlal alone has filed this appeal.

3. Learned counsel appearing on behalf of the appellant has assailed the judgment of the first appellate court only on three points:

"(1) Will Ex. A. 1 was executed by Mst. Godawari on 24-4-1956 when she was a limited owner and had no right to bequeath the property in favour of the temple, and, therefore, such a defective will could not pass any valid title to the legatee in the property.

(2) The defendants have failed to prove the due attestation of the will Ex. A. 1 as the attesting witnesses have not stated that they attested the document in the presence of Mst. Godawari.

(3) The will in favour of the temple which is not a juristic person is void." REG: Point No. 1:

4. The main contention of learned counsel for the appellant is that the property bequeathed by the testator is vested in the legatee from the date of the execution of the will and as Mst. Godawari was not the absolute owner of the property on the day the will was executed she had no authority to transfer in favour of the legatee cannot be cured even by the provisions of the Hindu Succession Act. In support of this plea reliance has been placed on Tirath Ram v Mst. Khan Devi AIR 1921 Lah 149 , Jagdeo Singh and Others Vs. Mt. Raja Kuer, and A.R. Srinivasachariar Vs. A. Raghavachariar and Others,

5. I carefully persued these three rulings and I am of opinion that the ratio of

these authorities has no bearing on the present case, and, therefore, these judgments are of no avail to the appellant. In Jagdeo Singh and Others Vs. Mt. Raja Kuer, learned Judge has pointed out the difference between a will and a settlement or deed inter vivos and in that connection observations of their Lordships of the Judicial Committee in (1872) 18 Suth WR 359 have been cited which are as follows :--

" "Will" means a continuous act of gift up to moment of the donor's death and, though revocable in his life time, is, until revocation, a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries."

Relying on these observations of their Lordships of the Judicial Committee it is contended that the shop was transferred by Godawari Bai on the day when the will Ex. A. 1 was executed, and that at that time the testator was not empowered to do so as she was then only a limited owner. This contention of learned counsel in my opinion does not find support from the observations quoted above. Their Lordships themselves have observed that the continuous act of gift operates to give the property disposed of by the will to the person designated as beneficiary on the death of the testator, which clearly means that the property bequeathed vests in the legatee on the death of the testator and not before that. Thus it is obvious that the property by means of a will is transferred only after the death of the testator when the will takes effect and not before that.

It is an admitted case of the parties that the testator in the present case died on the 17th August, 1956, when the Hindu Succession Act had already come into force on 17th June, 1956. It is not disputed that that Mst. Godawari when she died had become the absolute owner of the property bequeathed by her and therefore at the time of her death when the property is deemed to have been transferred to the legatee she had full authority to dispose of it.

In this state of law it is difficult for me to hold that the will executed by Mst. Godawari when she was a limited owner cannot operate even after the coming into force of the Hindu Succession Act which made the testator an absolute owner of the property. The defect that was attached to the will when it was executed was in my opinion cured when the Hindu Succession Act came into force and conferred the right of absolute ownership on Godawari in respect of the disputed property which was admittedly possessed by her. In this view of the matter it is difficult to uphold the contention of the learned counsel for the appellant that the aforementioned defect that Mt. Godawari had no right to dispose of such a property by will when it was executed still continued to be attached to the will even after the Hindu Succession Act came into force, and the transfer made by such a will is therefore vitiated.

6. In AIR 1921 Lah 149 and A.R. Srinivasachariar Vs. A. Raghavachariar and Others, it has been held that a legatee under the will of a Hindu widow derives no title in the property bequeathed by her. This finding is based on the principle

that a widow at that time when these judgments were passed used to acquire only life estate in the property left by her husband and as soon as she died no rights were left in such property and therefore she could not convey or transfer by means of a will which came into operation only after the death of the testator any rights in the property which she held for her life time only. But the position is now different. With the coming into force of the Hindu Succession Act the widow has now become absolute owner of the property which she possessed at the time the said Act came into force and therefore after her death she leaves her interest which she could transfer by means of a will to any one whom she liked. In this view of the matter the proposition of law laid down in these authorities is not applicable to the circumstances of the present case.

REG: Point No. 2:

7. It is next contended that the impugned will was not duly attested as the attesting witnesses have not clearly stated that they did put their signatures to the document in the presence of the testator, and, therefore, it being not a valid will, it cannot pass a valid title in the property to the legatee. In support of this contention Mr. Rastogi has placed reliance on a Supreme Court authority in *Girja Datt Singh Vs. Gangotri Datt Singh*, In that case Supreme Court has held,

"It cannot be presumed from the mere signatures of two persons appearing at the foot of the endorsement of registration of a will that they had appended their signatures to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witnesses. Section 68, Evidence Act, requires an attesting witness to be called as a witness to prove the due execution and attestation of the will. This provision should be complied with in order that these two persons might be treated as attesting witnesses."

8. In my opinion this authority of the Supreme Court is not applicable to the present, case as the attesting witnesses in this case have clearly stated that they had signed the will in the capacity of the attesting witnesses. It is not disputed before me that the entire will, including the attestation part thereof, was executed in one sitting. Gulabchand (D. W. 3), Phoolji (D. W. 6), Nand Kumar (D. W. 7) and Chand-mal (D. W. 8) are the attesting witnesses of this document and they have been produced in this case. There is no doubt that these witnesses have not said in so many words that they had put their signatures in the presence of Mst. Godawari but from the perusal of their evidence it becomes clear that the will was executed at one sitting and therefore the witnesses must have appended their signatures in the presence of the testator. The Supreme Court in *Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta*, has held,

"It cannot be laid down as a matter of law that because the witnesses did not state in examination in chief that they signed the will in the presence of the testator, there was no due attestation. It will depend on the circumstances elicited in evidence whether the attesting witnesses signed in the presence of the testator."

9. This is purely a question of fact whether the attesting witnesses had signed the will in the presence of the testator. Section 63 of the Indian Succession Act simply lays down that the testator shall sign the will in the presence of the attesta-tor and vice versa but it does not say how the compliance of the requirements of the provisions of Section 63 shall be established. Where the witnesses come before the Court and narrate the sequence of events showing that after the testator had put her thumb impression on the document they attested the document, the court can easily draw an inference that the witnesses had append- ed their signatures to the document in the presence of the testator.

If a witness owing to inadvertence omits to say that he had attested the document in the presence of the testator and narrates the sequence which lead to no other inference but the one that he had put his signatures in the presence of the testator then this omission on the part of the witness would not invalidate the will and it shall not preclude this Court to infer this fact from other evidence on the record that the attestor had signed the document in the presence of the testator. The law does not emphasise that the witness must use the language of the Section to prove the requisite merits thereof. If it is clear from the sequence of events described by a witness, that the witness had attested the document in the presence of the testator, then this technicality that he did not say so in the language used in Section 63 would not be of any avail to the opposite party. I do not find any weight in this contention of learned counsel for the appellant and it is therefore repelled.

10. The last and the important question that has been urged before me by the appellant is that the will is void as it was made in favour of Temple Beespanthiyan which is not a juristic person. According to the learned counsel for the appellant a will can be made only in favour of the person who is recognised by law as juristic person. His contention is that Mandir Beespanthiyan is not a juristic person and therefore the will should be declared void. In support of this contention he has placed reliance on Tha-kardwara Amritsar v. Ishar Das AIR 1928 Lah 375. The learned counsel for the respondents has on the contrary urged that this question has been raised for the first time in the second appeal

His contention is that if this objection was raised by the plaintiff at the trial then it was open for the defendant to say that the Mandir Beespanthiyan is endowment and as such it was a juristic person capable of receiving the properties bequeathed to it by means of a will. By raising this question which is undoubtedly mixed question of law and fact at this stage the defendant-respondent has been taken by surprise and therefore his prayer is that the plaintiff should not be allowed to raise this question at this stage.

In this connection my attention has been drawn to Vidya Varuthi Thirtha v. Baluswami Ayyar AIR 1922 PC 123, wherein their Lordships have held that gift can directly be made to an idol or temple. I agree that the objection raised by Mr. Kasliwal that this question whether temple Beespanthiyan is a juristic person or not is a mixed question of law and fact and therefore this cannot be allowed to

be raised at the stage of second appeal, where the defendant is likely to be prejudiced because he has not been afforded an opportunity to show that the temple in whose favour the property has been dedicated by making a will is really a juristic person. In view of this complexity I cannot permit the plaintiff-appellant to raise this mixed question of law and fact at this stage.

11. The appeal, therefore, fails and is hereby dismissed. But looking to the circumstances of the case I pass no order as to costs.

12. Learned counsel prays leave to file an appeal before the Division Bench u/s 18 of the Rajasthan High Court Ordinance. It is not a fit case for granting leave. Hence leave is refused.