
(2016) 09 AHC CK 0169
In the Allahabad High Court
Case No : Writ B No. 41011 of 2016

Vishnudatta

APPELLANT

Vs

Deputy Director of Consolidation

RESPONDENT

Date of Decision : 23-09-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 120 ALR 525 : (2017) 2 CivCC 472 : (2017) 134 RD 774 :
(2016) 133 RD 634

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

Bench : Single Bench

Advocate : C.S.C., Raghvendra Dwivedi, Advocate, for the Respondent; Ashok Gupta, Advocate, for the Petitioner

Final Decision : Dismissed

Judgement

Ram Surat Ram (Maurya), J. - Heard Sri C.S. Agnihotri, holding brief of Sri Ashok Gupta, for the petitioner and Sri Raghvendra Dwivedi, for the contesting respondents.

2. The writ petition has been filed against the orders of Consolidation Officer dated 10.01.2008, Settlement Officer Consolidation dated 25.06.2015 and Deputy Director of Consolidation dated 05.08.2016, passed in proceeding under Section 12 of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as "the Act").

3. The dispute between the parties is in respect of inheritance of Chaks 283, 284 and 549, which were carved out in the name of Moti Lal. After the death of Moti Lal, Maiyadeen (now represented by respondents-4 to 10) filed an objection under Section 12 of the Act, for mutating his name as an heir of Moti Lal, under his unregistered will dated 28.09.1992. Assistant Consolidation Officer, by order dated 11.05.1994 directed for recording the name of Maiyadeen as an heir of Moti Lal. The petitioner filed an appeal from aforesaid order, which was allowed

by order of Settlement Officer Consolidation, dated 25.07.1995 and the order of Assistant Consolidation Officer dated 11.05.1994 was set aside and the matter was remanded to Consolidation Officer for trial of dispute on merit. After remand, Consolidation Officer, by order dated 10.04.1997 directed for recording the name of the petitioner as an heir of Moti Lal under his unregistered will dated 23.09.1992. However this order was recalled on the application of Maiyadeen by order dated 18.06.2003.

4. Thereafter, Maiyadeen filed another objection on 12.09.2007, giving up his claim on the basis of will dated 28.09.1992 and claimed inheritance of ? share, being son of Motilal, under Section 171 of U.P. Act No.1 of 1951. Consolidation Officer framed issues. Maiyadeen examined himself before Consolidation Officer. The petitioner filed will dated 23.09.1992 and examined Sadashiv, attesting witness of the will. Consolidation Officer, after hearing the parties, by order dated 10.01.2008, held that due execution of will dated 23.09.1992 was not proved. Admittedly Vishnudatta and Maiyadeen were sons of Moti Lal as such they both are heirs of Moti Lal under Section 171 of U.P. Act No. 1 of 1951. On these findings, he directed for recording the names of Vishnudatta and Maiyadeen both as heirs of Moti Lal, holding their ? share each, over disputed land.

5. The petitioner filed an appeal (registered as Appeal No. 44) from aforesaid order. The appeal was heard by Settlement Officer Consolidation, who by order dated 25.06.2015, held that a perusal of will dated 23.09.1992, shows that Moti Lal had sold his house and entire sale consideration was paid to Maiyadeen, due to which he wished to give some property to his other son Vishnudatta so that their share may be equal. This does not show that Moti Lal had intention to execute a will, giving entire agricultural land to Vishnudatta, alone. The petitioner could not adduce any evidence to show that when the house was sold and what sale consideration was realised from it. Thus will dated 23.09.1992 is a suspicious document. On these findings, he dismissed the appeal of the petitioner. The petitioner filed a revision (registered as Revision No. 105) against aforesaid orders. The revision was heard by Deputy Director of Consolidation, who by order dated 05.08.2016, held that Sadashiv, in his statement, has nowhere stated that will was read over and explained to Moti Lal before signing the will. Second page of the will was not signed by the witness Sadashiv, which shows that entire will was not before him at the time of his signature. Due execution of the will was not proved from his statement. Simply for the reason that Vishnudatta was in possession of excess share of land does not prove execution of will. On these findings the revision was dismissed. Hence this writ petition has been filed.

6. I have considered the arguments of the counsel for the parties and examined the record. The counsel for the petitioner relied upon the judgment of Supreme Court in <u>Mahesh Kumar v. Vinod Kumar</u>, (2012) 4 SCC 387, <u>and submitted that in view of the proposition as laid down in this case</u>, due execution of the will dated 23.09.1992 was proved. In this case

following proposition has been laid down for proving due execution of the will:-

(1) Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

(2) Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, 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.

(3) Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

(4) Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

(5) It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

(6) If a caveator alleges fraud, undue influence, coercion, etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the

will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

7. Mode of execution of the will has been prescribed under Section 63 of Indian Succession Act, 1925, which is quoted below:-

<iuml;>"63. Execution of unprivileged wills.</iuml;-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.

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. Execution of the will is required to be proved, at least by one attesting witness under Section 68 of the Evidence Act, 1872, which is quoted below:-

<iuml;>"68. Proof of execution of document required by law to be attested.</iuml;-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."

9. 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;"

10. A Bench of three Hon'ble Judges of Supreme Court in *Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh*, (2009) 4 SCC 780, after reviewing earlier judgments held that as per provisions of Section 63 of the Succession Act, 1925 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 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 68 of 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.

11. A perusal of statement of Sadashiv, attesting witness of the will shows that Moti Lal was resident of village Pindaran, tahsil Baberu, district Banda, while Sadashiv was resident of village Kurram, tahsil Baberu district Banda. It is alleged there is a long distance between two villages. According to this witness, his hand was fractured 30 years ago (about in 1977) then he got treatment from Moti Lal. Apart from it, there was no other relation between two. It is alleged by this witness that this will was executed at tahsil Banda. There is no explanation as to why the will was not executed at tahsil Baberu or why it was not registered although for execution of will, Moti Lal had gone to tahsil. This witness had gone to meet his brother, who was employed in PWD Banda, while searching him he also went to tahsil Banda, when Moti Lal, who was aged about 82 years, saw him, he called him to attest his will, by which he wanted to give 8.25 acre land to Vishnudatta and 4.51 acre land to Maiyadeen as he had already given entire sale consideration of a house sold by him. He was asked that why will was not executed as stated above, he could not give any reply. From his statement, it is

proved that will was not read over and explained to Moti Lal before getting his signature on it. There could be no reason for not executing the will according to wishes of the executor. He was a resident of another village at a long distance and it was not possible for an old man of 82 years to recognise Sadashiv at a new place after about 15 years. This witness has been rightly disbelieved by the consolidation authorities. Otherwise also from his statement, due execution of the will was not proved as the will contained entirely different recitals.

12. Settlement Officer Consolidation found that in will dated 23.09.1992, reason for execution of will was mentioned that Moti Lal had sold his house and paid entire sale consideration to Maiyadeen. Due to which, he wished to give some more property to his other son Vishnudatta so that their share may be equal. This does not show that Moti Lal wanted to give entire agricultural land to Vishnudatta. The petitioner could not adduce any evidence to show that when the house was sold by Moti Lal and what sale consideration was realised from it. Thus recital of the will was found to be incorrect. There was no reason for Moti Lal to execute will dated 23.09.1992, giving all his agricultural land to one of his son. Thus will dated 23.09.1992 is a suspicious document. Finding recorded by Settlement Officer Consolidation does not suffer from any illegality.

13. If a will is surrounded by suspicious circumstances, the propounder is required to remove suspicious circumstances. Supreme Court in *H. Venkatachala v. B.N. Thimbajamma*, AIR 1959 SC 443 held that there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, Courts would be

reluctant to treat the document as the last will of the testator. This proposition has been consistently followed.

14. In view of aforesaid discussions, the writ petition has no merit and is dismissed.