

Jagdish Vs. Rajendra

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Court : Allahabad

Decided On : Feb-24-1975

Reported in : AIR1975All395

Judge : M.P. Mehrotra, J.

Acts : [Specific Relief Act, 1963](#) - Sections 34 and 36; Code of Criminal Procedure (CrPC) - Sections 145; [Hindu Adoptions and Maintenance Act, 1956](#) - Sections 13; Evidence Act - Sections 68; Code of Civil Procedure (CPC) - Order 41, Rule 27

Appeal No. : Second Appeal No. 2015 of 1969

Appellant : Jagdish

Respondent : Rajendra

Advocate for Def. : K.B.L. Gour, Adv.

Advocate for Pet/Ap. : Santosh Kumar and ;A.K. Banerji, Adv.

Disposition : Appeal dismissed

Judgement :

M.P. Mehrotra, J.

1. This second appeal arises out of a suit for declaration and injunction. The plaintiff prayed for a declaration that the will dated 3rd July, 1963, executed by

Ram Saran in favour of the defendant is void. He also prayed for an injunction restraining the defendant from interfering with the plaintiff's possession over the land in suit. The brief facts are these; The plaintiff-respondent claimed that he was the adopted son of Ram Saran deceased. The defendant, Jagdish, happened to be the daughter's son of the mother of Ram Saran. The said defendant set up a will dated 3rd July 1963, alleged to have been executed by Ram Saran in his favour and the plaintiff came to know about this will in the mutation proceedings. The plaintiff claimed that no such will was really executed and the one in question was forged and it was obtained by fraud and undue influence. The plaintiff claimed to be in possession of the property of Ram Saran as an adopted son. As he felt aggrieved with the alleged will and the claim which the defendant was setting up on the said basis, therefore, he filed a suit for declaration and injunction. It may be stated that the relief for injunction was claimed on the ground that the plaintiff's possession was sought to be disturbed. The defendant-appellant denied the plaintiff's allegations. He claimed that no adoption ceremony took place and that the plaintiff was not the adopted son of Ram Saran. He claimed that he was living with Ram Saran during the latter's lifetime and used to look after the latter's cultivation. He enjoyed the affection and confidence of Ram Saran and the latter executed a registered will dated 3rd July, 1963, in the former's favour. The will was said to be a genuine one. The defendant claimed to be in possession of the property. The proceedings under Section 145, Criminal Procedure Code took place but ultimately the same also ended in the defendant's favour and the defendant was given possession. The plaintiff's suit for mere declaration was, therefore, said to be not maintainable. It was also claimed that the courts below had no jurisdiction to try the suit.

2. The trial court held that the suit was maintainable in the civil court. However, the plaintiff was held not to have been adopted by the deceased Ram Saran and the will in question was held to be a valid and genuine one in favour of the defendant. The defendant was held to be in possession and the trial court came to the conclusion that the plaintiff's suit for declaration and injunction without the claim for possession was not maintainable under Section 34/41 of the Specific Relief Act. The Lower Appellate Court, however, allowed the appeal by the plaintiff. It held that adoption was validly proved. The will was held to have been not proved

in accordance with law. There was no compliance with the requirements of Section 68 of the Evidence Act and otherwise also the will was not proved beyond suspicion. The Civil Court's jurisdiction was upheld so far as the relief for declaration was concerned. However, the relief for injunction was refused to the plaintiff on the ground that it was not shown that he was in possession. The proceedings under Section 145 had ended in the defendant's favour and, therefore, there was nothing to show that the defendant had not been delivered possession- In such a situation the relief for injunction could not be granted to the plaintiff. The appeal was, therefore, partly allowed. The suit for declaration was decreed but the claim for injunction was refused. Feeling aggrieved, the defendant has come up in the second appeal and I have heard the learned Counsel for the appellant, Shri G.P. Bhargava. in some detail. Counsel made the following points:

(1) Section 13 of the Hindu Adoptions and Maintenance Act enacts that despite an adoption the adoptive father or mother retain the power to dispose of his or her property by transfer inter vivos or by will. Therefore, even if Ram Saran had made the alleged adoption, still, he retained the power to execute the will in favour of the defendant and the instant will, therefore, can stand despite the adoption, if any, in favour of the plaintiff.

(2) The suit was not maintainable for mere declaration in the absence of claim for possession.

(3) The suit was not triable by the civil court under Section 331 of the U. P. Act I of 1951.

(4) Mode of proof could not be objected to at the appellate stage; inasmuch as the certified copy of the will had been produced by the plaintiff and admitted by the defendant and exhibited by the court, an objection could not be raised at the later stage. Reliance was placed on *Gopal Das v. Sri Thakurji*, *Krishna Kumar v. Kayastha Pathshala* (AIR 1966 All 570) and *Aiodhya Pd. v. Mahabir Pd* : AIR1935 All293 .

(5) Section 68, Evidence Act laying down the mode of proof of attested document is not applicable to a case of certified copy. In this connection reliance was placed

on a passage occurring in Sarkar's Evidence, 12th Edn. 644 where there is a citation from Field's Evidence Act.

(6) The lower appellate Court was said to have been wrong in reversing the finding of the trial Court regarding the issue of adoption. It was alleged that the mother's concurrence had not been shown in the instant case.

(7) Lastly. Mr. Bhargava strongly contended that in the facts and circumstances of the case his client should be allowed to bring on record the original will with the aid of Order 41 Rule 27 C. P. C. under which provision an application has been moved by the defendant-appellant in this second appeal.

3. Shri K.B.L. Gaur, learned counsel for the plaintiff-respondent, submitted in opposition that the trial court was wrong in thinking that the suit for declaration was not maintainable in the absence of a claim for possession. He pointed out that the suit itself was filed on 18th November, 1966, on which date the property happened to be in custodia legis being under attachment in the criminal court. The Supurdar was appointed by the said court. In consequence of the criminal court's verdict possession was delivered to the defendant in 1967. In such a situation the suit could not be said to be not maintainable on the date when it was filed on the ground that possession had not been claimed. He placed reliance on *Lachmeshwar v. Keshwar Lal* and *Indra Narain v. Ganga Ram* : AIR1955 All683 .

4. Counsel next contended that the relief for declaration could not be granted by the revenue court and, therefore, the courts below were right in holding that the suit was cognizable by the civil court. It was pointed out that the lower appellate court had discussed fully the evidence bearing on the question of adoption and the finding recorded was a pure finding of fact. So far as the mode of proof was concerned it was pointed out that from the very beginning the plaintiff was contesting the validity and the execution of the will. In fact, the suit itself was filed for obtaining a declaration to that effect and in such a situation it could not be said that he should be out of court merely because the certified copy had been filed (which he was bound to do as the plaintiff to get the relief) which copy had been admitted by the defendant. The cases relied upon by Mr. Bhargava were said not to be applicable in such a situation. It was next submitted by him that even in the

case of a certified copy the requirement of Section 68 is equally applicable and for this purpose reliance was placed on Karimullah v. Gudar Koeri : AIR1925 All56 and Gobinda Chandra v. Pulin Behari : AIR1927 Cal102 .

5. Lastly, counsel submitted that the application under Order 41, Rule 27 did not deserve to be allowed in the circumstances of the case as the defendant-appellant had not been shown to have acted with due diligence. Moreover, he himself admitted while in the witness-box that he had not summoned the attesting witnesses.

6. Having considered these rival contentions, in my opinion, this appeal deserves to be dismissed.

7. I am not impressed with the contention that the suit was not triable by the Civil Court. Both the courts below have given good reasons why a suit for declaration of the kind which has been sought in the instant case could not be tried by the revenue court. Further, I agree with Mr. Gaur that on the date when the suit was instituted the plaintiff was not required to claim the relief for possession inasmuch as the property was in possession of the court. In : AIR1955 All683 a Division Bench laid down as follows:--

'The further relief contemplated in the proviso is a relief which was available to the plaintiff at the time of the institution of the suit and which he failed to pray for. If there is a change in the position of the parties during the pendency of a suit, and if by reason, of this change the plaintiff becomes entitled to seek further relief, then that is not the relief contemplated in the proviso.'

8. In my opinion, Section 13 of the Hindu Adoptions and Maintenance Act will only be applicable if the will were validly proved in accordance with law. It is, therefore, not necessary to examine the question with reference to Section 13 as I am agreeing with the lower appellate court that the will in the instant case was not properly and legally proved. The lower appellate Court has shown how the will in the instant case was not proved in accordance with the rule contained in Section 68 of the Evidence Act. Admittedly, no attesting witness was produced to prove the will. In my opinion, Mr. Bhargava is not correct in contending that if e certified

copy is produced of an attested document then the requirement of Section 68 is not applicable. Decisions contrary to the paid contention are forthcoming in : AIR1925 All56 and in : AIR1927 Cal102 . In the former case it was laid down:

'A certified copy is sufficient secondary evidence under Section 63 of the existence, conditions and contents of the deed but not of its execution, which must be proved as required under Section 68.' In the latter case it was laid down:

'The provisions of Section 68 are mandatory and they are not controlled by Section 90.

The mere fact that the only surviving attesting witness is considered hostile by the party does not relieve him from the duty of examining him as a witness. Nor is it enough that summons and warrants had been issued upon the witness and the witness had failed to appear, but the process of the Court such as are mentioned in Order 16, Rule 10, Civil Procedure Code have got to be exhausted.'

The lower appellate court has followed the law laid down in : AIR 1959 SC443 to hold that the defendant, who was the propounder of the will, failed to prove the same in the manner and on the standard of proof as laid down in the statute and the case law. None of the attesting witnesses were forthcoming nor was the scribe examined. The witnesses who were examined were shown to have been clearly interested and in such a situation where the plaintiff was hotly contesting the validity and genuineness of the will, that kind of evidence cannot be relied upon to sustain the validity and the genuineness of the will. Mr. Bhargava pointed out that the original will had been summoned by his client but nothing has been shown as to what transpired thereafter.

9. Lastly, so far as the application under Order 41, Rule 27 is concerned, I do not think that the same deserves to be allowed in the instant case. The lower appellate court has observed that the mutation case (where the original will was said to have been filed) was decided more than a year before the statement of the defendant was recorded. In such a situation the defendant cannot be said to have acted with due diligence. It was his duty to have obtained back the said paper from the court concerned and produced the same in the trial Court. It has not been shown to me

as to why the application under Order 41, Rule 27 could not be made in the lower appellate court. In my opinion, there has been a clear lack of diligence on the part of the defendant-appellant and the aid of Order 41, Rule 27 cannot be extended to him in such a situation. In my opinion, in none of the clauses of Order 41, Rule 27 this application deserves to be allowed.

10. I have considered the merits of the cross-objection and I am satisfied that the same also does not deserve to be allowed. There can be no denying that in case the plaintiff was held not to be in possession on the date when injunction was claimed, then he was not entitled to the same. Before an injunction can be granted it has to be shown that the plaintiff was in possession. As the situation stood on the date of the suit the plaintiff was not in possession. The possession at that point of time was in the hands of the criminal court and in such a situation also it is not clear how the plaintiff could be entitled to an injunction. Further subsequently possession was delivered to the defendant in consequence of the criminal court's verdict. Therefore, on the date when the suit was decreed by the lower appellate court the defendant happened to be in possession and the relief for injunction could not obviously be granted in such a situation. The lower appellate court seems to have left the plaintiff to claim back possession by a fresh suit. In my opinion, it is not necessary to allow the cross-objection now and it can be dismissed along with the appeal.

11. In the result, the appeal and the cross-objection are dismissed. There will be no order as to costs either in the appeal or in the cross-objection.

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