

Balzor Singh Vs. Balbir Singh

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Court : Allahabad

Decided On : Nov-19-2004

Reported in : AIR2005All117; 2005(3)AWC2272

Judge : K.N. Ojha, J.

Acts : Uttar Pradesh Zamindari Abolition and Land Reforms Act - Sections 331; Indian Succession Act - Sections 63; Evidence Act - Sections 63 and 68; Code of Civil Procedure (CPC) - Order 41, Rule 23 and 23-A

Appeal No. : First Appeal From Order No. 5 of 1988

Appellant : Balzor Singh

Respondent : Balbir Singh

Advocate for Def. : V.K. Goyal and ;N.S. Verma, Advs.

Advocate for Pet/Ap. : V.S. Chaudhary, ;B.S. Chaudhary, ;I.B. Singh and G.K. Chaturvedi, Advs.

Disposition : Appeal dismissed

Judgement :

ORDER

K.N. Ojha, J.

1. Instant appeal has been preferred against order dated 8th September, 1987 passed by IXth Additional Civil Judge, Meerut in Civil Appeal No. 250 of 1982 Baizor v. Balbir whereby judgment and decree dated 20th May, 1982 passed by Additional Munsif, Court No. 6, Meerut in Regular Suit No. 502 of 1981 Baizor Singh v. Balbir Singh was set aside and the case was remanded to frame specific issues in respect of genuineness of Will deed, record evidence and, therefore to decide the case afresh expeditiously in accordance with law.

2. Heard Shri B. S. Chaudhary, learned counsel for the appellant. None appeared for the respondent.

3. The fact of the case in brief is that both parties are resident of the same village Donnger, District Meerut. Anoop Singh is real brother of Balbir Singh. Kehar Singh was uncle of Balbir Singh. Disputed land was of plot No. 108 Khasra No. 557, area 5 beegah 6 Vishwasi. Balbir Singh, Anoop Singh and Kehar Singh were co tenure holders, in which 1/2 share belongs to Kehar Singh and the shares of Balbir Singh and Anoop Singh are 1/4 each. Family partition has taken place amongst these persons in respect of the land. Western half portion came in the share of Kehar Singh and the shares of Balbir Singh and Anoop Singh was of eastern side. According to Balbir Singh, they were in exclusive possession of the respective shares. Kehar Singh had one another plot No. 18 Khasara No. 615 area 12 beegah 9 Vishwasi in the same village. Kehar Singh had no wife or children and he used to live with Balbir Singh. Balbir Singh used to look after his landed property. Therefore, Kehar Singh executed registered Will deed of his movable and immovable property in favour of Balbir Singh on 23rd July, 1981. Thereafter, Kehar Singh expired on 25th August, 1981. On the death of Kehar Singh, Balbir Singh came in possession of his share and he is still in possession of it.

4. It was alleged by Balbir Singh, plaintiff-respondent that Balzor Singh is real brother of Kehar Singh and has no concern with the landed property.

5. Balzor Singh denied that any partition did take place among Balbir Singh, Anoop Singh and Kehar Singh. He denied that Kehar Singh executed any Will deed in favour of Balbir Singh. It was also alleged that if Balbir Singh obtained thumb impression of Kehar Singh on any plain paper, it is forged deed. It was

further alleged that Kehar Singh remained ill since two months before his death. He was unable to hear, speak and understand. Even he could not recognise any person during this period. The alleged Will deed was never, executed by Kehar Singh out of his own free Will and nothing is there in evidence. Balbir Singh alleged that he was in possession of the landed property. It was further alleged that Civil Court has no jurisdiction to try the suit as it was barred by Section 331 of the U.P. Zamindari Abolition and Land Reforms Act.

6. After going through the pleadings of both the parties, learned Additional Munsif framed issues in respect of ownership and possession of the land, valuation and payment of Court-fee, Section 331 of the U.P. Zamindari Abolition and Land Reforms Act, and non-joinder of Anoop Singh. No specific issue was framed about the genuineness of the Will deed.

7. Balbir Singh examined himself as P.W. 1 and Onkar as P.W. 2. The defendant-appellant examined Budh Singh as D.W. 1 and Bijendra as D.W. 2. After appreciating evidence, the learned Munsif felt that the Will deed was genuine. It was also held that since in this case it was to be ascertained as to whether forgery and fraud was committed in getting the Will deed executed it cannot be decided by the Revenue Court. Therefore the suit was not barred by Section 331 of the U.P. Zamindari Abolition and Land Reforms Act. It was held that it was Civil Court and not Revenue Court who was competent to decide the suit.

8. When the suit was decreed, Balzor Singh, appellant preferred the appeal with the plea that the case of Balbir Singh was based on execution of Will deed which was the basis of the claim of Balbir Singh in respect of half share of the land. Therefore, specific issue was to be framed and opportunity was to be given to both the parties to adduce evidence. It being not so, the decree was not maintainable. Learned appellate Court believed the contention of the respondent, set aside the judgment and decree passed by Additional Munsif and remanded the case to the trial Court for framing specific issue in respect of the genuineness of execution of Will deed, adducing additional evidence, and thereafter, to decide the case on merits. Even though the appeal was allowed and decree passed by learned Additional Munsif was set aside but according to learned counsel for the

defendant/appellant, the suit was to be dismissed rather than to be remanded to the Court of Additional Munsif. It was also alleged that further opportunity was not to be given to the plaintiff-respondent to fill up the lacuna in respect of the genuineness of the Will deed.

9. In this case, genuineness of the Will Deed alleged to have been executed by Kehar Singh in favour of Balbir Singh is in dispute even though specific issue was not framed on this point, still learned Munsif appreciated the evidence and made finding that the Will Deed was valid and it was held that the respondent was in possession of the disputed land. The question is as to whether it was in the interest of justice to remand the case or to dismiss the case on the ground that specific issue was not framed in respect of genuineness of Will deed and further opportunity was not to be allowed to the plaintiff-respondent. The learned counsel for the appellant submits that by remanding the case, the learned Additional Civil Judge has filled up the lacuna in the evidence of the respondent.

10. Order 41, Rule 23 of the Civil Procedure Code (hereinafter mentioned as Code) as amended is as below :--

23. Remand of case by appellate Court.-- Where the Court from whose decree an appeal is preferred has disposed of the suit upon preliminary point and the decree is reversed in appeal, or where the appellate Court was reversing or setting aside the decree under appeal, considers it necessary in the interest of justice to remand the case. It by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to readmit the suit under its original number in the register or civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.'

Rule 23-A was added by Act No. 104 of 1976 with effect from 1-2-1977 which is as below :--

23A. Remand in other cases.-- Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the

decree is reversed in appeal and a re-trial is considered necessary, the appellate Court shall have the same powers as it has under Rule 23.

11. In this case, Will deed is the basis of the claim of the respondent-Balbir Singh. In order to ascertain it, it is to be ascertained as to whether Kehar Singh was in a position to understand the nature and content of the Will deed which is said to have been executed by him in favour of Balbir Singh.

12. In 1977 (1) SCC 369 : (AIR 1977 SC 74 Para 8) Smt. Jaswant Kaur v. Smt. Amrit Kaur, it has been laid down by the Hon'ble Supreme Court that 'burden of proving due execution of the Will, lies on the party setting up the Will against claim by the other party since such party would fail if no evidence was led.'

AIR 1959 SC 443 was relied on in which it was laid down by Hon'ble Apex Court that the Will is 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. It was held that Section 63 of the Indian Succession Act requires the Will to be attested. It cannot be used as evidence only as required by Section 68 of the Evidence Act. One attesting witness at least is to be called for the purpose of proving its execution if one witness is alive. 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? It was further held that the cases in which the execution of the Will is surrounded by suspicious circumstances stands on a different footing, shaky signature, feeble mind and unfair and unjust disposition of property propounded himself taking a leading part in the making of a Will under which he received a substantial benefit and such other circumstances raise suspicion about the execution of the Will. Though suspicion cannot be removed by mere assertion of the propounder that the Will bears the signature of the testator or that the testators are in a sound disposing state of mind and momentary at the time when the Will was made or that those like the wife, children of the testator who would normally receive their due share in his state were disinherited because the testator might

have his own reasons for executing them. Therefore, the propounder must remove all legitimate suspicions before the document can be expected as last Will of the testator. If a caveator alleges fraud, undue influence etc. in regard to the execution of the Will, his pleas have to be proved by them but even though in the absence of such plea, the very circumstances surrounding the execution of the Will may raise doubt as to whether the testator was acting for his own free will and then it is a part of the initial onus or propounder to remove all reasonable doubts in the matter.

13. It has been held by this Court in 1983 (1) All Rent Cas 481 Firm Girdharilal Saheb Ram, Sandhila v. Vth Additional District Judge, Hardoi that 'it is the duty of the Court to frame proper issues suo motu if the Courts below fail to do their duty. Their decisions cannot be sustained and the case has to be remanded for disposal after framing proper issues.'

14. In 1986 All WC 1185 : (1986 All LJ 1499) Smt. Munia v. Deputy Director of Consolidation, Varanasi it has been laid down by this Court that the formal proof and interpretation of a Will involves some difficulties. The Will is a solemn document and unlike other documents it speaks from the death of testator and so when it is produced before the Court, the testator, who is already dead cannot be produced in the Court and no question can be put to him as to whether it is his Will or not. This aspect of the matter about proving the Will makes the task of the Court more heavier while deciding the validity of the Will. The Court has also to take into account the surrounding suspicious circumstances, if there are any. The onus probandi rests on the propounder to prove the Will, removing suspicious circumstances. In order to decide genuineness of Will, a number of facts have to be considered and even if the Will happens to be registered, the proceedings before the Registrar have to be scrutinized and taken into account before deciding as to whether the Will was a genuine document or not. Simply because the Will was registered would not lead to the inference that it has to be held as genuine, when, in fact, there were a number of other suspicious circumstances surrounding the Will.'

15. Thus, in this case, a specific issue about the genuineness of the Will deed was to be framed and different circumstances in the light of which, genuineness was to be considered were to be appreciated and for this purpose, evidence was to be adduced. Therefore, specific issue being not framed the case was remanded by the learned appellate Court, it was in accordance with the provisions of Order 41, Rule 23-A of the Code and there is no illegality in the order.

16. Learned counsel for the appellant has cited AIR 1975 All 341 (Para 3) Bhagwanti v. Jiuti in which it has been laid down by this Court that 'where the evidence on the record is sufficient to enable the appellate Court to pronounce a judgment, the appellate Court may after resetting the issues, if necessary, finally determine the suit notwithstanding that the judgment of the trial Court had proceeded wholly upon some ground other than that on which the appellate Court proceeds. Held on the facts and in the circumstances of case that appellate Court below was, justified in deciding the said question and had committed no error in not remanding the case to the trial Court.'

17. But this law was laid down in view of the circumstances, when specific issue was framed by the appellate Court and after recording additional evidence, the issue was decided. It depends upon the circumstances of this case as what is proper whether additional evidence should be recorded or the case should be remanded. In the instant case, when the Will deed is the basis of the claim of the respondent-plaintiff, the person who is said to have executed the Will is no more alive, many circumstances are to be considered and for it if the judgment and decree of lower Court was set aside and the lower Court was directed to frame specific issue about the genuineness of the Will deed, record evidence and decide the case afresh, there is no illegality.

18. Therefore, no illegality is found in the impugned judgment and order passed by the learned appellate Court remanding the case to the lower Court for framing specific issue, record evidence and thereafter decide the case afresh.

19. Since the case is to be decided afresh by the trial Court, therefore, there is no necessity to express opinion about the jurisdiction of the Civil Court to try the suit.

20. The perusal of the record shows that it was the appellant who prayed before the appellate Court that specific issue was not framed about the genuineness of the Will deed and detailed evidence was not adduced. Therefore, it is now not open for the appellant to allege that the order of remand is against the law. There is specific provision in the Civil Procedure Code to remand the case if it is required so for the interest of justice and it has been done accordingly by the learned appellate Court.

21. Therefore, instant appeal is devoid of merit and it deserves to be dismissed.

22. The appeal is dismissed with costs to the respondents. The parties are directed to appear on 21-12-2004 in the Court of Additional Munsif, Court No. 6/VIth Additional Civil Judge, Junior Division, Meerut to decide the case in accordance with law as has been observed by the 1st Additional Civil Judge, Meerut in Civil Appeal No. 250 of 1982 Balzor v. Balbir. In case the Court of 6th Additional Civil Judge is vacant, it is open to the learned District Judge, Meerut to transfer the case to another competent Court for expeditious disposal of the suit. The learned trial Court will make every effort to decide the suit expeditiously as far as possible within six months.

23. The office is directed to send a copy of this judgment immediately to the learned District Judge, Meerut for information.