

Jamuna Devi Vs. Sarbati Devi Through L.Rs.

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Court : Punjab and Haryana

Decided On : Jan-20-2004

Reported in : (2004)137PLR547

Judge : K.C. Gupta, J.

Acts : [Evidence Act, 1872](#) - Sections 64

Appeal No. : Regular Second Appeal No. 1104 of 1990

Appellant : Jamuna Devi

Respondent : Sarbati Devi Through L.Rs.

Advocate for Def. : B.L. Gulati, Adv.

Advocate for Pet/Ap. : Arun Jain, Adv.

Disposition : Appeal dismissed

Judgement :

K.C. Gupta, J.

1. This appeal has been instituted by the defendant, Smt. Jamuna Devi, against judgment dated 8.5.1990 passed by Additional District Judge, Faridabad, whereby he set aside the judgment and order dated 4.8.1988 passed by Sub Judge IInd Class, Faridabad, in favour of the appellant and allowed the claim of the

respondent-plaintiff and decree for possession in respect of the suit land was passed against the appellant.

2. Briefly stated, the facts are that the respondent-plaintiff, Smt. Sarbati Devi, and her brother, Suraj Bhan were owners in possession in equal shares of the agriculture land measuring 78 Kanals 13 Marlas situated in revenue estate of Village Ladhali, Tehsil Ballabgarh, district Faridabad. Suraj Bhan had filed a civil suit against the respondent for declaration to the fact that he be declared as owner of the share of the respondent in the suit land as the respondent had agreed to part with the share by mutual consent. The said suit was decreed in favour of Suraj Bhan on 17.3.1973 by Sub Judge 1st Class, Ballabgarh and in this manner Suraj Bhan became owner of the whole of the land measuring 78 Kanals 13 Marlas. It was further alleged that Suraj Bhan had no concern with Smt. Champi and her daughter, Jamuna Devi, appellant and on the other hand, Smt. Champi had given birth to Smt. Jamuna Devi from the loins of Rattan Lal.

3. It was next averred that Smt. Jamuna Devi never resided with Sh. Suraj Bhan and was not brought up by him. It was further alleged that Suraj Bhan died issueless on 19.12.1981 and she, being the sister of Suraj Bhan, was the sole legal heir and was entitled to succeed to his property.

4. It was further averred that Suraj Bhan had not executed any will in favour of Smt. Jamuna Devi on 25.8.1971 and mutation No. 79 alleged to have been sanctioned in her favour on 22.12.1981 was illegal and wrong. With these allegations, the suit for possession of the aforesaid land was filed.

5. The appellant (defendant) contested the suit and took certain preliminary objections regarding limitation, proper valuation of the suit for the purpose of Court fee, estoppel and maintainability. She further pleaded that suit land was not ancestral qua Suraj Bhan and it was not inherited by him from his fore-fathers. It was also pleaded that Suraj Bhan had performed Kareva marriage with Smt. Champi and Jamuna Devi had come along with Smt. Champi Devi and was brought up by Suraj Bhan as his own daughter and used to serve him and in lieu of service, he had executed a valid will on 25.8.1971 in her favour, which was got registered.

6. Accordingly, the following issues were framed on 6.11.1985:-

'1. Whether late Suraj Bhan had executed a valid will dated 28.5.1971 in favour of the defendant? OPP

2. Whether the suit is time barred? OPD

3. Whether the suit is not properly valued for the purposes of court fees and jurisdiction? OPD

4. Whether plaintiff is estopped from filing this suit by her act and conduct? OPD

5. Whether the suit is not maintainable in its present form? OPD

6. Relief.

7. The parties adduced their evidence, after hearing counsel for the parties, vide judgment dated 4.8.1988, Sub Judge, Faridabad, dismissed the suit of the respondent-plaintiff by holding under Issue No. 1 that Suraj Bhan had executed a valid will dated 25.8.1971 wrongly dated 28.5.1971 in favour of the appellant. However, under Issue No. 2, it was held that the suit was within time. Issue No. 3 was decided against the appellant as not pressed. Under Issue No. 4, it was held, that the respondent was estopped from filing the suit by her act and conduct. Under Issue No. 5, it was held that she had no right to file the suit.

8. Aggrieved by the said judgment and decree, the plaintiff filed an appeal, which was accepted by the Additional District Judge, Faridabad, vide judgment dated 8.5.1990 by holding that execution of the valid will dated 25.8.1971 in favour of the appellant has not been proved and as such, the respondent has got the locus-standi to file the suit and she is not estopped from filing the suit by her act and conduct and further the suit was maintainable in the present form.

9. Aggrieved by the said judgment and decree, the defendant has filed the present appeal.

10. I have heard Mr. Arun Jain, counsel for the appellant, Mr. B.L. Gulati, counsel for the respondents and carefully gone through the record.

11. The only question to be seen is whether it is proved on file that Suraj Bhan had executed valid will in favour of the appellant, Jamuna Devi on 25.8.1971. The Will, Ex.D1, is attested by Amar Singh, Lambardar and Arjan Singh. It is stated that Amar Singh, attesting witness of the will, had died and as such, he was not examined. Of course Arjan Singh, another attesting witness of the will, had been examined as DW8. He has not supported the case of the appellant. He stated that the will mark 'A' (Ex.D1) dated 25.8.1971 did not contain his signatures. He further stated that the endorsement, which is on the back of the will, did not contain his signatures. He was declared hostile but in the cross-examination conducted by counsel for the appellant, he has not got anything beneficial to the appellant. He, however, admitted that the respondent and Suraj Bhan were real sister and brother. According to Section 63(c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, the will is required to be attested by two witnesses and in order to prove its due execution, one attesting witness must be examined. In the present case, one attesting witness of the will, namely, DW8 Arjan Singh was examined but he has not supported about the fact of due execution of the will. The appellant has also examined twice Som Nath Aggarwal, Handwriting and finger print expert, firstly as DW5 and then as DW10, who stated that the will, Ex.D1, contained the thumb impression of Suraj Bhan as executant and that of Arjan Singh as attesting witness. The respondent, on the other hand, has examined PW5 Vir Kumar Sakhuja, Handwriting and Finger Print Identification Expert, who stated that the will Ex.D1, did not contain the thumb impression of Suraj Bhan and also the signatures of Arjan Singh. Thus, the evidence given by Som Nath Aggarwal as DW5 and then DW10 is contradicted by PW5 Vir Kumar Sakhuja. Of course, the appellant has also examined Dharam Pal, scribe, as DW2. He stated that he had seen the will dated 25.8.1971 mark 'A', which was scribed by him. He further stated that after writing, he had read over the same to Suraj Bhan, which was written at his instance and then he had put his thumb impression after admitting it to be correct in the presence of the witnesses and further the witnesses had attested the will in his presence. He also stated that he had made entry regarding the scribing of this document at Sr. No. 1140 in his register on 25.8.1971. He also stated that Suraj Bhan was known to him personally and he belonged to his brotherhood. The Sub Registrar, who had registered the will, has

not been examined but DW4 A.P. Jain, Assistant from the D.C. Office, was examined and he stated that he identified the signatures of Chaudhary Chamela Ram, Sub Registrar, as he had made endorsement on it at the instance of Sub Registrar. He further stated that the thumb impression and signatures were made before the Sub Registrar. He also stated that Chaudhary Chamela Ram has died.

12. Now the question to be seen is whether the testimony of DW2 Dharam Pal, scribe and DW4 A.P. Jain, Assistant, fulfilled the criteria to prove the due execution of the will and their testimony is to be considered as the testimony of a witness as required under Section 68 of the Indian Evidence Act. For this contention, counsel for the appellant has placed reliance upon the following authorities:-

1. Lila Dhar v. Smt. Badho and Anr., (1994-1) 106 P.L.R. 525.
2. Kartar Kaur v. Bhagwan Kaur, (1993-1)103 P.L.R. 99.
3. Mohinder Kaur v. Harbhajan Singh, 2002(1) R.C.R. (Civil) 134.
4. Lal Singh and Anr. v. Bant Singh and Ors., A.I.R. 1983 Punjab and Haryana 384; and
5. Sita Ram v. R.D. Gupta and Ors. A.I.R. 1981 Punjab and Haryana 83.

13. In the said authorities, it was observed that the Sub Registrar or the scribe of the will could be treated as a witness to prove the due execution of the will, if there is no other suspicious circumstance. In the present case, the Sub Registrar has not been examined. So, these authorities are not applicable. The scribe of the will has not attested the will as an attesting witness but he has signed the same as a scribe only. So, he cannot be deemed to be an attesting witness. It has been observed by the Hon'ble Apex Court in Janki Narayan Bhoir v. Narayan Namdeo Kadam, J.T. 2002(10) S.C. 340 that the scribe of the will cannot be treated as an attesting witness. DW4 A.P. Jain, Assistant in D.C. Office, cannot also be treated as an attesting witness because the will was not registered by him but it was registered by Chaudhary Chamela Ram, who has died. It has been further observed by the Hon'ble Apex Court in M.L. Abdul Jabbar Sahib v. H. Venkata

Sastri and Sons and Ors. etc., A.I.R. 1969 Supreme Court 1147 that if a person puts his signatures on the document for some other purpose i.e. to certify that he is a scribe or identifier or a registering officer, he is not to be treated as an attesting witness. Therefore, in view of the authorities of the Hon'ble Apex Court, the authorities of this Court delivered by Single Judges cannot be taken into consideration. In the present case, there is one suspicious circumstance also. Admittedly, the respondent, Sarbati Devi, is the real sister of Suraj Ban. The relations between them were cordial because earlier Smt. Sarbati Devi had transferred her one half of share as in favour of Suraj Bhan by court decree. Therefore, there was no reason for Suraj Bhan to execute the will in favour of the Jamuna Devi, appellant, who was not related to him in any manner. It is not proved on file that Suraj Bhan had performed Kareva marriage with Smt. Champi Devi.

14. In view of the above discussion, I hold that it is not proved on file that Suraj Bhan had executed valid will in favour of the appellant, Jamuna Devi, on 25.8.1971 Ex.D1. Consequently, the findings of the Additional District Judge on this issue are affirmed.

15. No other point has been urged before me.

16. The up shoot of the above discussion is that this appeal fails and the same is dismissed with costs.