

Asharfi Devi Vs. Tirlok Chand and ors.

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Court : Punjab and Haryana

Decided On : Jul-29-1964

Reported in : AIR1965P& H140

Judge : A.N. Grover and; H.R. Khanna, JJ.

Acts : [Transfer of Property Act, 1882](#) - Sections 41; [Indian Succession Act, 1925](#) - Sections 63; [Evidence Act, 1872](#) - Sections 68

Appeal No. : First Appeal No. 32 of 1955

Appellant : Asharfi Devi

Respondent : Tirlok Chand and ors.

Advocate for Pet/Ap. : Mr. Goswami

Judgement :

Grover, J.

(1) Manohar Lal, who was the last holder of the property in dispute, executed a will on 3rd January 1927 in favour of his wife Mst. Asharfi Devi bequeathing his entire property, with the exception of one pukhta haveli, to her. It was stated in the will that Prem Chand defendant-respondent had been living with him and that he desired to perform the ceremony of his adoption on 6th February 1927. Even after the adoption ceremony, Mst. Asharfi Devi was to be the full owner of the entire

property and if the relations became strained between her and Prem Chand, then she was to pay Rs.5,000/- to him for purposes of business. After Mst. Asharfi's death, Prem Chand was to be the full owner of the entire property of every description. This will was attested by two witnesses, Shiv Dhian Singh and Nand Kishore and it was presented for registration by Manohar Lal, who appeared before Neki Ram Sub-Registrar on 8th January 1927, the Sub-Registrar's endorsement being of the same date. Indeed the will was also registered on the same day. Manohar Lal died on 17th August 1950 leaving behind Mst. Asharfi Devi, his widow, and Prem Chand, the adopted son who had a son of the name of Rajinder Kumar.

On the death of Manohar Lal, the agricultural land belonging to the deceased was mutated in the name of Prem Chand who got rent deeds executed in his favour in respect of the urban immoveable property. Necessary entries were also made in his favour in the records of the Municipalities of Sonapat and Delhi. It is a common ground that Mst. Asharfi Devi and Prem Chand were residing in the same house when on 18th February 1952 the latter sold 50 bighas 17 biswas of agricultural land to defendants 2 to 6 for a sum of Rs.35,000/-. On the 7th October 1952 he mortgaged 2 bighas 6 biswas of land to Mst. Sukhman defendant No. 7 for Rs.6,500/-. He remained in possession himself of that land as a tenant. Tirlok Chand defendant No. 1 had a money decree against Prem Chand defendant No. 8 and in execution of that decree he got attached houses, the plans of which are Exhibits P 14 and P. 15 and agricultural land comprising an area of 78 bighas odd.

On 1st February 1954 Mst. Asharfi Devi filed a suit out of which the present appeal has arisen for possession of the land which had been sold to defendants 2 to 6 and for declarations to the effect that the mortgage created by Prem Chand defendant No. 8 in favour of Mst. Sukhman defendant No. 7 was null, void, ineffective and unenforceable against her and that the agricultural land and residential property mentioned in paragraphs 1 and 2 of the plaint were owned and possessed by her and Prem Chand had no connection with them and those properties were not liable to attachment and sale in execution of the decrees against Prem Chand. The principal plea of the plaintiff, Mst. Asharfi Devi, was that by virtue of the will, Exhibit P 16, she was the owner of the properties in dispute

and Prem Chand defendant No. 8 had no right, title or interest in the same and could not have, therefore, alienated them nor could they be got attached and sold in execution of the decrees against the afore said defendant. In defence, a number of pleas were taken up but the, main points raised were that the suit property was joint family property and that the plaintiff could not acquire any rights under the will, the execution and validity of which was also challenged and that the transferees were entitled to the protection conferred by section 41. Transfer of Property Act.

(2) The trial Court found that the execution of the will by Manohar Lal deceased had been established but that its execution and attestation as required by section 63 of the [Indian Succession Act, 1925](#), had not been proved. It was further found that only one house, the plan of which was Exhibit P. 23, was joint family property and that the rest of the property was self-acquired of Manohar Lal with the exception of another house, the plan of which was Exhibit P. 22, which has ancestral. In other words, it was found that if the will was valid, the plaintiff would acquire interest in the entire property left by her husband with the exception of the properties shown in the plan, Exhibits P. 22 and P. 23. It was also held that defendants 2 to 6 had purchased the land in question in good faith and for consideration and were protected by the provisions of section 41 of the [Transfer of Property Act, 1882](#). The same was the finding with regard to the land mortgaged with defendant No. 7. In the result, the suit was dismissed.

(3) During the pendency of the appeal in this Court Mst. Asharfi Devi died on 20th March 1957. Rajinder Kumar son of Prem Chand defendant No. 8 applied through his guardian on 5th August 1957 for being impleaded as legal representative of Mst. Asharfi Devi deceased on the basis of a will said to have been executed by her in his favour on 25th November 1953. The genuineness of this will was questioned on behalf of the respondents and on 29th November 1962 an order was made calling for a report from the trial Court with regard to the genuineness of the execution or otherwise of the will in favour of Rajinder Kumar. In the report dated 20th March 1963 it was found that the will had been duly executed by Mst. Asharfi Devi in favour of Rajinder Kumar. After considering the objections, legal and factual, raised on behalf of the respondents with regard to the aforesaid will, it

was held by a Division Bench of this Court on 1st May 1964 that Rajinder Kumar was entitled to be substituted in place of Mst. Asharfi Devi appellant by virtue of the will in his favour.

(4) It may be mentioned that certain respondents had died during the pendency of the appeal. The question of the abatement of the appeal was also disposed of by the same order mentioned above and it was held that the appeal had abated so far as the interest of Sukhdev defendant No. 6 in it was concerned, being one-third share of land sold by means of the sale deed, Exhibit D. 24, dated 18th February 1952. The appeal has now come up for hearing for final disposal.

(5) Mr. Goswami, learned counsel for the appellant has confined his argument only to two points. His first contention is that the will, the execution of which by the testator has been found to have been duly proved and which was a registered document, should be held to be perfectly valid as the requirements of section 63 of the Succession Act and the relevant provisions of the Indian [Evidence Act, 1872](#), relating to proof had been fully satisfied. His second point relates to the finding given by the trial Court that defendants 2 to 6 and defendant No. 7 were entitled to the protection of section 41 of the Transfer of Property Act.

(6) On the first point, Mr. Goswami has called attention to the conclusion of the trial Court that the will in question had been proved to have been written by Manohar Lal deceased himself and bore his signatures. The Court had no hesitation in holding that it was a genuine document but its view was that it had not been duly attested and, therefore, could not be acted upon. Now, the trial Court has itself found that out of the two attesting witnesses, Shiv Dhian Singh had died and Nand Kishore, though alive, was incapable of giving evidence on account of senility, his age being 109 years. The will could not, therefore, be proved in accordance with the provisions of sections 68 of the Evidence Act.

As regards the provisions contained in S. 69, which requires that if no such attesting witness can be found it must be proved that the attestation of one attesting witness at least in his handwriting, apart from proving that the signature of the person executing the document is in the handwriting of that person, the plaintiff had sought to get the handwriting of Nand Kishore proved from the

deposition of his grandson Amar Nath P.W. 9 but that witness was unable to identify on the ground that the signature was in Urdu and he did not know the Urdu script. Shiv Dhian Singh, the other attesting witness, had left four sons and one of them, Kishan Sarup, had been summoned by the plaintiff but had been given up subsequently. The explanation now given by the learned counsel for the appellant is that witness had been won over and had to be given up. Jainti Parshad P.W. 6 identified the signatures of Shiv Dhian Singh but the trial Court found it difficult to accept his testimony principally on the ground that he had not been summoned by the plaintiff and it was admitted that he was asked by Prem Chand defendant No. 8 to give evidence in the case on the morning of the day he appeared in the Court for the plaintiff.

It is difficult to understand why the trial Court rejected the evidence of Jainti Parshad P.W. 6 when all the circumstance and other facts fully established the genuineness of the will about which the trial Court itself had no doubt. It is not possible to agree with the trial Court that merely because a witness had not been summoned and is requested or asked to give evidence by the party which produced him, that makes him an untruthful witness. The statement of P.W. 6 Jainti Parshad when read as a whole does not show that he was interested in any way in the plaintiff or had any reason to come and give perjured evidence. It was stated by him that Shiv Dhian Singh was known to him and he had been seeing him writing every day. He was literate and could identify his signatures and he identified the signatures on the will, Exhibit P. 16, at the place marked 'B' of the Shiv Dhian Singh. He stated in cross-examination that it was on that very morning when he gave evidence that he was asked to testify in the matter for the first time. I can see no reason for not believing this witness, particularly when all the other facts and circumstances are taken into consideration about the genuineness of the will.

(7) Even if the statement of Jainti Parshad P.W. 6 is to be discarded for the reasons given by the trial Court, I have no doubt that the statement of Neki Ram, Sub-Registrar, who was admittedly dead at the time the suit was decided by the trial Court, was admissible for the purposes of proving his attestation as a witness within the meaning of section 63(1)(c) of the Succession Act. The trial Court while

accepting that position in view of the law laid down in Parshotam Ram v. Kesho Das, AIR 1945 Lah 3 and Chhaju Ram v. Surinder Kumar, AIR 1951 Punj 305 felt that owing to the observations contained in the second case it had to be proved that Neki Ram had signed the endorsement in the presence of the testator and as there was no evidence to that effect, he would not be regarded as having signed the will as an attesting witness. This part of the view, which was taken in AIR 1951 Punj 305 and which the trial Court was indeed bound to follow, can no longer be regarded as good law owing to what has been laid down in Naresh Charan Das Gupta v. Paresh Charan Das Gupta, (S) AIR 1955 SC 363. According to that decision, 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. It is clear from the endorsement made on the will, Exhibit P. 16, that the testator signed the will in the presence of the Sub-Registrar who also signed the endorsement contemporaneously from which it must be presumed that it was in the presence of Manohar Lal. Thus, the Sub-Registrar became an attesting witness within the meaning of section 63(1)(c) of the Succession Act and in the present case the requirements of section 69 of the Evidence Act were also fully satisfied. There can be no doubt that the will, Exhibit P. 16, has been proved to have been validly executed in accordance with law by Manohar Lal in favour of Mst. Asharfi Devi.

(8) The question involved in issues 5 to 7 was whether defendants 2 to 6 and defendant No. 7 could obtain the benefit of the provisions of section 41 of the Transfer of Property Act and whether the plaintiff was estopped by words or conduct from bringing the suit. The trial Court dealt with this matter carefully and gave a number of reasons for holding that they aforesaid defendants were entitled to the protection conferred by section 41 of the Transfer of Property Act which may be summarised as follows:

(1) Although according to the plaintiff, she had knowledge of the will made in her favour by Manohar Lal, she took no steps to claim her rights under that will soon after the death of Manohar Lal.

(2) The agricultural land was mutated in the name of defendant No. 8 as exclusive heir of the deceased Manohar Lal and he also got rent deeds executed in his favour in respect of the urban immoveable property left by Manohar Lal.

(3) The mutations in the revenue records relating to land and the necessary entries in the records of the Municipalities of Sonapat and Delhi were made in favour of defendant No. 8 as owner.

(4) Even some shares of the Ganesh Flour Mills Ltd., Delhi, which were held by the deceased, were transferred in the name of defendant No. 8 on his application.

(5) The plaintiff and defendant No. 8 used to reside in the same house and since the latter had taken possession of all the properties of Manohar Lal without any objection by the plaintiff, it followed that he had taken possession with her consent and was the ostensible owner of the property which was later on alienated by him to those defendants.

(6) An ejectment suit had been lodged by defendant No. 8 Manohar Lal against one Gopal Dass and there was a case for fixation of rent instituted by the latter against the two landlords when Manohar Lal died. According to the will, the house became the property of the plaintiff, Shri Sant Lal Advocate, who admittedly had the will in his possession, was the counsel for the landlords in those two cases but he did not take any steps to propound the will and get the plaintiff impleaded as the legal representative of her deceased husband and she was not made a party to those proceedings.

(7) The will remained a secret document and the transferees had no reason to suspect that any will had been ever executed in favour of the plaintiff so as to be put on guard and make enquiries about it.

(9) Mr. Goswami has contended that no proper enquiries were made by the aforesaid defendants who were the transferees with regard to the right title and interest of the plaintiff in the properties left by Manohar Lal. It is pointed out that admittedly defendant No. 8's son Rajinder Kumar (present appellant) had been born when the alienations were made and since he was a minor the defendants

should have made proper enquiries with regard to the joint family or ancestral nature of the properties and if they had gone about like prudent men and business, they could have met the plaintiff who would have informed them about the existence of the will. This argument is some what far-fetched because what has to be seen under section 41 of the Transfer of Property Act is not whether proper enquiries were made in connection with the ancestral nature or otherwise of certain properties but whether the transferee when dealing with an ostensible owner took reasonable care to ascertain that the transferor had power to make the transfer and had acted in good faith. When Prem Chand defendant NO. 8 was the undisputed son, though adopted, of Manohar Lal and in the revenue records the mutations had been effected in his favour with regard to the agricultural lands there was hardly anything which defendants 2 to 6 any will left by deceased. It is true that the will was registered but, as had been pointed out by the trial Court, under section 57(1) of the Indian Registration Act, 1908, inspection of book No. 3 containing entries about wills is not allowed. It is only the registering officer who could look into that register under section 57(4). Thus, the defendants could not have discovered the existence of the will by making any inspection in the Registration Department.

In her statement, the plaintiff stated that after the death of Manohar Lal, she remained in possession of the property left by him and had been taking its income. It is difficult to accept that statement when the revenue entries as also the entries in the municipal records and the rent deeds showed that the possession was with defendant No. 8. The reasons which have been given by the trial Court together with what has been stated above leave no manner of doubt that the aforesaid defendants were fully entitled to the benefit of section 41 of the Transfer of Property Act and Mr. Goswami has not been able to persuade us to disagree with the view expressed by the trial Court on this point.

(10) In the result, although it has been proved that Mst. Asharfi Devi became the owner of the properties in dispute by virtue of the will, Exhibit P. 16, it must be held that defendants 2 to 6 and defendant No. 7 were fully entitled to the protection afforded by section 41 of the Transfer of Property Act. Consequently, the appeal fails and it is dismissed. The cross-objections have not been pressed and they are

also dismissed.

(11) In view of the entire circumstances, the parties are left to bear their own costs in the appeal as also in the cross-objections. It may be mentioned that the appeal was not pressed against the defendant (1) on the ground that there has been a compromise with him.

Khanna, J.

(12) I agree.

(13) Appeal dismissed.

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