

Nimbo Vs. Satyabir Singh

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SooperKanoon Citation : sooperkanoon.com/625991

Court : Punjab and Haryana

Decided On : Sep-09-1994

Reported in : (1995)109PLR546

Judge : N.K. Kapoor, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 - Order 5, Rule 16

Appeal No. : R.S.A. No. 1048 of 1991

Appellant : Nimbo

Respondent : Satyabir Singh

Advocate for Def. : R.K. Gupta, Adv.

Advocate for Pet/Ap. : Bhoop Singh, Adv.

Judgement :

N.K. Kapoor, J.

1. This is unsuccessful plaintiffs' regular second appeal.

2. Plaintiffs filed a suit for the declaration to the effect that the decree dated 1.3.1984 passed in civil suit No. 114 of 1984 is null and void and any transaction carried on or entered into by the defendant is also null and void with consequential relief of permanent injunction restraining the defendant from creating any charge

or lien upon the suit land or otherwise interfering with their peaceful cultivating possession over the land in any manner. On the basis of pedigree table as given in para No. 2 of the plaint which for facility of reference is hereunder reproduced, the plaintiffs claim themselves to be legal heirs of Smt. Sarupi.

Jas Ram (deceased)/-----Ami Lal Bhallu(deceased)
(deceased): /----- Har Sarup (deceased)Sarupi(now Chhoto
Satyabir(deceased) (deceased)/-----Nimbo Bhateri
Jehro Rukman(deceased) :/-----Ranbir Dalbir
Ramrati(deceased)

3. Challenging the judgment and decree dated 1,3.1984, it has been averred by the plaintiffs that the same came to their knowledge just few days before the filing of the suit when they visited village Hadwa on the demise of Smt. Sarupi. Assailing the decree it has been stated that the same has been procured by fraud and impersonation. According to the plaintiffs, Smt. Sarupi neither signed nor filed any written statement in the suit filed by the defendant (now under challenge) nor she appeared or made any statement in the Court. Even otherwise, the very basis of the suit was, in fact, a made up claim as the defendant had no relation with Smt. Sarupi and thus a question of family settlement could not arrive at all.

4. Defendant vide written statement controverted the material averments made in the plaint as well as took up few preliminary objections, namely; that the suit for mere declaration without seeking possession is not legally maintainable; that the suit of the plaintiffs is bad for mis-joinder and non-joinder of necessary parties; that the plaintiffs have no cause of action against the defendants as Smt. Sarupi was absolute owner of the suit land that the suit has not been properly valued for the purposes of court fee and jurisdiction.

On the pleadings of the parties, following issues were framed:-

1) Whether the plaintiffs are the sole heirs of Sarupi deceased, if so, to what effect OPP.

- 2) Whether the impugned decree is illegal, void and not binding on the plaintiffs for the reasons given in the plaint OPP.
- 3) Whether Sarupi deceased executed a valid Will in favour of the defendant, if so, to what effect OPD.
- 4) Whether the suit is not maintainable in the present form OPD.
- 5) Whether the suit is bad for non-joinder and mis-joinder of necessary parties OPD.
- 6) Whether the plaintiffs have no cause of action OPD.
- 7) Whether the plaintiffs are estopped from filing the present suit by their own act and conduct OPD.
- 8) Whether the suit has not been properly valued OPD.
- 9) Relief.

5. Learned Sub Judge decided issue No. 1 in favour of the plaintiffs whereas issues No. 2 and 3 were decided against the plaintiffs. Issue No. 4 was decided in favour of the plaintiffs holding that they being co-sharers were deemed to be in possession of the suit and land and so a suit for mere declaration was maintainable. However, it was held that since Smt Sarupi executed a valid Will in favour of the defendant, the plaintiffs have no cause of action to file the present suit. Issue No. 5 was decided against the defendant. Issue No. 6 was decided against the plaintiffs. Issue No. 7 and 8 were decided in favour of the plaintiffs. Thus, in view of the findings under Issues No. 2 and 3 against the plaintiffs, the suit was dismissed vide judgment and decree dated 13.3.1989.

6. The lower appellate Court once again examined the matter on facts as well as on law, but found no reason to reverse the findings of the trial Court on Issues No. 2 and 3. Resultantly, the appeal too was dismissed vide judgment and decree dated 15.2.1991.

7. The appellants feeling aggrieved by the judgment and decree of the Courts below have filed the appeal challenging the same on the ground that the Courts below have either misread the evidence or guilty of ignoring the material documents on record, on which account both the judgments stand vitiated and so deserves to be set aside. According to the appellants, both the Courts below have erred in law in overlooking the material evidence with regard to the presence of Smt. Sarupi before the Court on 1.3.1984, on which date she is stated to have filed an application for preponing the date of hearing and her purported statement in the Court admitting the claim of the plaintiff (now defendant in this case). Further elaborating on this aspect of the matter, the counsel urged that even as per deposition of handwriting expert examined by Satyabir, thumb-impression upon the application for preponing the date Q8, on her statement in the Court Q7 and thumb-impression on the summons issued by the Court Q9, are not decipherable. This material evidence has just been ignored/sidetracked for no legitimate reason. Elaborating, the counsel urged, it appears quite strange that as per evidence of the expert, Smt. Sarupi's thumb-impression upon the written statement and on power of attorney tally with the standard thumb-impressions of Smt. Sarupi though these documents too were executed on 1.3.1984, yet as per material documents Q7 to Q9 no such inference can be made. On the basis of these documents, irresistible conclusion would be that somebody other than Sarupi appeared for her for preponing the date as well as admitting the claim of the plaintiff before the Court. Criticising the approach of the Courts below in this regard, the counsel highlighted the statement of Moti Ram, Clerk to Sh. B.R. Soni, Advocate, that the lady who appeared in the Court was about 50 years of age; whereas as per present plaintiffs, she was about 78 years of age, while Satyabir defendant, admitted her to be of about 73 years of age. This aspect of the matter has also not been examined either by the trial Court or by the lower appellate Court which too resulted in failure of justice. Not only this, none from the village had identified Smt. Sarupi when she appeared in the Court. Since the Courts below have ignored the material evidence, such a finding clearly stands vitiated which can be legitimately interfered with in the regular second appeal. The counsel accordingly urged that the finding in respect of issue No. 2 is liable to be reversed.

8. Challenging the finding of the Courts below with regards to the Will dated 17.9.1979 set up by the defendant as an alternative plea, it has been urged that the same is surrounded by various suspicious circumstances which have not been dispelled by the defendant. Elaborating, the counsel urged that there is evidence on record that Satyabir was present at the time of the alleged execution of the Will and thus he took an active part. A bare perusal of the Will reveals that no reasons have been assigned for disinheriting the plaintiffs-legal heirs of Smt. Sarupi. The witnesses examined by the defendant to prove the due execution of the Will have expressed their total ignorance as to its contents or that the same was read over to them after which they appended their thumb-impressions. Not only this, Surta, PW 13, one of the attesting witnesses, has deposed that the contents of the Will have neither read over to the witnesses nor the same was read over to Smt. Sarupi in their presence. According to the appellants, the Will if viewed in the context of other material on record i.e. partition proceedings initiated by Smt. Sarupi against Satyabir thereby succeeding in getting her land separated vide order dated 12.3.1979, clearly belie the assertion of the defendant that they had good relations and it is out of love and affection and without any pressure that she bequeathed her property in favour of the defendant. Both the Courts have simply glossed over this material as well. Relying upon the judicial pronouncement of the apex Court in case reported as Smt. Jaswant Kaur v. Smt. Amrit Kaur and Ors., 1977 PLJ 54, it was urged that before the Will is acted upon, the same has to satisfy the Court's conscious. A heavy onus is cast upon the propounder of the Will to explain the suspicious circumstances surrounding execution of the Will. Support was also sought from the decision of the apex Court in case reported as Gorantla Thataiah v. Thotakura Vankata Subbaiah and Ors., AIR 1968 SC 1332.

9. Counsel for the respondent in support of the conclusion of the Courts below has urged that their being concurrent findings in respect of the material issues, the same is not liable to be interfered with under Section 100 of the Code of Civil Procedure. Reliance has been placed upon the decision of the apex Court reported as Deity Pattabhiramaswamy v. S. Hanymayya and Ors., AIR 1959 SC 57; Sadhu v. Mst. Kishni, (1979) 81 PLR 577.

10. Defending the decree dated 1.3.1984 challenged in the present suit, it was urged that no case has been made out to interfere with this consent decree. According to the counsel, consent decree is as good a decree as suffered after a contest. Such a decree binds the person and his or her successor-in-interest unless and until the same can be interfered with in a subsequent suit on the ground on which contract can be set aside, namely, if obtained by fraud, impersonation or coercion etc. No material has been placed on record by the plaintiffs for the contention that a fraud has been practised upon Smt. Sarupi. Even the plea of impersonation set up by the plaintiffs has been found by the Courts below to be devoid of any substance and rightly so. Smt. Sarupi pursuant to the summons issued by the Court came present, engaged a counsel and filed written statement admitting the claim of the plaintiff. Counsel for Smt. Sarupi appeared as a witness and has deposed that he was engaged by her and as per direction, written statement admitting the claim of the plaintiff was drafted which was duly thumb-marked by her. Smt. Sarupi appeared in the Court and also deposed there as per her written statement. Referring to the objections raised by the counsel for the appellants that thumb-impressions Q8 and 09 do not tally with the standard thumb-impressions of Smt. Sarupi, it was stated that this could hardly be a ground to ignore the deposition of Mr. B.R. Soni, Advocate, DW2, or for that matter written statement filed by Smt. Sarupi. There is no material on record to suggest that a fraud had been practised upon the Court. Thus, the Courts below rightly came to the conclusion that Smt. Sarupi suffered a consent decree in favour of the defendant.

11. Justifying the conclusion of the Courts below with regard to the validity of the Will, it was stated that the scribe as well as the attesting witnesses examined by the defendant prove the due execution of the Will. Thumb-impression upon the Will tally with the standard thumb-impression. The Will was executed by Smt. Sarupi as the defendant had been rendering her help in old age and otherwise too the defendant being the sole male heir in the family, she chose to bequeath her property in his favour. In fact, as per evidence on record, it has been proved beyond doubt that Smt. Sarupi, in fact, had been living with the defendant for a number of years. In addition thereto, it was self-acquired property of Smt. Sarupi who thus could dispose of in any manner she liked, giving no cause to the plaintiffs

to challenge the valid decree or Will executed by her. Support has been sought from the decision of the apex Court in case reported as Surendra Pal and Ors. v. Dr. (Mrs.) Saraswati Arora and Anr., AIR 1974 SC 1999; and the decision of this Court in case reported as Smt. Rajeshwari Rani Pathak v. Smt. Nirja Guleri and Ors., AIR 1977 Punjab & Haryana 123.

12. I have heard learned counsel for the parties and perused the material documents as well as the statements of the witnesses referred to during the course of their submissions.

13. Before examining the respective contentions raised by the parties, it would be appropriate to deal with the preliminary objection raised by the defendant as to the maintainability of the regular second appeal. Regular second appeal is maintainable in a case which involves substantial question of law. A second appeal is not maintainable on the ground of erroneous finding of fact however gross the error may seem to be provided the same is based upon an appreciation of relevant evidence. It was so held in the decision in Deity Pattabhiramaswamy's case (Supra). However, a finding of fact can be interfered with if the same has been arrived at without considering any part of the evidence oral as well as documentary. In case it is established that the Court has by passed the material evidence, it is well within its right to examine this aspect of the matter and reverse the same if deem proper. Thus, before taking up the plea raised by the appellants seeking reversal of the finding of fact on the ground that the same stands vitiated, it is to be concluded that no such error is discernible as has been highlighted by the appellants in their submissions. Full Bench of the Calcutta High Court in case reported as Ratanlal Bansilal and Ors. v. Kishorilal Goenka and Ors., AIR 1993 Calcutta, 144, examined the precise objection in the light of various decisions of the apex Court and came to the conclusion that if there is perversity in finding of fact or that finding of fact is based on no evidence, second appeal is competent. As regards the scope of Section 100 of the Code of Civil Procedure, it has been held that a question of law affecting exclusively the rights of the parties to that case which throws up the question is also a substantial question i.e. a question of law to be substantial need not be of general importance. Referring to the decision of the three Judge Bench of the Supreme Court in case reported as Pankaj

Bharoava v. Mahainder Nath, AIR 1991 SC 1233, it was held that if the Courts below took an erroneous view of a fact and the same has been given substantial character between the parties, the question arising there from did involve a substantial character. The question directly and substantially affecting the parties would be a 'substantial question of law'. The 'decision took notice of the tests of Sir Chunilal v. Mehta, AIR 1962SC 1314.

'Thus for a question of law to assume substantiality it is enough if it affects the right of the parties. In Pankaj Bhargava (Supra), the Supreme Court has further taken the view that even a mixed question of law and fact could constitute a substantial question of law and there cannot be a strait-jacket formula for determining what question of law is a substantial one. It will depend on facts and circumstances of each case. But (he primary consideration is whether on the question depends the right of the parties in the case. This three Judge Bench of the, Supreme Court made this observation even after taking notice of the ratio of the larger Bench of the Supreme Court in Chunilal v. Mehta and sons (Supra).'

In the present context, a number of points have been urged for (he proposition that material evidence has altogether been ignored for no valid reason and that the conclusion of the Courts below on few material points is based on 'no evidence'. Thus, I find no merit in the objection of the respondent's counsel in this regard.

14. Relationship of the parties is duly reflected in the pedigree table reproduced in the earlier part of the judgment. A bare perusal of the pedigree table reveals that since Smt. Sarupi died issueless, in the absence of any decree or Will, the property, as per provisions of the Hindu Succession Act (which govern the parties) would have been inherited by the plaintiffs-appellants. Decree dated 1.3.1984 cast a cloud upon their valuable right and hence the present suit. The impugned decree is dated 1.3.1984 whereas Smt. Sarupi died on 10.3.1984. The decree has been challenged on the ground of fraud and impersonation. As per proof on record, the suit was filed on 18.2.1984 and process for summoning the defendant by registered post was issued for 22.2.1984 and thereafter to 9.3.1984. There is no evidence on record that any summons were sent by registered post or that she received such. Copy of the summons bearing her thumb-impression, Exhibit D-4,

has been placed on record by DW2 Mr. B.R. Saini, Advocate thumb-impression upon the reverse of the summons (Q9) do not tally with the standard thumb-impression of Smt. Sarupi. Similarly, thumb-impression on application for preponing the date to 1.3.1984 and her statement in the Court on 1.3.1984 (Q8 and Q7 respectively) also do not tally with the standard thumb-impression. Possibly, no explanation is forthcoming as to why the thumb-impressions upon these material documents do not compare with the standard thumb-impression and how the thumb-impressions upon the power of attorney and the written statement which was also filed on 1.3.1984 tally with the standard thumb-impression. This aspect of the matter has, in fact, material bearing upon the point in controversy. According to the present plaintiff-appellants, somebody impersonated Smt. Sarupi and for this reason her thumb-impression upon the application for preponing the date as well as for her statement in the Court and on the copy of the summons Exhibit D-4 do not tally. According to the appellants, in all probability the defendant, in fact, had procured her thumb-impressions upon a plain paper as well as power of attorney by duping her and it is on this account that her thumb-impressions upon the written statement and power of attorney tally with the standard signatures. This aspect of the matter has not been examined in all seriousness as is expected from a Judicial Officer, especially from an experienced Additional District Judge. This precisely ought to have put the Court on alert. Unfortunately, both the Courts were more impressed by the statement of Mr. B.R. Saini, Advocate, that he had been engaged by her and she had come present and deposed in the Court as per her written statement. The approach of the Additional District Judge appears to be cursory. Had he cared to examine summons Exhibit D-4 bearing her alleged thumb-impression, it would have become crystal clear that whole thing appears to have been cooked up. There is no report by the process server that service has been effected upon Smt. Sarupi. There is also no attestation by any respectable of the village/person who identified that lady. In fact, there is no mention under the thumb-impression that it is of Smt. Sarupi. Even if one looks to the statement alleged to have been made by Smt. Sarupi, it gives an impression that the Trial Court was not even in the know of the elementary procedure. Statement of Smt. Sarupi does not record her parentage or her age. The alleged statement has also not been got identified from a respectable

of the village. Even Mr. B.R. Saini, Advocate, DW2, has not certified that the lady was known to her. With this material evidence on record coupled with the statement of Moti Ram, Clerk of the counsel, the lady who appeared on 1.3.1984 was about 50 years of age, lends credence to the version of the plaintiffs that a lady other than Smt. Sarupi came present on 1.3.1984. This material evidence has been simply glossed over by the Courts below. Since the statement made by Smt. Sarupi is not proved to bear her thumb-impression, I am of the view that the decree had been procured by practising fraud impersonation upon the Court. Thus, I reverse the finding of the courts below on issue No. 2.

15. Will dated 17.9.1979 has been set up by the defendant as an alternative plea. Execution of the Will is proved by the statement of the scribe DW3 Shiv Kumar and its attesting witnesses, namely, DW4 Baru, DW5 Tara Chand, DW6 Ram Kishan and PW 13 Surta. Despite the execution of the Will, it is upon the propounder of the Will to prove by satisfactory evidence that the Will was signed by the testator; that the testator at the relevant time was in the state of sound mind; that he understood the nature and effect of the deposition and put his signatures on the document on his own free Will. In case, there are suspicious circumstances surrounding the execution of the Will, the same too have to be dispelled with by the propounder. The fact that propounder had taken an active part in the execution of the Will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstances attending the execution of the Will and the propounder is required to remove the said suspicion by clear and satisfactory evidence.

16. The apex Court in Jaswant Kaur's case (Supra) relied upon the decision of the apex Court in case reported as H. Venkatachala Iyengar v. Thimmajamma and Ors., AIR 1959 SC 443 and put in the conclusion in the form of propositions which reads as under:-

'(1) Stated generally, 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, 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 could 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 therefore, in case where the circumstances attendant upon the execution of the Will excite the suspicion of the Court, the propounder must remove all legitimate suspicious circumstances 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 when it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.'

The appellants highlighted the following as suspicious circumstances (i) active part played by Satbir - a beneficiary at the time of execution of the Will; (ii) no reason has been assigned for disinheriting the plaintiffs who were legally entitled to succeed as per provisions of the Hindu Succession Act; (iii) Statements of the witnesses that they have no knowledge of the contents of the Will nor the same was read over to them; and (iv) the language of the Will. Surta PW13 an attesting witness of the Will has deposed that the contents of the Will were not read over to him and Satyabir made me thumb-mark the Will. He further stated that Smt. Sarupi though was present at that time, but she did not put her thumb-impression in his presence. He has further stated that the contents of the Will were not read over to her. Even with regard to the thumb-impressions of other witnesses, he has stated that they had already affixed their thumb-impressions before he came present. Significantly, this witness has not been cross-examined with regard to the above noted statement relating to the presence of Satyabir, his active role in the execution of the Will and that the contents of the Will were not read over to him nor Smt. Sarupi or other witnesses thumb-marked in her presence. Tara Chand, DW5, another witness had deposed that he neither understands Urdu, Hindi or English. He has also stated that he does not know the language in which the petition writer wrote this document. To somewhat similar effect is the statement of Ram Kishan DW6. On perusal of the Will, it is clear that no reason has been assigned for disinheriting the legal heirs. Except for the oral evidence there is no documentary evidence on record to prove that Smt. Sarupi had been residing with Satyabir who had also been looking after her in her old age. The decisions of this Court as well

as the apex Court are quite consistent that it is propounder who had to explain the suspicious circumstances surrounding the Will, especially when he was present at the time of the execution of the Will and also took an active part. In the present case, no explanation is forthcoming. The Will if examined in the context of earlier litigation between Smt. Sarupi and Satyabir ultimately leading to partitioning of their joint holding vide order dated 12.3.1987 further raises an element of doubt that the Will was executed under pressure. Had relations between the parties been cordial as stated by the defendant, there could hardly be any ground for partitioning of the joint khewat. There is no clear evidence on record that Smt. Sarupi and Satyabir had been residing together. In fact, as per copy of the ration card adduced in evidence by the plaintiffs, member/members named belonging to the plaintiffs family are shown in the ration cards.

17. No doubt, both the Courts after appraising evidence have decided the issue with regard to the validity of the Will in favour of the defendant. All the same, this Court, for the reasons noticed above, is not precluded from examining the matter even when the findings are concurrent. In case reported as Ram Piari v. Bhagwant and Ors., (1990-1) 97 P.L.R. 639, the apex Court chose to reverse the decision of the three Courts below as no cogent reasons were assigned while disinheriting the daughter. The apex Court held as under:-

'...Even though it cannot be said to be hard and fast rule yet when dis-inheritance is amongst heirs of equal degree and no reason for exclusion is disclosed, then the standard of scrutiny is not the same and if the courts below failed to be alive to it as is clear from their orders then their orders cannot be said to be beyond review...' Facts of the present case are bit better. Plaintiffs alone were entitled to succeed to the estate of Smt. Sarupi. Since the defendant has failed to dispel the suspicious circumstances surrounding the execution of the Will, I have no hesitation in reversing this finding of the Courts below as well.

Resultantly, I accept the appeal, set aside the judgment and decree of the Courts below and decree the suit of the plaintiff as prayed for. The parties, however, will bear their own costs.

