

Soma Devi Vs. Guln Devi and ors.

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Court : Himachal Pradesh

Decided On : Mar-13-2003

Reported in : AIR2003HP158

Judge : M.R. Verma, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 18, Rules 17 and 17A; ;
[Evidence Act, 1872](#) - Section 73; ;[Specific Relief Act, 1963](#) - Section 34

Appeal No. : Civil Revn. No. 292 of 2001

Appellant : Soma Devi

Respondent : Guln Devi and ors.

Advocate for Def. : Romesh Verma, Adv.

Advocate for Pet/Ap. : R.K. Bawa, Sr. Adv. and; Sudip Singh, Adv.

Judgement :

ORDER

M.R. Verma, J.

1. This revision petition under Section 115 of the Code of Civil Procedure (hereafter referred to as 'the Code') is directed against the order dated 31-8-2001 passed by the learned sub Judge, Anni whereby an application of the

petitioner/defendant (hereafter referred to as 'the defendant') under Order 11 Rule 12. Order 18 Rules 17. 17A of the Code and Section 73 of the Indian Evidence Act in Civil Suit No. 32 of 2000 has been dismissed.

2. Brief facts leading to the presentation of this revision petition are that the respondents/plaintiffs (hereafter referred to as 'the plaintiffs') have instituted a suit for declaration that the Will dated 31-12-1997 executed by late Paras Ram in their favour is legal and valid and they are entitled to inherit the estate of the said deceased and the order of the Sub Registrar. Anni rejecting the Will is illegal and without jurisdiction and the defendant has no right to succeed to the estate of the deceased. The suit was contested by the defendant denying the execution and validity of the said Will and claimed to be entitled to have succeeded to the estate of the deceased on the basis of the Will dated 24-11-1997. The evidence of the parties in the suit was concluded on 26-7-2001 and the suit was fixed for final arguments on 16-8-2001. However, on 16-8-2001 the aforesaid application was moved by the defendant. It was averred in the application that she had earlier filed an application under Section 73 of the Evidence Act seeking comparison of the signatures of the testator of the Will in suit with his admitted signatures on a gift deed but the said application was not pressed as it was found that the gift deed was not signed but was thumb marked as the testator was illiterate at that time and thus the signatures could not be compared. However, the testator later learnt signing papers and his signatures are on acquittance rolls, leave applications, medical certificates, nomination form etc, in possession of the Executive Engineer, HP. PWD. Nirmand where the testator worked as a workcharge Beldar. It is further averred that plaintiff Guin Devi had reported the death of the testator to the Patwari on 21-3-1998 and at that time he had not disclosed about the execution of the alleged Will. Thus the said report and the statement of the concerned Patwari is material evidence in the case. It is also claimed that the defendant has denied the signatures of the testator on the Will by taking a specific plea but the witnesses of the plaintiffs were not cross-examined on these lines, therefore, further cross-examination of PW 2 to PW 4 is also essential. On the strength of these facts as averred in the application, it has been prayed that the aforesaid documents signed by the testator lying in possession of the Executive Engineer be called for and along with the disputed signatures sent to the Government Examiner of

Questioned Documents for comparison and opinion, that the Patwari and the report aforesaid be summoned and PW 2 to PW 4 may be re-called for further cross-examination.

3. The plaintiffs resisted the application on the grounds that the earlier application of the defendant seeking comparison of the signatures of the testator with the admitted signatures on a gift deed stood dismissed on merits and the order dismissing the same was not assailed in any manner, therefore, such order has become final, The existence of signature of the testator in the documents as alleged in the application have been denied for want of knowledge and that such comparison is not required because of the direct evidence having been led about the execution of the two Wills set up by the parties. The other averments in the application have been denied and it has been claimed that the present application which has been filed at the stage of final arguments, is a device to prolong the disposal of the suit and pressurise the plaintiffs to give up their legitimate claim.

4. After hearing the parties, the learned trial Judge dismissed the application by the impugned order, Hence, this petition.

5. I have heard the learned counsel for the parties and have also gone through the records.

6. One of the prayers in the application is for leading additional evidence by way of production of report dated 21-3-1998 and the concerned Patwari in evidence. Before the recent amendment of the Code of Civil Procedure, a party to a suit could be allowed to lead additional evidence if it satisfied the Court that after due diligence such evidence was not within its knowledge and, therefore, could not be produced at the time of leading its evidence. It is not the case of the defendant that when she led the evidence, the evidence now sought to be produced, was not within her knowledge and could not be produced despite due diligence. The reason for non-production of such evidence at the relevant time is that it could not be produced due to inadvertence. Inadvertence is a form of negligence, therefore, non-production of the evidence sought to be now produced, is attributable to negligence and failure to produce such evidence because of inadvertence/negligence, is not a lawful ground to permit a party to lead additional

evidence within the ambit and scope of Rule 17 A of Order 18 of the Code as it stood before amendment.

7. The other prayer has been made for recalling of the witnesses examined by the plaintiffs for their further cross-examination on the ground that at the time of their cross-examination by the defendant earlier, they could not be cross-examined about her plea that the signatures on the Will dated 31-12-1997 are not those of the testator. As per the contents of the application, this lapse has also been attributed to inadvertence. The Court has powers to recall and examine the witnesses under Rule 17 of Order 18 of the Code. It is not the case of the defendant that she had no opportunity to cross-examine the witnesses of the plaintiffs. In fact the witnesses were cross-examined by her counsel. It has to be borne in mind that the powers of the Court under the rule are discretionary and has to be exercised with great care and only in exceptional circumstances to prevent failure of justice.

8. A perusal of the statements of PWs. 2 to 4 reveals that it has been suggested to all of them that the Will in favour of the plaintiffs was forged. Thus, the plea that the Will in question does not bear the signatures of the testator has already been suggested to these witnesses in their cross-examination. Thus, there is no reason to exercise the discretionary powers of recalling the witnesses within the scope of Rule 17 of Order 18 of the Code.

9. The last prayer in the application is for summoning certain documents allegedly signed by the testator and lying in the office of the Executive Engineer and sending them to the Government Examiner of Questioned Documents for comparison with the disputed signatures. The Court has power to order comparison of the signatures/writings under Section 73 of the Evidence Act.

10. Section 73 of the Evidence Act reads as follows :

'73. Comparison of signature, writing or seal with others admitted or proved. In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by

that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This Section applies also, with any necessary modifications, to finger impressions.'

11. It is first part of the Section underwhich the defendant has prayed for comparison of the signatures. It is evident on abare reading of the aforesaid provisions thatit provides for comparison of signatures, writing etc. purporting to have been written/made by a person With such other documents in which the signatures/writing isadmitted or proved to the satisfaction of theCourt, Therefore, the genuineness of thedocuments with which comparison is to be made must be established to the satisfaction of the Court and it must have been admitted or proved to have been written/signedby the person with whose disputed writing/signatures it is to be compared.

12. In the case in hand, the alleged signatures on the documents mentioned in theapplication have not been admitted by theplaintiffs. The defendant has not taken stepsto prove their genuineness. Therefore, thetrial Court has rightly refused to get the signatures on such documents and the disputed signatures compared.

13. It may also be pointed out here that an application under Section 73 of the Evidence Act was earlier moved by the defendant for comparison of the disputed signatures on the Will with the allegedly admitted signatures of the testator on a gift deed. The defendant claims that such application was not pressed by her because the gift deed was not signed by the testator but it was thumb marked. This averment in the application is unfounded and incorrect. The application earlier moved by the defendant was opposed by the plaintiffs and was dismissed by the trial Court vide order dated 18-6-2001 not because this application was not pressed or that the gift deed, was not signed by the testator and was thumb marked but for the reason that it was the duty of the plaintiffs to prove the Will dated 31-12-1997 to be free from blemish and suspicious circumstances.

Therefore, there was no need to get the signatures in the two Wills in the suit compared with the gift deed and thus the application was found without any merit and was dismissed. This order was never challenged by the defendant. Thus, relying on false allegations to seek the aid of Section 73 of the Evidence Act, the defendant's act in making the application at a highly belated stage cannot be said to be bona fide and lends credibility to the case of the plaintiffs that she is indulging in delaying tactics.

14. For the reasons stated hereinabove, none of the prayers made by the defendant in the application deserved to be allowed and have been rightly rejected by the learned trial Judge. Therefore, the impugned order does not call for any interference by this Court.

15. As a result, this revision petition is dismissed. Parties, however, are left to bear their own costs of this petition.

16. Parties, through their learned counsel, are directed to appeal before the trial Court on 10-4-2003.