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Court : Himachal Pradesh

Decided On : Apr-17-2002

Reported in : AIR2004HP26

Judge : Kuldip Chand Sood, J.

Acts : Succession Act, 1925 - Section 63; ;Evidence Act, 1872 - Section 68; ;Code of Civil Procedure (CPC),1908 - Section 100

Appeal No. : R.S.A. No. 290 of 1999

Appellant : Sito

Respondent : Amar Nath and ors.

Advocate for Def. : Anand Sharma and Tarlok Chauhan, Jagdish Thakur and Ramesh Sharma

Advocate for Pet/Ap. : Naresh Kumar Thakur, Adv.

Disposition : Appeal dismissed

Judgement :

Kuldip Chand Sood, J.

1. Plaintiff-appellants Sito Devi and Chaino having lost before the trial Court and first appellate Court are in second appeal under Section 100 of the Code of Civil

Procedure.

2. In order to appreciate the controversy, few facts may be noticed :

Beli Ram was the owner of the land, subject-matter of dispute, to the extent of 1/3rd share. Beli Ram died in the year 1992, leaving behind his two daughters-plaintiffs-Sito Devi and Chaino. After his death, defendant-respondent-Amar Nath set up a Will. Mutation of inheritance of the share of Beli Ram, in the suit property, was attested in favour of the contesting defendant on 14th May, 1992. Plaintiffs on 28th June, 1994 brought a suit against the defendant claiming that the Will set up by him was invalid and forged. The Will, impugned, does not effect the right, title and interest of the plaintiffs over the disputed property. The defendants were also sought to be permanently restrained from interfering in the peaceful ownership and possession of the plaintiffs. In the alternative, it was prayed that if defendants are dispossessed, during the pendency of the suit, then a decree for possession may be passed in their favour.

3. It was the case of the plaintiffs that the property in dispute was ancestral in nature and the same could not have been bequeathed by Beli Ram and that the impugned Will in any case was result of undue influence as Beli Ram was of weak mind and not in a sound and disposing mind at the time of the execution of the Will.

4. Defendant-Amar Nath resisted the suit. Allegations were controverted. According to the defendant, he used to serve Beli Ram. Beli Ram was pleased with the services rendered by him and, therefore, Beli Ram executed the Will in question in his favour. It was pleaded that Beli Ram was of sound disposing mind at the time of the execution of the Will. Defendant further pleaded that Beli Ram was a 'Gaddi' by caste and under the custom, by which Beli Ram was governed, married daughters are not entitled to inherit the property left by their father.

5. On the pleadings of the parties, several issues were settled by the learned trial Court. The plea of the plaintiffs that the suit property was ancestral in nature was negatived. This plea, in fact, was not pressed by the plaintiffs. Similarly, plea set up by defendant-Amar Nath that under the custom, by which Beli Ram was

governed, married daughters were excluded from inheriting the property of their father too was not pressed before the trial Court. Learned trial Court concluded that a valid Will was executed by Beli Ram in favour of defendant-Amar Nath and in view of the Will executed by Beli Ram, plaintiffs were not entitled to succeed to the property of deceased-Beli Ram.

6. The Will was contested on the grounds that it is shrouded by suspicious circumstances and the suspicious circumstances surrounding the execution of the Will have not been removed by the defendant-Amar Nath. The suspicious circumstances urged on behalf of the plaintiffs were :

a) The beneficiary took active part in the execution of the Will;

b) The Will does not disclose the reasons for disinheriting the natural heirs;

c) Beli Ram was not in a sound disposing mind at the time of the execution of the Will.

7. Both the learned trial Court and first appellate Court rejected the objections raised by the plaintiffs and held that the suspicious circumstances enumerated by the plaintiffs are untenable or non-existent.

8. This appeal was admitted on 10th September, 1999 without framing any substantial question of law.

9. Having heard the learned counsel for the parties, the following substantial question of law arises for consideration :

'Whether the Will in question is shrouded by suspicious circumstances which have not been dispelled by the defendant beneficiary?

10. Mr. Naresh Kumar Thakur, learned counsel for the appellants submitted that the Will in question is shrouded by the suspicious circumstances which rendered due execution of the Will improbable. The circumstances detailed by the learned counsel are :

a) defendant-beneficiary took active part in the execution of the Will;

b) the natural heirs have been disinherited without any reasons and there is no mention in the Will as to why the natural heirs were excluded.

11. So far the question of active participation by defendant-Amar Nath, in the execution of the Will, is concerned, it is true that the defendant-Amar Nath admitted in his deposition before the Court that he had accompanied the testator to Chamba for the execution of the Will. He also admitted that both the witnesses Devo and Dumnu were brought by him and it was he who paid Rs. 150/- to the scribe of the Will as his fees.

12. Mr. Thakur, relying upon Ramchandra Rambux v. Champabai, AIR 1965 SC 354, submits that the very fact of the propounder has taken a prominent part in the execution of the Will renders the Will open to doubt, particularly when such doubt still persist and has not been removed by any cogent evidence on record.

13. There is evidence on record, as noticed by the learned District Judge, to show that Beli Ram was living with the defendant who was looking after him and, therefore, it was not unnatural for the defendant to have taken Beli Ram to Chamba for the execution of the Will. It was also not unnatural for the defendant to have paid the fees of the petition writer for scribing the Will particularly when Beli Ram was dependent on the defendant. Merely because the beneficiary was present at the time of the execution of the Will or he accompanied the testator for the execution of the Will would not show that undue influence was exercised by the beneficiary in the execution of the Will. Moreso, when the Will was registered on the same day and the endorsement of the Sub-Registrar shows that the contents of the Will were read over and explained to the testator, who admitted the contents to be correct. (See Tirath Singh v. Sajjan Singh (died) trough his LRs., 1998 (1) SLJ 232).

14. In Gun Parkash v. Bhola Nath. AIR 1997 HP 27 the Will was scribed in the presence of the family members of the beneficiary. The testator was an old lady and natural heirs were deprived by her. In this context it was observed :

'No doubt, presence of the family members of the defendants has been stated to be there by the plaintiffs witnesses, but that by itself will not make the Will

suspicious unless something more than this established. The Will in question in the instant case, is a registered and the deceased was identified by an Advocate before the Sub-Registrar. Simply because the testator was an old lady and natural heirs have been deprived by her is not by itself suspicious circumstance to discard the Will.'

15. Similarly, the payment of fees to the petition writer by the beneficiary will not render the Will to be forged and non-genuine.

16. So far the question of plaintiffs having been disinherited by the Will is concerned, the law is now well settled. The Supreme Court in Rabindra Nath Mukherjee v. Panchanan Benerjee, AIR 1995 SC 1684 observed that deprivation of natural heirs by the testator should not raise any suspicion. Their Lordships observed :

'. . . . .The whole idea behind execution of will is to interfere with the normal line of succession. So natural heirs would be debarred in every case of will of course, it may be that in some case they are fully debarred and in others only partially.'

17. The perusal of Will Ex. DW 4/A shows that while executing the Will testator Bell Ram took note of the fact that his two daughters were married and he had no son. The Will also recite that defendant-Amar

Nath was living with him and looking after him and, therefore, he was executing the Will in his favour. In the circumstances the fact that the plaintiffs, the daughters of the testator, were disinherited by the Will in dispute would not to be a suspicious circumstance to invalidate the Will.

18. Lastly, Mr. Thakur contended that the due execution of the Will has not been proved in this case. He particularly referred to the testimony of Dumnu (D.W. 3). He submitted that though he was a marginal witness yet the Will was put to him. He also admitted that he was not aware of the contents of the Will. True it is, however, a careful reading of his testimony shows that it was Amar Nath who was looking after Bell Ram testator and got him medically treated at Chamba. Merely because he was not told about the contents of the Will either by the petition writer

or Beli Ram would not invalidate the Will, when Devo Ram, the other marginal witness (D.W. 4) categorically stated that the Will was scribed by the petition writer Anand Sagar at the instance of Beli Ram. It is the evidence of Devo Ram that the contents of the Will were read over and explained to Beli Ram and Beli Ram after admitting the contents to be correct thumb marked the same. It is his evidence that at that time, he, Amar Nath and Dumnu were present and he signed the Will Ex. DW 4/A as witness. It is his further evidence that thereafter they went to Tehsil to get the Will registered and Advocate P.C. Sharma identified Beli Ram before the Sub-Registrar. In cross-examination he denied the suggestion that Beli Ram was not of sound disposing mind.

19. It may be noticed that neither the provisions of Section 63 of the Indian Succession Act nor Section 3 of the Transfer of Property Act provide for a particular mode of the attestation of the Will but as required under Section 68 of the Indian Evidence Act, at least one of the attesting witnesses should be examined to prove the 'due execution' of the Will. It is the duty of the propounder of the Will to prove, by satisfactory evidence, that the attesting witnesses saw the testator signing or thumb marking the Will or obtained an acknowledgment of the signatures or mark or the signatures of such other person from the testator and the witnesses themselves signed the Will in the presence of the testator. In other words, for valid attestation of the Will, the following conditions must be fulfilled :

(a) The Will must be attested by at least two witnesses;

(b) Each of these :

(i) must either see the testator sign or affix his mark to the Will or must see some other person sign the Will in the presence and by the direction of the testator, or

(ii) must receive from the testator a per sonal acknowledgment of his signature or mark or of the signature of such other per son;

(iii) each of these must sign the Will;

(iv) they must sign in the presence of the testator.

20. Needless to say that if any of these four conditions is not satisfied, the attestation is bad and the Will invalid.

21. I have already noticed that one of the attesting witnesses Devo Ram (DW 4) has stated in no ambiguous term that the Will was attested by two witnesses; namely; himself and Dumnu and he signed the Will in the presence of the testator and testator also signed the same in the presence of both the witnesses after the contents were read over and explained to the testator by the petition writer and testator admitted the contents to be correct.

22. It is true that the conscience of the Court has to be satisfied that the Will in question was not only executed and attested as required by law, but also that the Will was result of free volition of the executant and if there are any suspicious circumstances surrounding the Will it is the duty of the propounder of the Will to dispel those suspicious circumstances.

23. Both the first appellate Court and the trial Court, in the present case, concluded that the Will has freely been executed by Beli Ram by recording sufficient reasons.

24. The question, whether the Will can be believed or not, in my view, is not a question of law and, therefore, the High Court will not reappraise the evidence to ascertain whether the Will should be believed or not.

25. In Nalinakshi N. Rai v. Indira Shetty (1999) 9 SCC 248 : (2000 AIR SCW 1916) the Apex Court observed :

'The question that is involved in the second appeal is whether the Will executed by Babu Shetty in favour of Narayana of his 1/4th share under Ex. D-1 can be believed or not.'

'Such a question is not a question of law much less a substantial question of law.'

26. In my view, it is not within the jurisdiction of this Court, under Section 100 of the Code of Civil Procedure, to investigate the grounds on which the findings of fact were arrived at by the last Court of fact i.e. first appellate Court. Even in a

case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate Court would be binding on the High Court in second appeal. The High Court cannot substitute its own opinion for the opinion of the first appellate Court unless it is found that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law or based on no evidence. Such is not the position.

27. The conclusion arrived at by the trial Court as affirmed by the first appellate Court, in the present case, cannot be said to be dehors the evidence on record.

28. The substantial question of law raised by the plaintiff-appellants is non-existent. There is no merit in this appeal, the same is dismissed. The parties shall bear their own costs.

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