Dayashankar and Others Vs. Jaishankar Since Deceased Through His Legal Representatives and Others

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Court : Chhattisgarh

Decided On : Nov-22-2011

Judge : N. K. Agarwal

Appeal No. : FA No 201 of 2004

Appellant : Dayashankar and Others

Respondent : Jaishankar Since Deceased Through His Legal Representatives and Others

Judgement :

(FIRST APPEAL UNDER SECTION 96 OF CIVIL PROCEDURE CODE)

1. This is defendants' first appeal under Section 96 of the Code of Civil Procedure (for brevity `the C.P.C.') against the judgment and decree dated 21.09.2004 passed in Civil Suit No. 18-A/2002 by the 4th Additional District Judge (F.T.C.), Raigarh whereby and whereunder the plaintiff's suit has been decreed.

2. During the pendency of the appeal, appellant No.2 - Chandra Sekhar and respondent No.1/plaintif have died and their legal representatives were brought on record.

3. Facts of the case in brief are as under:-

(i) The original plaintiff (since deceased) filed a civil suit for declaration of his title over the suit property i.e. house described in Schedule-A, situated at Raigarh and agricultural lands situated at village Sahaspur, Tahsil Sarangarh, total area 2,631 hectares described in Schedule-B, for recovery of possession of the house property, described in Schedule-A and for permanent injunction to restrain defendants from interfering in his possession over the agricultural lands described in Schedule-B of the plaint, inter alia on the grounds: the suit property was self-earned property of late Samaru Ram i.e. his father, who bequeathed the suit property in plaintiff's favour vide registered Will deed (Ex.P.1) dated 06.03.1986. Samaru Ram died on 23.01.1994 at Sarangarh. Thereafter, on the strength of aforesaid Will, the plaintiff became absolute owner of the suit property and also got his name mutated in the revenue records.

(ii) According to the plaintiff, the original defendants - Dayashankar and Chandra Sekhar are the sons of late Samaru Ram from his second wife. The plaintiff and his father late Samaru Ram were residing in the house situated in front of Sarangarh hospital whereas the appellants were residing with their mother in the house situated at Beerpara, Sarangarh. The original defendants (hereinafter referred to as 'defendants') obtained his signature forcibly on a blank stamp paper and got their names mutated in the revenue records along with the plaintiff and started disputing plaintiff's title. As per the plaintiff, on the basis of genuine and valid registered Will deed dated 06.03.1986, he became the absolute owner of the suit property.

(iii) The defence, in a nutshell, to the suit inter alia is that the suit property was not self-earned property of late Samaru Ram but was purchased from joint income of late Samaru Ram and defendants and is their joint family property; late Samaru Ram had no authority to execute the Will in plaintiff's favour; the alleged Will is forged and fabricated and does not confer any title on the plaintiff and suit is liable to be dismissed.

(iv) According to the defendants, late Samaru Ram, in order to maintain peace between his two wives i.e. Nanki Bai @ Saili Bai and Nanbai, affected partition in his lifetime and allotted 5 acres of land situated in village Sahaspur and a house

situated at Beerpara in favour of original defendants and their mother and allotted 1 1/2 acre of land and house situated at Jailpara to plaintiff's mother Nanbai @ Saili and started living with her separately.

(v) The learned trial Court, after framing issues, recorded the evidence of parties.

(vi) The learned trial Court, vide impugned judgment decreed the plaintiff's suit finding inter alia: the Will (Ex.P.1) is a genuine and valid document; suit property was not partitioned between the parties by late Samaru Ram during his lifetime; the suit property is self-earned property of late Samaru and is not their ancestral property. The plaintiff became absolute owner of the property, on the strength of said Will dated 6.3.1986.

4. Shri Ratan Pusty, learned counsel appearing for the appellants would submit: the Will deed is not genuine document; was got executed by the plaintiff in his favour taking disadvantage of late Samaru's old age and infirm; has not been proved in the manner, as required by Section 68 of Indian Evidence Act, 1872 (henceforth 'the Act of 1872) and Section 63 (c) of the Indian Succession Act, 1925 (henceforth the Act of1925'); role of attesting witness No.2 Jitendra Kumar Mishra is shrouded with mystery; statement of propounder i.e. plaintiff (P.W.1) with regard to execution of attestation of the Will is contradictory to the statement of Tungbhadra Singh (P.W.2); the evidence of Tungbhadra Singh (P.W.2) falls short of requirement of Section 63 (c) of the Act of 1925 inasmuch as in his evidence, he nowhere says that either Jitendra Kumar Mishra had ever seen the testator signed or affixed his mark to the Will or said Jitendra Kumar Mishra had signed the Will in the presence of the testator; mere presence of both the witnesses is not sufficient to discharge the burden laid upon the propounder of the Will by Section 63 (c) of the Act of 1925 unless it is proved that each of them had seen the testator signing the Will and thereafter had also put their signature either conjointly or separately in the present of testator. It was further contended, the second attesting witness Jitendra Kumar Mishra had not supported the case of the plaintiff. In para - 6 of the cross-examination, he had specifically denied the suggestion put to him and had denied to have signed in presence of late Samaru.

5. As per Mr. Pusty, the Will deed (Ex.P.1) is also invalid and shrouded by the following unexplained suspicious circumstances:

The Will suffers from incorrect recital

i. of essential facts.

Nothing has been given to defendants

ii who are also legal representatives of late Samaru Ram, which is quite unnatural.

iii Plaintiff himself took a prominent part

i. in the execution of the Will.

iv The testator was too old and infirm and the plaintiff was in a position to dominate his Will.

6. On the other hand, Shri H.S. Patel, learned counsel appearing for the legal representatives No.(i) to Ivi) of deceased/respondent No.1 supported the judgment and decree and submitted: the trial Court, after appreciating the entire evidence and material brought on record by both the parties in its proper perspective, has passed the judgment and decree, which deserves to be upheld.

7. I have heard learned counsel for the parties, perused the judgment and decree impugned including the record of the trial Court.

8. Indisputably, the suit property was purchased in the name of late Samaru Ram vide various registered sale deeds. The defendant - Chandra Sekhar was not even born (as per statement of Chandra Sekhar [D.W.1]) whereas defendant Dayashankar was minor inasmuch as the property was purchased by late Samaru between 1946 to 1957. The fact that late Samaru affected partition and allotted 5 acres of land and one house to the defendants and their mother is also not correct. Chandra Sekhar (D.W.1) himself, in para 31 of his statement, has admitted, they were living in the house situated at Beerpara with the consent of late Samaru and after his death with the consent of plaintiff late Jaishankar.

9. The real controversy in the instant case revolves around the question whether or not, in the facts and circumstances of the case, the Will deed (Ex.P.1) was executed and proved in the manner, as required by Section 63 (c) of the Act of 1925 and the Act of 1872 and whether or not the Will is surrounded by such circumstances which makes it invalid and ingenuine.

10. Section 63 of the Indian Succession Act, 1925 (for short `the Act of 1925') and Section 68 of the Indian Evidence Act, 1872 (henceforth `the Act of 1872') read as under:

"63. Execution of unprivileged Wills.--

Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person, and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

"68. Proof of execution of document required by law to be attested.---If a document is required by law to be attested, it shall not be used as evidence until 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:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]"

11. Section 63 of the Act of 1925 lays down the mode and manner of execution of an unprivileged Will. Section 68 of the Act of 1982 postulates the mode and manner and proof of execution of document, which is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive and subject to the process of the court and capable of giving evidence. Will being a document has to be proved by primary evidence except when the Court permits a document to be proved by leading secondary evidence.

12. The burden of proof that the Will has been validly executed in terms of Section 63 of the Act of 1925 and is a genuine document is on the propounder. The propounder is further required to remove the suspicion by leading sufficient and cogent evidence, if there exists any. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document.

13. The Supreme Court, in the case of Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria and Ors., 2009 AIR SCW 828, has held in para - 16: Section 68 of the Act of 1872 gives a concession to those who want to prove and establish a Will in a Court of law by examining at least one attesting witness even though Will has to be attested at least by two witnesses mandatorily under Section 63 (c) of the Act of 1925. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a Will. To put in other words, if one attesting witness can prove execution of the Will in terms of Clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence, has to satisfy the attestation of a Will by him and the other attesting witness in order to prove there

was due execution of the Will.

14. The Supreme Court, in the case of Bharpur Singh and Ors. v. Shamsher Singh, 2009 AIR SCW 1338, has held in para - 11 as under:

"11. The legal principles in regard to proof of a will are no longer res integra. A will must be proved having regard to the provisions contained in clause (c) of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, in terms whereof the propounder of a will must prove its execution by examining one or more attesting witnesses. Where, however, the validity of the Will is challenged on the ground of fraud, coercion or undue influence, the burden of proof would be on the caveator. In a case where the Will is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator."

15. The Supreme Court, in the case of Savithri and Ors. v. Karthyayani Amma and Ors., 2007 AIR SCW 6787, has held in para - 15 of its judgment as under:

"15. We may, however, notice that according to the appellants themselves, the signature of the testator on the Will was obtained under undue influence or coercion. The onus to prove the same was on them. They have failed to do so. If the propounder proves that the Will was signed by the testator and he at the relevant time was in sound disposing state of mind and understood the nature and effect of disposition, the onus stands discharged. For the aforementioned purpose the background fact of the attending circumstances may also be taken in to consideration."

16. A Division Bench of Patna High Court, in the case of Dulhin Ful Kueri and another v. Moti Jharo Kuer, AIR 1972 Patna 214, has held in para - 2 of its judgment:

"Signatures of witnesses at the end or somewhere on the instrument are sufficient to show, without any explanation, that the witnesses put their signatures by way of saying that they had seen the document being executed and had received an acknowledgement. It is not necessary for them to state on the document that they

put their signatures in presence of the testator."

17. The Supreme Court in the case of Madhukar D. Shende v. Tarabai Aba Shedage, (2002) 2 SCC 85 has held: the law of evidence does not permit the conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict - positive or negative and observed in paragraphs 8 and 9 as under:

"8. The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and way layers. What was told by Baron Alderson to the Jury in R v. Hodge 1838, 2 Lewis CC 227 may be apposite to some extent :

"The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

The conscience of the court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a

will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict positive or negative.

“9. It is well-settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance."

18. Plaintiff examined attesting witness Tungbhadra Singh (P.W.2). The witness Tungbhadra Singh (P.W.2), in his deposition para - 2, has stated: the Will deed was executed and registered in his presence. The Will was earlier read over by document writer Upendranath Mishra to late Samaru Ram. After finding it proper, late Samaru signed the Will in his presence. Thereafter, he and Jitendra Kumar Mishra put their signatures over the Will deed as witnesses. Further, he has deposed in para -3, at the time of execution of the Will, late Samaru was in sound disposing state of mind and the Will was executed by him at his free own will without any pressure. In para - 4, he proved the signature testator, his signature and signature of other attesting witnesses - Jitendra Kumar Mishra. Indisputably, as per his statement, late Samaru, Jitendra Kumar Mishra and P.W.2 Tungbhadra

Singh, all were present and have signed the Will at the same time. Merely because technically it has not been stated that Jitendra Kumar Mishra has also signed the Will not only in his presence but also in the presence of testator late Samaru, when no question was asked from him to that effect, it cannot be said that the execution of Will falls short of Section 63 (c) of the Act of 1925.

19. Further, although a suggestion has been put by the appellant to Tungbhadra Singh (P.W.2) i.e. attesting witness that he and Jitendra Kumar Mishra, in collusion with propounder Jaishankar, have prepared a false Will but appellants themselves have examined Jitendra Kumar Mishra as their witness as D.W.3, who himself has admitted his signature over the Will deed (Ex.P.1) in the presence of document writer and Tungbhadra Singh (P.W.2). Although he has said that Tungbhadra Singh (P.W.2) introduced him with late Samaru, as evident from cross-examination para -2 of his statement, but the same is not correct, in view of his statement para - 1 wherein he has admitted that he knows Samaru Mehar, he was having two wives and three sons Jaishankar, Dayashankar and Chandra Sekhar. Further, he has stated, he knows Chandra Sekhar since 2 - 3 years. Here it is to be noted that the suit was filed in the year 1996, the statement of Tungbhadra Singh (P.W.2) was recorded in the year 2003 and statement of Jitendra Kumar Mishra was recorded in the year 2004. Jitendra Kumar Mishra has also admitted, he has not denied that he has not put his signature before the Registrar or late Samaru has not signed the Will deed or the Will is forged one.

20. The Will is registered one. Chandra Sekhar (D.W.1) has stated in para - 24 of his statement that after death of his father i.e. Samaru, the land situated in village Sahasput was mutated in the name of plaintiff - Jaishankar on the basis of Will and this fact was made known to him by the plaintiff. In para - 23, he has stated that he has heard that his father has executed a Will deed but whether it is correct or incorrect, he was not aware and he was also not aware that his father has registered the Will with Sub-Registrar, Sarangarh. In para - 27, he has admitted, his father was suffering from illness. Nowhether, he has denied the fact that the Will deed (Ex.P.1) bears the signature of late Samaru. On the contrary, they tried to rely upon inadmissible document (Ex.D.1), alleged to be partition deed, executed by Jaishankar. A bare perusal of above document would reveal: the

property was bequeathed by late Samaru in favour of plaintiff - Jaishankar.

21. The above facts, when examined in the light of judgment rendered by the Supreme Court in the case of Madhukar D. Shende (supra), it is crystal clear that the plaintiff has successfully proved the due execution of the Will (Ex.P.1) in the manner as provided under Section 63 (c) of the Act of 1925 and Section 68 of the Act of 1872. Further, the circumstances, which according to Mr. Pusty, are such which make the Will invalid is also devoid of merit. No such pleas have subsequently been taken by the respondents in their written statement. As per the appellants' own statement, late Samaru was not ill, the plea that the Will was obtained by the plaintiff by means fraud has to be proved by the appellants/defendants, in which, they have utterly failed. Knowing fully well that Will was executed by late Samaru in favour of plaintiff, they never raised any objection regarding the fact that the Will is not genuine rather Ex.D.1 shows that they have indirectly admitted the title of plaintiff on the strength of Will executed by late Samaru.

22. No other points have been raised.

23. For the reasons mentioned hereinabove, the appeal being devoid of merit and substance, is liable to be and is hereby dismissed.

24. In the facts and circumstances of the case, there shall be no order as to costs.

25. A decree be drawn accordingly.