

R-79

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment Reserved on: 10.12.2010

Judgment Delivered on: 14.12.2010

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RSA No.58/2000

SH.RAM BABU SHARMA

.....Appellant

Through: Mr.V.P.Chaudhary, Sr.Adv.
with Mr.Abhinav Jain, Adv.

Versus

SMT.SANTOSH KUMARI & ORS.

.....Respondents

Through: Mr.Girish Verma, Adv. for
Respondents no.2 to 6.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. Plaintiff Pt.Ram Babu Sharma is the son of Pt.Ram Kishan; Pt.Ram Kishan the father of the plaintiff used to look after Mst.Jhando Devi @ Phulo Devi, widow of Sh.Chhiddoo Mal; Mst.Phulo Devi was the owner of property bearing no.4090, Ward NO.VII, Kucha Dilwali Singh, Ajmerigate, Delhi; she was the only living person in her family. For the services rendered to her Mst.Phulo Devi executed her last will dated 1.1.1951 bequeathing her properties including the aforementioned suit property in favour of Pt.Ram Kishan. Pt.Ram Kishan was in continuous possession of this suit property up to the time of his death. After his death, the present plaintiff has inherited the aforesaid property. He is in occupation of the same. On the death of Phulo Devi on 2.1.1951

the defendants no.1 to 3 who had been appointed as trustees of the
RSA No.58/2000

said immovable property took possession of the said property. Defendants no.4 to 6 are stated to be the tenants in the suit property. It is contended that defendants no.1 to 3 have no right to remain in occupation of the said property or to realize the rent from the tenants i.e. defendants no.4 to 6. It is pointed out that the earlier will of Ms.Phulo Devi dated 27.12.1950 appointing defendants no.1 to 3 as trustees had stood superseded by the last will dated 1.1.1951 pursuant to which the father of the plaintiff had been bequeathed the said immovable property. Suit for possession had accordingly been filed.

2. Defendants no.1 to 3 contested the suit. It was stated that the plaintiff is in permissive possession of one dalan, kotha and one kitchen forming a part of the house in the suit property which was in terms of the will dated 27.12.1950 executed by the deceased Phulo Devi; she had created a trust. It was denied that she had executed the last will dated 1.1.1951 superseding her earlier will of 27.12.1950. Submission was that defendants no.1 to 3 were the three trustees out of four appointed under her will dated 27.12.1950. In pursuance of the said will the trustees had taken possession of the whole of the house; defendants no.4 to 6 were tenants and paying the rent to the trust through the trustees. The will dated 27.12.1950 is the only valid will of the deceased.

3. On the rival contentions of the parties, the following six issues were framed by the trial court, which read as follows:

1. Whether the suit is correctly valued for purposes of court fees and jurisdiction?
2. Whether suit against defendant no.1 is not competent?
3. Whether Jhando Devi executed the will dated 1.1.1951?
4. Whether the plaintiff is estopped from propounding the Will dated 1.1.1951?
5. Whether defendants are entitled to special costs?
6. Relief.

4. On the basis of oral and documentary evidence which was led before the trial court, the suit of the plaintiff was dismissed.

5. In appeal vide impugned judgment dated 3.7.1999 the findings of the trial judge were endorsed. Appeal stood dismissed.

6. This is a second appeal. After its admission, on 8.7.2009, the following substantial question of law was formulated which reads as follows:

Whether the entries made in the register of the deed writer containing a brief description of the contents of two Wills pertaining to movable and immovable properties of the testator in the absence of any written Will can be considered as valid Wills executed by the testator in favour of the appellant's father?

7. Counsel for the appellant has drawn the attention of this court to Sections 2(h), 63 (c) and 238 of the Indian Succession Act, 1925 (hereinafter referred to 'the ISA'). It is submitted that a will can be proved by one or the other attesting witness; in a case when the original will had been lost or destroyed in terms of Section 238 of the ISA a probate can be granted of its contents if the same is established by evidence. It is submitted that in the instant case the plaintiff has relied upon a will dated 1.1.1951; the scribe of this will had come into the witness box as PW1; the two attesting witnesses had been examined as PW-3 and PW-5 respectively. Although admittedly the original of that will had not been produced but this was for the reason that the said will was in the custody of the defendants who did not produce it intentionally. It is pointed out that the earlier will i.e. the will dated 27.12.1950 on which reliance had been placed upon by the defendants has not been proved in accordance with law; the impugned judgment has erred in relying upon the said will. No issue qua the said will had also

been framed.

8. Arguments have been countered.

9. Perusal of the record shows that the plaintiff had claimed possession of the suit property relying upon a will dated 1.1.1951. Admittedly this document had not seen the light of the day. It was not a piece of evidence before the court. However, the earlier will which was four days prior in time i.e. dated 27.12.1950 Ex.D-1 was proved through its attesting witness Gian Chand who was examined as DW3. Badri Prasad DW4 a neighbour of the testator Phulo Devi had deposed that 2-3 days prior to the date of her death (which was 2.1.1951) the testator was suffering from dysentery and she was incapable of identifying persons; he was her Ayurvedic doctor; his testimony had cast a suspicion on the will of 1.1.1951 on which the plaintiff had relied.

10. In the written statement the defendants had stated that the last will and testament of Phulo Devi was her will dated 27.12.1950; they had set up a challenge to the will dated 1.1.1951 relied upon by the plaintiff. It is relevant to state that in the replication filed by the plaintiff/appellant he did not challenge either the execution or the content of this will dated 27.12.1950. His contention was that the will of 27.12.1950 had been superseded by the subsequent will dated 1.1.1951. As already noted supra the will dated 1.1.1951 had not seen the light of the day and merely because one witness had come into the witness box to state that a will had been executed by Phulo Devi in the absence of the document itself would not be proof of the said document. PW-1 the scribe of the earlier will of 27.12.1950 had described the entries made by him in his deed register; so also about an entry of

1.1.1951. This was in the document Ex.P-1 where the entry No.581 in the Register of the deed writer was against the will dated 27.12.1950. Entry No.586 in Ex.P-1 was against the will dated 1.1.1951. The hand writing expert M.K.Mehta had opined that the thumb mark against entry 581 appeared to be that of the testator whereas the entry against the serial No.586 purported to be the thumb mark of the testator could not be established. The said report is Ex.PW-5/1. Provisions of Section 238 of the Indian Succession Act relied upon by the counsel for the appellant to advance this argument are even otherwise inapplicable as this provision only applies to the probate of such a will.

11. The impugned judgment while dealing with two wills has recorded its findings as under:

“16. Now we have to move carrying with us both the wills to decide as to which one is genuine and capable of being given effect to. So far as formulation of will is concerned, the law does not prescribe any specific form and language. Under Section 3 of Probate and Administration Act, a Will is defined as being the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death.

17. Keeping in view the above definition, it can be said that even oral statement amounts to a will but in that case greater care must be taken and strict proof must be required.

18. As regards the entry in the Register of deed-writer as aforesaid carrying substantial subject matter having the effect of conveying the disputed property to the plaintiff, in the absence of the drafted will, itself can be taken as sufficient a document amounting to a will. It is the case of the plaintiff that will-draft allegedly thumb marked by the testator had been taken into possession by the trustees/defendants at the time of the death of the testators alongwith taking into possession the immovable property and other belongings of her. This version of the plaintiff the father of appellant seems to be plausible.

19. As regards, genuineness and validity of this subsequent will dated 1.1.51, that is highly doubtful. The

circumstances brought on record through evidence prove it so. Firstly the questioned will dated 1.1.51 allegedly being executed one day prior to the death of the testator. Secondly, as per unrebutted statement on oath of DW-3 Sh.Gyan Chand one of the attesting witnesses to the previous will that Smt.Phoolo Devi testator was lying unconscious two or three days before her death. This very statement nowhere finds any challenge and rebuttal from the side of the plaintiff in cross-examination.

20. Thirdly, DW-4 Sh.Badari Parshad, a tenant in the property of the testator testifying in evidence that two, three days prior to the death of testator, the testator was suffering from dysentery as a result of which her condition was bad and she was not capable of identifying the persons and objects. DW-4 also stated that in his capacity as Ayurvedic doctor he used to treat her. This very statement of DW-4 also finds no challenge and rebuttal in cross-examination.

21. Fourthly, the plaintiff while filing the suit choose not to disclose the names of the attesting witnesses to the subsequent questioned will dated 1.1.51 and when specifically pointed out so by the defendants in their written statement alleging that the names have been concealed intentionally to procure the witnesses later on according to choice, the plaintiff even then did not bother to disclose their names in replication.

22. Fifthly, the original plaintiff acquiescing his rights to the first previous will by accepting the personal effects and ornaments of Smt. Phoolo Devi alias Jhando Devi vide receipt duly proved as Ex.D-2. This receipt of Ex.-2 has been proved beyond doubt inasmuch as the signatures of original plaintiff have been admitted by his counsel. These personal effects and ornaments were delivered and accepted after about 25 days of the death of testator.

23. Sixthly, the previous will dt.27.12.50 Ex.D-1 having been duly proved by PW-1 meeting all the requirements of a valid will. I have gone through Ex.D-1 and on such perusal, I find that it carries the mental and actual intention of the testator to dispose of her property movable and immovable. The creation of trust in respect of her immovable property is to keep her name immortal and the giving of her ornaments and personal effects to original plaintiff amounts to her affection and gratitude toward the plaintiff for his services rendered to the testator. This will dated 27.12.50 is certainly a balanced will which, by itself reflects its validity and genuineness.

24. Seventhly, it has been rightly observed by the Hon'ble Trial Judge that the filing of the suit at the fake end of 12 years from the date of the execution of the

questioned subsequent will is a strong circumstance against the suitor- there is no authentic and plausible explanation to this lapse of 12 years period in filing the suit. Throughout these 12 years the disputed property continued to be managed peacefully by the trustees.

In view of above observation and discussion, I can safely conclude that the questioned subsequent will dated 1.1.51 cannot be said and held to be a genuine and a valid will. No effect can be given to it. On the other hand, the previous will dated 27.12.50 is a rightly and validly executed will. The judgment dated 23.10.1978 impugned by way of this appeal calls for no interference. The appeal merits dismissal. It is ordered accordingly. No order as to cost."

12. There is no perversity in this finding. Impugned judgment had correctly held that the will dated 27.12.1950 was the genuine will of deceased Phulo Devi; it was adequately proved.

13. The receipt Ex.D-2 dated 23.1.1951 duly signed by the plaintiff also endorses the fact that the plaintiff has accepted the ornaments of the deceased which were in terms of the contents of this will dated 27.12.1950. Plaintiff himself had acquiesced to this will by the execution of Ex.D-2. The foundation of the case of the plaintiff being on a will which was not proved by him; suit was rightly dismissed. There is no merit in this appeal.

14. Learned counsel for the appellant has however pointed out that without prejudice to his contentions this court must consider the fact that if will dated 27.12.1950 had been proved, the intention of the testator must be given effect to. The trustees who had been appointed in terms of this will have since died and no action has been taken in terms of the Section 92 of the Code of Civil Procedure and the Indian Trust Act. The defendants no.4 to 6 are living in the suit property as tenants. Even on query learned counsel for the respondent states that they are merely tenants and after the death of the trustees which was 10 years ago they are not

paying rent to any person as there is no person to whom they could pay this amount. The intention of the testator as gathered from Ex.D-1 (will dated 27.12.1950) is that in case the trustees die without leaving any legal heir the memories of the testator should be kept alive; for this purpose, the trust should be allowed to remain functional; a mandir should be made in the suit property; the panchayat/biradari should formulate a trust.

15. Parties are at liberty to approach the concerned Authority to give effect to this intention of the testator.

16. With these observations, the appeal is disposed of.

INDERMEET KAUR, J.

DECEMBER 14, 2010
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