

R-207

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

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Judgment reserved on: 29.03.2011

Judgment delivered on: 01.04.2011

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RSA No.209/2006

SHRI RAMESH KUMAR CHAUHAN & ANR Appellants

Through: Mr. Piyush Sharma, Advocate.

Versus

SMT. BIMLA & OTHERS Respondents

Through: Mr. Harish Pandey, Advocate.

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 This appeal has impugned the judgment and decree dated 20.04.2006 which had reversed the findings of the trial Judge dated 07.08.2004. Vide judgment and decree dated 07.08.2004, the suit filed by the plaintiff Smt. Bimla Kumari seeking possession of the suit land i.e. 54 square yards in khasra No.409/1, Hospital Road, Jangpura, Bhogal, New Delhi had been dismissed. The impugned judgment had reversed this finding. Suit of the plaintiff stood decreed.

2 The plaintiff has claimed herself to be the owners of the aforenoted suit property. His contention is that his father Kure was the erstwhile owner; Kure had also acquired another plot of land

measuring 100 square yards bearing No. 410 situated at Jangpura, Bhogal on which a room with a kitchen, bathroom and latrine had been constructed. To adjust and accommodate the increasing members in the family, late Kure allowed his son Ram Swaroop (successor in interest of the defendant) to occupy the aforementioned suit property i.e. property No. 410. To eliminate all kinds of further disputes, Kure had executed his Will dated 15.12.1978 by virtue of which the aforementioned suit property had been bequeathed to the plaintiff. This Will was duly registered. The plaintiff had constructed one room and kitchen on the said floor; his late father Kure was living with him. By virtue of this Will, the plaintiff had become the owner of the suit property. The defendant on 05.10.1990 threatened the plaintiff to raise construction on a vacant portion of the suit land which was being used by the plaintiff as a courtyard. Criminal complaint was also lodged. On 08.10.1990, the defendant started digging foundation on the said vacant portion; they succeeded in their illegal design and raised a tin shed on this vacant portion which they occupied. Present suit for possession and damages was accordingly filed.

3 The defendant is admittedly the brother of the plaintiff. He had contested the suit. His contention in para 5 of the preliminary objection and in para 5 of his reply on merits as also in para 12 is to the effect that the Will of Kure is forged, illegal and void; it was never acted upon; it was not executed out of the free will of the deceased; the thumb impression of the deceased was not his; deceased in fact did not understand the nature of the instrument; he was not competent to thumb mark this document. Further defence of the defendant was that the parties had entered into a

compromise; matter was settled; compromise was reduced into writing by virtue of which the defendant was occupying the portion which was in his possession.

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

1. *Whether there is no cause of action against the defendant and in favour of plaintiff? OPD*
2. *Whether the Will of late Sh. Bhure is illegal and forged as alleged by defendant in preliminary objection No. 5? OPD*
3. *Whether the property has never been partitioned as alleged by defendant in preliminary objection No. 6?*
4. *Whether the suit is bad for non-joinder of parties and is liable to be dismissed? OPD*
5. *Whether the suit has not been properly valued for the purposes of jurisdiction and court fee? OPD*
6. *Whether the plaintiff is entitled for recovery of possession and injunction as prayed? OPP*
7. *Relief.*

5 Four witnesses were examined on behalf of the plaintiff and one witness was examined on behalf of the defendant. The trial Judge returned a finding against the plaintiff. The Will Ex. PW-1/A was the bone of contention which formed the basis of issue No. 2. This issue was, however, decided in favour of the plaintiff. Trial Judge noted that there is nothing on record to show that the Will is forged. Testimony of PW-4 the attesting witness had been adverted to. In fact all issues (except issue No. 6) were decided in favour of the plaintiff. Qua issue No. 6, the Court reexamined the Will Ex. PW-1/A and while disposing of this issue, it held that the plaintiff has failed to prove that the Will was duly executed by the testator;

since the suit filed by the plaintiff was based on this Will, the suit of the plaintiff stood dismissed.

6 The impugned judgment had reversed this finding. Oral and documentary evidence was reappreciated and reexamined; the suit of the plaintiff stood decreed. The finding returned reads as follows:-

"19On perusal of the evidence led by the plaintiff as well as examination in chief and cross-examination of DW-1 it is found that the Ld. Trial Court has failed to appreciate the evidence properly. The DW-1 Sh. Ramesh Kumar Chauhan in his cross-examination deposed that we are living in the aforesaid house No. 410, Jangpura, Bhogal, New Delhi for the last more than 35 years continuously. The plot is owned by my father. We do not have document to show that the plot No. 410 is owned by my father. It is correct that the plaintiff could not have induced Sh. Kure to make the Will etc. It is correct that Sh.Kure was living with the plaintiff since 1978. It is also correct that plaintiff was taking care of all the needs of Sh.Kure. I do not know whether Sh.Kure executed the will in question in favour of the plaintiff or not. It is correct that a formal settlement was made under which we shifted to the plot No. 410 as aforesaid and the plaintiff was living in the property in question. It is correct that the plaintiff is living in the property in question since his birth. This deposition of DW-1 in cross-examination shows that the DW-1 has feigned ignorance with regard to the execution or non-execution of the will in favor of the plaintiff. The conduct and deposition shows that the defendant has not categorically denied the execution of Will in question by the testator late Sh. Kure in favour of the plaintiff. The deposition of DW-1 wherein he admitted that a formal settlement took place under which they (defendants) shifted to plot no. 410 and the plaintiff was living in the property in question rather proves the case of the plaintiff. The plaintiff has alleged in the plaint that he was living in the suit property since his birth and the defendants were living in the property no. 410 which was acquired by late Sh. Kure and the defendants shifted to that house because of the large number of family members. Thus the deposition in cross-examination of DW-1 has not been appreciated and considered by Ld. Trial Court and the Ld.Trial Court has, therefore, wrongly held that the whole claim of the plaintiff was based upon the Will Ex. PW-1/A.

20 The plaintiff has proved the requirement of Section 68 of the Indian Evidence Act, 1872 by examining Sh. H.V. Chauhan, Advocate as attesting witness. The overall impression of the cross-examination of this witness PW-4 shows that he was present at the time of registration of the will in question. He deposed that when this will was registered that time it was not the position that

right from the writing up the will till the registration the presence of the witness was required. It is correct that when this will was executed in 1978, the trend was that we used to sign just as a witness and that was only the act for us till registration. We used to ask little bit from the parties before putting the witness. Vol. We used to ask the parties whether the will bears the signatures of the parties concerned or not. Since, there was no procedure regarding identification of person, we used to sign as witnesses. When I signed the will of Sh. Kure S/o Sh. Kale which is Ex. PW-1/A and signed as witness no. 2 at point E. I charged Rs.5/- as my profession fee as witness. I cannot say that the thumb impression on this will are that of the actual executants. It is this last line which was highly relied by the Ld. Trial Court for deciding the issue no. 6 against the plaintiff. The other deposition in cross-examination of PW-4 shows that he was present at the time of execution and registration of the will Ex. PW-1/A and as per the trend at that time, he was not required to investigate deeply about the execution of the will by the executants. Even if it is assumed that attesting witness has not identified the thumb impression, the deposition of PW-4 wherein he deposed that he cannot say that the thumb impression on the will are that of actual executants does not mean that he has not verified about the thumb impression of the executants at the time of attesting the will. It is so because this witness was quite old when he was examined and was also suffering from diabetes. He may have deposed about the thumb impression of the executants as because of his old age and his physical and mental condition. He may not have been able to recollect fully about those thumb impression whether made by executants or not. Moreover, in the present case as already discussed, there is sufficient cross-examination of PW-2 and also sufficient overments in the written statement which leads to the conclusion that the defendants are admitting the execution of the will of late Sh. Kure while alleging that the plaintiff might have played fraud/trick by obtaining his thumb impression because of force and coercion. Admittedly, the issue no. 2 has been decided in favour of the plaintiff and the defendants have failed to prove that the will was illegal and forged. The Section 70 & 71 of the Indian Evidence Act, 1872 are relevant and reproduced as under:-

70. Admission of execution by party to attested document.- the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

71. Proof when attesting witness denies the execution.- if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

21 The admission of defendants with regard to execution of will by late Sh. Kure are itself sufficient to prove the execution and attestation of will Ex. PW-1/A as per the provisions of Section 70 of the Indian Evidence Act. In case it is argued that the PW-4 attesting witness has denied the execution of the will by executants, the plaintiff has examined himself as PW-2 and has sufficiently

proved the execution and registration of the will by deposing in his cross-examination that he was present at the time of registration of the will. In his examination in chief, the PW-2 has categorically deposed that the will Ex. PW-1/A was made by his father in his favour and it bears thumb impression of his father at point A and B. No question was put in cross-examination of PW-2 with regard to his above deposition. In these circumstances, the plaintiff has sufficiently proved the execution and attestation of will Ex. PW-1/A in his favour by which the suit property was bequeathed by its owner late Sh. Kure in favour of the plaintiff.

22. *The other aspect which the Ld. Trial Court has failed to appreciate is the averments in the para no. 8 on merits of written statement which was reproduced while discussing the facts of the case. In para no. 8 of the written statement, the defendants alleged that a compromise entered into plaintiff and defendants with regard to suit property on 07.10.1990. It was also stated that a copy of the said compromise was filed with the written statement. On perusal of the file it is found that no such copy of the said compromise has been placed on record by the defendants. The defendants have not led any evidence to prove that the compromise was arrived on 07.10.1990 with regard to suit property under which they have got a legal right as being joint owner of the suit property to occupy the disputed portion in the same. This averment in the written statement with regard to alleged compromise on 07.10.1990 shows that the defendants were not in possession of disputed portion before 07.10.1990 and has, therefore, forcibly occupied the same as alleged by the plaintiff. The plaintiff has also proved the complaint made to the police against the defendants stating that the police was in connivance with the defendants and helped the defendants in raising the disputed portion in the suit property which has been forcibly occupied by the defendants. The admission of the DW-1 in cross-examination with regard to a formal settlement under which they occupied house no. 410, Jangpura, Bhogal and the plaintiff was living since birth in the suit property proves the fact tht the plaintiff was in occupation and possession in the suit property including the disputed portion since his birth. Since, the plaintiff has also proved the bequeathing of the suit property in his favour by his father late Sh. Kure by way of registered will Ex. PW-1/A, he is, therefore, held to be legal occupant of the suit property including the 'disputed portion'. Moreover, if the defendants considered themselves to be joint owner of the suit property, they have no right to forcibly occupy the disputed portion despite the fact that the plaintiff was in settled possession of the same. The plaintiff has, therefore, succeeded in proving by sufficient material that the defendants have occupied the 'disputed portion' in the suit property and are, therefore, unauthorized occupant of the same. The plaintiff being legally occupant of the suit property including the disputed portion has every right to seek the possession of the 'disputed portion' as shown in red colour in site plan. The defendants are duty bound to restore the disputed portion in the suit property to the plaintiff. The plaintiff has, therefore, proved the issue no. 6 by discharging*

the onus and the same is accordingly decided in favour of the plaintiff and against the defendants. Because of the above reasons, the findings recorded by the Ld. Trial Court on the said issue is not sustainable in the eyes of law and the judgment of Ld. Trial Court is accordingly set aside."

7 This is a second appeal. It had been admitted and on 10.07.2007, the following substantial question of law was formulated:-

"Whether a valid Will was executed by Sh. Kure on 15.12.1978 in favour of the respondent in respect of the suit property and whether the executant was in the state of sound and disposing mind at the time of execution of the Will?"

8 On behalf of the appellants, it has been urged that the courts below had illegally relied upon a Will Ex. PW-1/A. It is pointed out that the mandate of Section 63(c) of the Indian Succession Act, 1925 (hereinafter referred to as the 'ISA') and Section 68 of the Indian Evidence Act, 1872 (hereinafter referred to as the 'IEA') had not been followed. Attention has been drawn to the testimony of PW-4. It is pointed out that PW-4 the attesting witness has nowhere stated that the testator had executed this document in his presence; in fact in his cross-examination PW-4 as admitted that he cannot say as to whether the thumb impression on this Will is that of the actual executant; the impugned judgment relying upon the aforementioned oral and documentary evidence is thus a perverse finding and interference is called for. Learned counsel for the appellants has placed reliance upon AIR 2003 SC 761 Janki Narayan Hoir Vs. Narayan Namdeo Kadam to support his submission that the requirement of attestation as contained in Section 63 (c) of ISA must necessarily be adhered to in the absence of which it cannot be said that the Will has been duly proved.

9 Arguments have been refuted. It is pointed out that findings of fact cannot be interfered with by the second appellate court; powers are restricted under Section 100 of the Code of Civil Procedure (hereinafter referred to as the 'Code'); for this proposition reliance has been placed upon AIR 2007 SC 2967 Chacko & Anr Vs. Mahadevan.

10 Record had been perused. Issues No. 2 & 6 are relevant for the controversy in hand. The plaintiff had produced four witnesses in support of his case. PW-2 was the plaintiff himself. He had on oath reiterated that his father had executed his last Will and testament Ex. PW-1/A and his thumb impression at points 'A' and 'B' are that of the testator. In his cross-examination, he had admitted that he was present at the time when the Will was registered. PW-1 had produced the summoned record from the office of Sub-Registrar; he had proved that the Will Ex. PW-1/A was registered vide registration No.2279 at the office of the Sub-Registrar. PW-4 was the attesting witness and probably the most crucial. He had tendered a one line examination in chief to the effect that his signatures at point 'E' on the Will Ex. PW-1/A are his signatures. PW4 was an Advocate by profession. In his cross-examination, he admitted that he had signed as a witness; at that time, the trend was to ask the party whether the Will bears the signatures of the party concerned or not; he had signed at point 'E'; he had charged Rs.5/- as a professional fee.

11 The question that arises is whether the mandate of Section 63 (c) of ISA and Section 68 of the IEA have been fulfilled in terms

of this testimony of PW-4 or not. Section 68 of the IEA reads as follows:-

“68. Proof of execution of document required by law to be attested.- It is 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.]”

12 One of the requirements of the due execution of a Will is that it must be attested by two witnesses; one of the two attesting witnesses must be called to prove the Will. It follows that where a attesting witness is alive, he has to be examined before the document which is attested can be used in evidence. Section 70 of the said Act relates to admission of the execution by a party to the attested document; meaning thereby that an attesting witness (as in this case PW-4) is not necessary when a party executing a document admits the fact of its execution. Section 71 is in the nature of safeguard to the mandatory provisions of Section 68 i.e. to meet a situation where it is not possible to prove the execution of the Will by calling an attesting witnesses even though he is alive. This section has no application to the instant case.

13 Section 63 (c) of the ISA is reproduced herein 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) XXXXXXXXXXXXX

(b) XXXXXXXXXXXXX

(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 the testator, or has received from the testator a personal acknowledgement 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."*

14 To prove the execution of a Will, it is necessary that the testator must have signed the Will in the presence of one or more attesting witness; it is not necessary that both the attesting witnesses must be present at the same time. The requirement only being that each of the attesting witness must have seen the testator sign or affix his thumb impression to the Will or he had received from the testator a personal acknowledgment or mark on the Will. There is also an additional requirement that each of the attesting witness shall sign the Will in presence of the testator.

15 On this touch stone, the testimony of PW-4 has to be examined. Testimony of PW-4 shows that PW-4 was a professionally qualified Advocate; he had charged professional fee of Rs.5/- for attesting the Will Ex. PW-1/A. He has deposed that the trend at that time was to ask the party concerned as to whether the Will bears the signatures of the concerned party or not; he had signed the Will at point 'E' as an attesting witness. Ex. PW-1/A has also been examined. This is a two page document and bears the left thumb impression of the executant at two places on the first page

and one place i.e. on the column of the testator on the last page. The document further recites

‘that the executants is blind and the contents have been explained to him’

16 Not even a single suggestion has been given to this witness that Ex. PW-1/A did not in fact bears the thumb impression of the testator Kure. This is especially relevant in view of specific deposition of PW-4 wherein he had stated that he at that time the trend was to ask questions from the party concerned whether the Will bears the signatures of the said party or not; the said party obviously has reference to Kure. No suggestion has been given to PW-1 either through whose testimony Ex. PW1/A had been proved that this document in fact did not contain the aforementioned contents or that it was forged or fabricated. PW-1 had admitted that Kure had put his thumb impression on the various places as noted in Ex. PW-1/A but he had not signed anywhere. This witness had deposed as per the record.

17 It was also not the case of the defendant either in his written statement or even in his defence in the courts below that his father Kure was not in a sound state of mind at the time when he had made this Will; it was also not his defence that the deceased was blind and was thus incomplete. Argument urged before this Court today that the deceased being blind and was thus incompetent. and not having been able to see the contents of the document could not have been known the contents is thus frivolous; it cannot be raised at this stage.

18 The substantial question of law is in fact bordered on this statement i.e. as to whether the executant was in a sound disposing

state of mind at the time of execution of the Will. As noted above, this was never a specific defence in the written statement; the defence in the written statement was that the Will Ex. PW-1/A could not be acted upon as it was illegal and forged; the defendant was not sure that it even bore the thumb impression of his father. It was never a specific plea that his father for any special reason either of age or of failing health was not in a sound disposing mind at the time of the execution of the Will. This did not form part of the pleadings.

19 In AIR 2001 SC 965 Santosh Hazari Vs. Pursushottam Tiwari, it had been held that a plea not emanating from the pleadings between the parties cannot be raised for the first time before the second appellate Court; such a plea would not amount to a substantial question of law.

20 The impugned judgment had examined the deposition of the witnesses of the plaintiff as also of the defendant to arrive at a conclusion that the Will of Kure was validly executed by him. It had drawn a positive fact finding from this deposition of PW-4 that PW-4 was present at the time of registration of the Will in question. Various portion of his evidence have in fact been reproduced in the impugned judgment. This fact finding does not in any manner call for any interference.

21 The judgment reported in 1925 PC 203 Hira Bibi & Others Vs. Ram Hari Lal & Others relied upon by the learned counsel for the appellant has no application. This case has laid down a legal proposition that Section 70 of the IEA applies only to a document duly attested; in this case there was a mortgage deed which was

not in the legal sense attested; it was merely signed by the persons who professed themselves to be the witnesses although they were not; section 70 was held to have no application. This judgment does not in any manner advance the case of the appellants.

22 Substantial question of law is answered accordingly. It is in favour of the respondents and against the appellants. Appeal has no merit. Dismissed.

(INDERMEET KAUR)
JUDGE

APRIL, 01,2011
A