

Court No. - 1

Case :- MATTERS UNDER ARTICLE 227 No. - 9699 of 2023

Petitioner :- Rakesh Pandey

Respondent :- Suresh Pathak And Another

Counsel for Petitioner :- Ashish Kumar Singh, Ajay Kumar Singh, Tejas Singh

Hon'ble Jayant Banerji, J.

1. Heard Shri Ajay Kumar Singh, learned counsel for the petitioner.

2. This petition has been filed seeking the following relief:

"(1) to issue a suitable order or direction setting aside the judgment and order dated 9.5.2023 (Annexure No. 1 to the petition) passed by District Judge, Varanasi in Civil Revision No. 98 of 2022, Rakesh Pandey Vs. Suresh Pathak and another and also the order dated 14.7.2022 (Annexure No. 2 to the petition) passed by the Civil Judge, Senior Division, Fast Track Court, Varanasi in O.S. No. 657 of 2015 Suresh Pathak Vs. Rakesh Pandey.

(II) to issue a suitable order or direction allowing application (154 Ga) (Annexure No. 7 to the petition) of defendant-petitioner.

(III) to issue any other suitable, order or direction as this Hon'ble Court may deem fit and proper to meet the ends of justice under the facts and circumstances of the present case;

(IV) to award cost of petition to the petitioner."

3. It appears that an Original Suit No.657 of 2015 (Suresh Pathak Vs. Rakesh Pandey) was initiated in the court of the Civil Judge (Senior Division), Varanasi, which was filed by the plaintiff-respondent seeking a decree of permanent injunction restraining the defendant-petitioner and the defendant-respondent from selling the half-undivided portion of the house. A written-statement was filed, in which a counter claim was filed on behalf of the defendants.

4. It is stated by the learned counsel for the petitioner that the plaintiff staked his claim on the basis of an unregistered will deed dated 3.2.1988. However, the defendants had set up a prior will dated 29.1.2988, which was registered. In the suit, the defendants filed an application 154C for obtaining an expert report with

regard to the signature/thumb impression of the testator on the will filed as Paper No.148C, which, as stated by the learned counsel for the petitioner, is the will dated 3.2.1988. The aforesaid application was considered by the trial court, and by the order impugned dated 14.7.2022, the application 154C was dismissed. A Civil Revision No. 98 of 2022 was filed by the petitioner-defendant challenging the order dated 14.7.2022. By the impugned order dated 9.5.2023, the civil revision has been dismissed.

5. The contention of the learned counsel for the petitioner is that the application 154C and the revision filed by the defendants have been dismissed on the sole ground that there is no admitted signature on record for comparison of the signatures. It is contended that the courts have gone on the fact that the Register No. 8 that is maintained in the Office of the Sub-Registrar for registration of documents was destroyed in accordance with rules and, therefore, there was no other material from which the disputed signatures could be compared. The contention is that since a registered document, which was the will dated 29.1.1988 executed in favour of the defendants, was on record in sealed cover before the court, therefore, the signatures could be compared from that document. Learned counsel has referred to the provision of Section 90 of Indian Evidence Act (U.P. Amendment) in support of his contention that a presumption with regard to the validity and signature of the registered document can be drawn. In support of his contention, learned counsel has relied upon a judgment of this Court in the case of **Smt. Sarla Goel and others vs. Sangam Educational Society, Allahabad and others** reported in **(2013) 118 RD 384**.

6. A perusal of the order of the trial court dated 14.7.2022 reflects that the court recorded that a report of the expert would not be fruitful in the facts and circumstances, because there was no admitted signature on record. The trial court further noted that on record there is no admitted document which could be compared with the wills dated 3.2.1988 and 29.1.1988 for getting the signatures examined. The trial court noted that the parties have full opportunity to lead evidence in the matter. The parties can lead evidence with regard to the wills.

7. The revisional court while referring to the order of the trial court has stated that no record is available in the Office of the Sub-Registrar Registration with regard to the registered will deed. Accordingly, it cannot be determined which of the two wills is correct and on which will is the genuine thumb impression of the testator affixed. The revisional court noted that both the wills are

denied by the contesting parties. It was further noted that Register No. 8 was not available in the office of the Sub-Registrar Registration. The revisional court observed that the validity of the documents in question could be proved by leading proper evidence. Accordingly, the revision was dismissed.

8. The submission of the learned counsel for the petitioner with regard to Section 90 of the Evidence Act is not correct in the facts and circumstances of the present case. The U.P. State Amendment, deals with presumption in respect of documents more than twenty years old, and a document that is registered and a duly certified copy is produced, the court is enjoined to presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to have been executed or attested. However, such a presumption would apply in case of documents other than wills because a will is required to be proved under the provisions of the Indian Succession Act. As observed by the Supreme Court in **Bharpur Singh and others Vs. Shamsheer Singh (2009) 3 SCC 687**, the provisions of Section 90 of the Evidence Act, 1872, keeping in view the nature of proof required for proving a will, have no application. The Supreme Court has elaborated its opinion as follows:

"19. The provisions of Section 90 of the Evidence Act, 1872 keeping in view the nature of proof required for proving a will have no application. A will must be proved in terms of the provisions of Section 63(c) of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872. In the event the provisions thereof cannot be complied with, the other provisions contained therein, namely, Sections 69 and 70 of the Evidence Act providing for exceptions in relation thereto would be attracted. Compliance with statutory requirements for proving an ordinary document is not sufficient, as Section 68 of the Evidence Act postulates that execution must be proved by at least one of the attesting witnesses, if an attesting witness is alive and subject to the process of the court and capable of giving evidence."

9. As far as, the judgment cited by the learned counsel for the petitioner in the case of **Smt. Sarla Goel** (supra), it is noted that in Paragraph No.10 thereof, the court has observed that the handwriting or signature can be compared with an admitted handwriting or signature of the person concerned, which is not the case in the present petition.

10. The orders of the trial court and the Revisional Court are justified in the facts and circumstances of the case and merit no

interference.

11. This petition is, therefore, **dismissed**.

Order Date :- 13.12.2023

K.K.Tiwari

(Jayant Banerji, J.)