

Neutral Citation No. - 2024:AHC-LKO:28266

Reserved

AFR

Court No. - 5

Case :- SECOND APPEAL No. - 425 of 2014

Appellant :- Sri Thakur Sanatan Ram Yugal Sarkar Virajman Mandir
Faizabad

Respondent :- Kusum Dasi Chelin Sri Lalita Das

Counsel for Appellant :- R.D.Shahi

Counsel for Respondent :- Prem Shanker Shukla

Hon'ble Rajnish Kumar,J.

1. Heard Shri R.D. Shahi, learned counsel for the appellant and Shri Prem Shankar Shukla, learned counsel for the respondent.

2. This second appeal has been filed assailing the judgment and order dated 09.10.2014 passed in Civil Appeal No.158 of 2014; Kusum Dasi Vs. Awadhesh Das and Another by Additional District Judge, Court No.1, Faizabad, by means of which the appeal has been allowed and the judgment and decree dated 30.05.2014 passed in Regular Suit No.192 of 1978; Sri Thakur Sanatan Ram Yugal Sarkar Virajman Mandir Maibara and Another Vs. Lalita Dasi by Civil Judge (Senior Division), Faizabad has been set aside and the suit of the plaintiff-appellants for declaration and possession has been dismissed.

3. This second appeal was admitted on the following substantial questions of law:-

"1. Whether the learned first appellate court erred in law in observing that the will deed dated 26.09.1969 was not proved despite the execution of the same being duly admitted by D.W.1 and D.W.2 making the will deed admissible under Section 70 of the Indian Evidence Act?"

2. Whether the learned courts below erred in law in placing burden of proof upon the appellants though as per the law of the land when both the parties have led the evidence, the burden of proof loses its significance?"

4. Learned counsel for the plaintiff-appellants submitted that the appellant had filed suit for permanent injunction on the basis of registered will deed dated 26.09.1969 executed by Ram Rati Dasi in favour of Janki Dasi. During pendency of the suit, the suit was amended and the prayer for declaration and possession, and eviction of defendant-respondent was made. The will deed dated 26.09.1969 was duly proved and execution of the same was also admitted by the D.W.1 and D.W.2, therefore the same was proved as per Section 69 and 70 of the Indian Evidence Act and considering the same, suit of the appellant-plaintiff was decreed by the Trial Court, but the Appellate Court without considering the same allowed the appeal and set-aside the judgment and decree passed by the Trial Court which could not have been done. He further submitted that the respondents were claiming rights on the basis of an unregistered will dated 28.06.1978 executed by Ram Rati Dasi, whereas she had died on 28.08.1976. Thus, the submission is that the judgment and order passed by the Appellate Court is not sustainable in the eyes of law and liable to be set-aside. He relied on **Sampath Kumar Vs. Ayyakannu and Another; (2002) 7 SCC 559, Babu Singh and Others Vs. Ram Sahai alias Ram Singh; (2008) 14 SCC 754 & M.B. Ramesh (D) by LRs. V. K.M. Veeraje Urs (D) by LRs. and Others; AIR 2013 SC 2088.**

5. Per contra, learned counsel for the respondent-defendant submitted that it is not in dispute that the Ram Rati Dasi was the founder of the temple namely Sri. Thakur Sanatan Ram Yugal Sarkar Virajman Mandir Maibara and that she had died on 28.08.1976. However he submits that the suit for permanent injunction was filed on the basis of falls and concocted cause of action by an impostor lady namely Janki Dasi on the behest of Lal Das. He further submitted that the Lal Das, who was a hooligan of Ayodhya and trying to capture the temple in question, had also got executed a document from Janki

Dasi appointing him as Sarvarakar. However, when he could not succeed in his illegal design to capture the temple, the suit was amended admitting the possession of the respondent-defendant and the prayer for declaration and possession was added.

6. He further submitted that since the will deed dated 26.09.1969 was the basis of the suit filed by the appellant-plaintiffs, therefore the same was required to be proved as per Section 90A which was added by the U.P. Amendment and the presumption provided under Section 90 of the Indian Evidence Act is not available. He further submitted that the will was required to be proved in accordance with Section 63 of the Indian Succession Act and Sections 68 and 69 of the Indian Evidence Act, as it is not admitted by the respondent-defendant. The burden of proving the will was on the plaintiff- appellants as they were claiming the rights on the basis of the said will. He further submitted that the suit for permanent injunction was filed without disclosing or filing any proof of possession, whereas the respondent-defendant was and is in possession of the temple in dispute and the proof of title and possession such as mutation, tax receipts, invitations etc. were filed by the respondent-defendant, but without considering the same, the suit was allowed, therefore the appeal has rightly been allowed in accordance with law and the suit of the plaintiff-appellants has been dismissed. Thus this second appeal has been filed on misconceived and baseless grounds and no substantial question of law arises in this appeal, therefore the appeal is liable to be dismissed with cost. He relied on **Sebastiao Luis Fernandes (Dead) and Others Vs. K.V.P. Shastri (Dead) and Others; 2014 (32) LCD 1452, Gurunath Manohar Pavaskar and Others Vs. Nagesh Siddappa Navalgund and Others; 2008 (26) LCD 225, Union of India and Others Vs. Vasavi Co-operative Housing Society Ltd. and Others; 2014 (32) LCD 277, Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others;**

AIR 1977 SC 74 & Bharpur Singh and Others Vs. Shamsheer Singh; AIR 2009 SC 1766.

7. I have considered the submissions of learned counsel for the parties and perused the records.

8. The temple in dispute namely Sri. Thakur Sanatan Ram Yugal Sarkar was constructed and established by late Ram Rati Dasi. During her life time, she used to offer prayers etc. She died on 28.08.1976. A suit for permanent injunction was filed by the appellant-plaintiff no.1 and Mahant Smt. Janki Dasi, claiming the right and possession on the temple as Sarvarakar as plaintiff no.2 on the basis of will deed dated 26.09.1969 executed by Ram Rati Dasi. The suit was filed alleging an incident of 19.08.1978 without lodging any FIR etc. During pendency of the suit, the plaintiff no.2 Janki Dasi through a registered document executed on 02.03.1979 appointed Mahant Lal Das as Sarvarakar and alleged to have handed him over the possession and charge of the temple. Mahant Lal Das was murdered on 16.11.1993. However before his murder, he had executed a will dated 14.11.1993 in favour of the appellant-plaintiff no.2 Mahant Awadhesh Das. Accordingly he is claiming himself to be the legal heir and Sarvarakar of the temple.

9. The written statement and additional written statement was filed denying the averments made in the plaint and stating in the additional statement that after Mahant Ram Rati Dasi, Lalita Dasi was the Mahant. Smt. Ram Rati Dasi had got a lease of the land, on which the temple is situated, which was constructed and established by her. After death of Ram Rati Dasi, Lalita Dasi had got her cremation etc. done and in presence of reputed saints, Mahants and others of Ayodhya she was made the Mahant of the temple in dispute and a Mehzarnama was also signed by them to this effect. It was also stated that a will dated 28.06.1976 was executed by Ram Rati Dasi, which could not be registered and it was informed by her only and after her death Lalita

Dasi is in charge of the temple. It was also alleged that a gang of Ayodhya and Lal Das, who claims himself to be the Naga of Hanumangarhi, Ayodhya used to threaten the defendants to vacate the temple. It was also alleged that Lal Das was basically a family man who has been ousted from Hanumangarhi. It was also alleged that he is disciple of Ramesh Tyagi and residing in Kurmi Mandir, Pramod Van, Ayodhya and with his collusion the suit has been filed by an impostor lady Janki Dasi, who resides at Bodhayan Asharam, Mohalla- Janki Ghat. She has no concern with temple situated at Maibara. A plea was also taken that no man can reside or come to the temple in question, however it could not be proved. Certain documents relating to the mutation in Nagar Palika, old house number, ration card, correspondence etc. were filed. It was also alleged that the alleged registered will deed had been got executed through some impostor lady. During pendency of suit, it was amended and prayer for declaration, possession and eviction of respondent was made. On the basis of the pleadings of the parties, eighteen issues were framed. Thereafter the evidence was adduced by the parties.

10. The Trial Court allowed the suit. The civil appeal was filed by the respondent-defendant before the District Judge, Faizabad now Ayodhya which has been allowed by the Additional District Judge, Court No.1, Faizabad now Ayodhya. The First Appellate Court framed two points of determination in appeal. The first was as to whether Ram Rati Dasi has executed any will deed dated 26.09.1969 in favour of Janki Dasi, which has been proved by the plaintiffs in accordance with law. The second as to whether any man could have been Sarvarakar of the place/ temple according to the custom, if yes, what would be its effect on merit of appeal. In regard to the first point of determination, the first Appellate Court found that the Court has to examine basically two issues in regard to proof of the will. The first is as to whether the alleged will has been got proved in accordance with

law under the provisions of the Indian Evidence Act and Section 63 of the Indian Succession Act. The second is as to whether the alleged will is beyond any doubt and as to whether, the doubt which has been raised has been clearly explained by the appellant-plaintiff. The Appellate Court has further recorded that the said two issues are required to be proved by the plaintiffs beyond doubt. The appellate court, after considering the pleadings of the parties and evidence adduced before the trial court and affording opportunity of hearing to the parties allowed the appeal and set aside the judgment and decree passed by the trial court and dismissed the suit of the plaintiff-appellants.

11. In view of above and the substantial questions of law framed in this appeal, the issue to be considered in this second appeal is as to whether the alleged will deed has been proved in accordance with law under the relevant provisions of Indian Evidence Act and Section 63 of the Indian Succession Act or not and the doubts raised by the defendant-respondent have been clarified and removed by the plaintiff-appellants or not or as to whether the execution of Will has been admitted by the defendant-respondent, which may be sufficient proof of it's execution as against her.

12. Section 63 of the Indian Succession Act, 1925 provides the manner, in which a will shall be executed, which is extracted here-in-below:-

***"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 the testator; or has received from the testator a personal acknowledgment of his signature or mark, or of 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."

13. Sections 68 to 71 of the Indian Evidence Act provides as to how a will is required to be proved, which are extracted here-in-below:-

"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.]

69. Proof where no attesting witness found.—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the hand writing of that person.

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."

14. The aforesaid section 68 provides that 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 he is alive and capable of giving evidence. Section 69 provides that if no such attesting witness can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the

document is in the hand writing of that person. In case of admission of a party to an attested document of its execution, it shall be sufficient proof of its execution against him as per section 70. In case the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence as per section 71.

15. The Hon'ble Supreme Court, in the case of **Bharpur Singh and Others Vs. Shamsheer Singh (Supra)**, has held that 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 and in a case where the Will is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator. The relevant paragraph 11 is extracted here-in-below:-

"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."

16. A three judge Bench of the Hon'ble Supreme Court, in the case of **Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others (Supra)**, while considering the relevant provisions of Section 63 of the Indian Succession Act and 68 of the Evidence Act held as under in paragraphs-9 and 10. award

"9. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless

the party which sets up the will .offers a 'cogent and convincing explanation of the suspicious circumstances surrounding the making of the will.

10. *There is a long line of decisions bearing on the nature and standard of evidence required to prove a will. Those decisions have been reviewed in an elaborate judgment of this Court in R. Venkatachala Iyengar v.B.N. Thirumajamma & Others. (1) The Court, speaking through Gajendragadkar J., laid down in that case the following positions :--*

1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by section 63 of the Evidence Act, 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.
3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances

makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

17. The Hon'ble Supreme Court, in the case **Babu Singh and Others Vs. Ram Sahai alias Ram Singh (Supra)**, has held that in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search, only in that event, the Will may be proved in the manner indicated in Section 69, i.e., by examining witnesses who were able to prove the handwriting of the testator or executant and then the burden of proof may be shifted to others. However, a Will ordinarily must be proved keeping in view the provisions of Section 63 of the Indian Succession Act and Section 68 of the Evidence Act, in the event the ingredients thereof, as noticed here-in-before, are brought on record, strict proof of execution and attestation stands relaxed. However, signature and handwriting, as contemplated in Section 69, must be proved.

18. In a recent judgment of **Meena Pradhan and Others Vs. Kamla Pradhan and Another; (2023) 9 SCC 734**, the Hon'ble Supreme Court relying on several previous judgments of the Hon'ble Supreme Court deduced the principles required for proving the validity and execution of a Will in terms of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act. The Hon'ble Supreme Court has also held that one who alleges fraud, fabrication, undue influence etc. has to prove the same. However, even in the absence of such allegations, if there are circumstances giving rise to doubt, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation.

19. In view of above, a will is required to be proved by propounder of the Will in accordance with Section 63 of Indian Succession Act 1925 and the aforesaid provisions made in the Indian Evidence Act 1872 and in case of suspicious circumstances giving rise to doubt about the execution of the Will by the executor for one or the other reason, the same is required to be dispel by the propounder by giving cogent and convincing explanation.

20. Adverting to the facts of the present case, the attesting witnesses were not available, therefore the plaintiff-appellants have adduced the oral evidence of Bina Tripathi as PW-2 to prove the will in accordance with section 69 of the Indian Evidence Act. She stated in her examination-in-chief that she knows very well to Ram Rati Dasi and her disciple Smt. Janki Dasi, who used to live in the temple in question together. Both have died. Ram Rati Dasi had executed a will in favour of Sanatan Ram Bhagwan in the year 1969 and by the same will appointed her disciple Janki Dasi as her legal heir and Sarvarakar. She also stated that the said will deed was written by Ram Rati Dasi with her free will when she was present with Ram Rati Dasi. The will was written by Naval Kishore Lal and the witnesses were

Bhagat Das and Parag Das. She had put her signatures on the will after hearing and understanding the same before her and both the witnesses have also signed. PW-2 also stated that she was not the attesting witness of the will but since the will was prepared before her, therefore she recognizes the document.

21. The first Appellate Court found that this witness has not proved the will in her examination-in-chief as per law because she has failed to state that Ram Rati Dasi had put her thumb impression after reading or hearing and understanding. She has also failed to disclose the order of putting thumb impression by Ram Rati Dasi and the witnesses. The appellate court further recorded that PW-2 in her cross-examination stated that she knows the Maibara temple because she is going there for the last 25-26 years. Kurmi temple is half kilometer away from her house and now she does not go to Kurmi temple. Janki Dasi was lower in age to her but she was her friend, however she does not know as to which original place she belongs. Janki Dasi was disciple of Ram Rati, who had taken Mantra before her about 26 years back. Ram Rati Dasi was of 70 years of age at that time. Thereafter she stated that she was not present at the time of Mantra, however she had heard that she had become disciple of Ram Rati Dasi in the year 1967, again said in 1977 and she died in Maibara temple. She had gone in her 13th day ceremony, for which the cards were distributed. The first Appellate Court found that she does not know sufficiently about Janki Dasi and Ram Rati Dasi. The statement of this witness was recorded on 03.03.2014 and at that time she had stated that her age is 65 years, therefore she was born in 1949 and as per her statement regarding her connection with Maibara temple and Ram Rati Dasi, she had come in contact with Janki Dasi in the year 1976, whereas the will deed was executed on 26.09.1969, therefore she was not in contact with Janki Dasi and Ram Rati Dasi at that time, therefore the question of his

presence with Ram Rati Dasi and the attesting witnesses at the time of alleged execution of will deed dated 26.09.1969 does not arrive.

22. The First Appellate Court has further recorded that PW-2 has stated in his evidence that Janki Dasi had taken Mantra from Ram Rati Dasi 24 years back when she became the disciple of Ram Rati Dasi, therefore she would have taken Mantra in the year 1990 as per her statement, whereas she was not alive at that time because she had died in the year 1967 as stated by her even by his subsequent statement of Ram Rati Dasi had died in the year 1977, though it is not correct, thus her evidence is doubtful. The first Appellate Court also found that this witness has stated in her further cross-examination that Ram Rati Dasi had died at the age of 100 years and even if she had died in the year 1977, the evidence of the said witness is not believable because as per her own statement, when she had seen Ram Rati Dasi, she was 70 years of age and she would have been 70 years of age in the year 1947, whereas the witness was born in 1949, therefore it is apparent that this witness had no information in regard to Ram Rati Dasi and Janki Dasi. He also could not give the length and breadth of the temple and its boundaries. She also does not know the measurement of the statues of Ram, Laxman, Sita and Hanuman and the material of which they are made. She further stated that Maibara is in Ramghat but she does not know any other temple in Ramghat and she does not go there. She further stated in her cross-examination that the will was written in eastern side of court but she does not know the name of the writer. She further stated that she had singed on the said will deed but does not know as to how many places she had signed. She also does not know as to whether thumb impression was taken or not and who was the other witness in the will deed. Her signatures or thumb impression are not on the Will. She also does not know as to who had written the will. She also stated that she does not know Kusum Dasi,

who is present in the court. Janki Dasi had died in the year 1969 in Maibara and she had not gone in the 13th day ceremony.

23. In view of above, if Janki Dasi had died in the year 1969 and Ram Rati Dasi in the year 1977 then the question of execution of the will in favour of Janki Dasi does not arise because as per her subsequent statement she died in the year 1977, therefore the first Appellate Court found that the evidence of PW-2 is completely doubtful and his statement is not believable and she has failed to prove the execution of the alleged will in accordance with law.

24. The first Appellate Court also found that the evidence of PW-3 Satya Deo Tiwari is also not believable and sufficient to prove the will of 1969 because he had disclosed his name Satya Deo Tiwari in the examination-in-chief, whereas in the cross-examination he told his name as Satya Deo Tripathi. His signatures are also different and they also do not seem to be of one and the same person. This witness has recorded his father's name as Girja Shanker Tiwari in the affidavit of examination-in-chief, whereas in the cross-examination he has told his name Girja Shanker Tripathi. He has stated in his evidence that Ram Rati Dasi had executed the will in her lifetime in the year 1969 in favour of Sanatan Ram Bhagwan and by the same will appointed her disciple Janki Dasi as her successor and Sarvarakar and it was told to him by Janki Dasi and the said document was also shown to him. He also tried to prove the document of Sarvarakari written by Janki Dasi in favour of Ram Das.

25. The first Appellate Court found that PW-2 and PW-3 both have not disclosed the date, month and year of execution of the will deed and nothing stated in this regard except that the will deed was written in 1969. PW-3 has given his evidence on the basis of information given by Janki Dasi in regard to the will deed. He has also not proved the signatures of the attesting witnesses and he was not present at the

time of execution of the will deed. The first Appellate Court has also recorded that at the time of giving evidence on 07.03.2014, PW-3 has stated his age about 58 years, therefore he must have been borne in the year 1956 and 13 years of age in the year 1969, therefore he is incompetent to prove the will of 1969. The first Appellate Court also found that as per statement of PW-3, he had not seen Ram Rati Dasi and he had gone to Maibara temple for the first time 40 years back, when Janki Dasi had met her, who used to come to his house and at that time he was 18/19 years of age, therefore he is not competent to prove the thumb impression of Ram Rati Dasi and signatures of the attesting witnesses. Thus the PW-2 and PW-3 have failed to prove the Will.

26. This Court does not find any illegality or error in the aforesaid findings recorded by the first appellate court, which have been recorded on the basis of pleadings, evidence adduced before the trial court and material on record, which are in conformity with them.

27. Now the question arises as to whether even if the plaintiff-appellants have failed to prove the execution of will deed in accordance with law, as to whether the DW-1 and DW-2 have admitted execution of the will and the same can be said to be sufficient proof of execution of will against the defendant-respondent under Section 70 of the Indian Evidence Act

28. Perusal of the oral evidence adduced by DW-1 and DW-2 indicates that DW-1 has stated in his examination-in-chief that Janki Dasi had never lived in the concerned temple and she was not a disciple of Ram Rati Dasi. She has further stated that as per written statement Lal Das, Mahipath Pandey, Lallu Pandey and a forged lady namely Meera had got prepared the will in the name of Ram Rati Dasi and got registered which is apparent from its reading because there was no justification of mentioning Janki Dasi as Sadik Cheli and in

the property only Haata has been written and Kaushalya Dasi never lived as such there was no connection of Janki Dasi with the property in dispute. In her cross-examination also she has stated that she does not know as to whether the will dated 26.09.1969 has been written by Ram Rati Dasi to Janki Dasi and she had not heard of the same prior to it. She has further stated that Lalita Dasi had told her that a will was got executed in favour of Janki Dasi by an impostor lady as Ram Rati Dasi. The DW-2 has stated in her examination-in-chief that Janki Dasi, who used to live in Pramod Van, Janki Ghat, Bodhayan Ashram never lived in Maibara temple. Janki Dasi has never been the disciple of Ram Rati Dasi and she knows it very well because she is residing there since the age of 12 years. She has specifically stated in her cross-examination that Ram Rati Dasi has not written any document in her presence. She also does not know as to any will was executed by Ram Rati Dasi to any Janki Dasi. She also does not know Janki Dasi. Lalita Dasi was the disciple of Ram Rati Dasi.

29. In view of above, it is apparent that DW-1 and DW-2 have not admitted the execution of the will dated 26.09.1969 executed by Ram Rati Dasi in favour of Janki Dasi rather it has specifically been stated by DW-1 that she was told by Lalita Dasi that a will was got executed by an impostor lady as Ram Rati Dasi, therefore, it can not be said that the execution of the will has been admitted by the defendants and the same is admissible against the defendant under Section 70 of the Indian Evidence Act. However by the said statement, the DW-1 has deepened the doubt of execution of Will by an imposter lady which was required to be clarified and removed by the plaintiff-appellants which they have failed to do.

30. In view of above, it is apparent that the plaintiff- appellants have failed to prove the execution of Will in terms of Section 63 of the Indian Succession Act and by giving any cogent evidence in accordance with the provisions made in the Indian Evidence Act. The

respondent defendants and DW-1 and DW-2 appeared on their behalf have not admitted the execution of the will. Their aforesaid statement can only be a hearsay evidence, which can not be relied in absence of its corroboration and substantive evidence and there is no corroborative substantial evidence as discussed above.

31. A Constitution (five judges) Bench of Hon'ble Supreme Court, in the case of **Neeraj Dutta vs State (Govt. of N.C.T. of Delhi); (2023) 4 SCC 731**, has held that hearsay evidence is also called derivative, transmitted, or second-hand evidence in which a witness is merely reporting not what he himself saw or heard, and not what has come under the immediate observation of his own bodily senses, but what he has learnt in respect of the fact through the medium of a third person and normally, a hearsay evidence would be inadmissible, but when it is corroborated by substantive evidence of other witnesses, it would be admissible.

32. The plaintiff-appellants had filed a suit for permanent injunction and during pendency amended the suit and the prayer for declaration, possession and eviction of respondent was made, therefore the burden was heavily on the plaintiff- appellants to establish that they are entitled for such declaration and consequently the possession and eviction of respondent. The weakness, if any, of the case set up by the respondent- defendants could not be a ground to grant relief to the plaintiff-appellants, as they have to stand on their own legs, which they have failed to do, as discussed above.

33. The Hon'ble Supreme Court, in the case of **Union of India and Others Vs. Vasavi Co-operative Housing Society Ltd. and Others (Supra)**, has held that the legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective

of the question whether the defendants have proved their case or not.

The relevant paragraphs- 12 to 15 are extracted here-in-below:-

"12. It is trite law that, in a suit for declaration of title, burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff.

13. The High Court, we notice, has taken the view that once the evidence is let in by both the parties, the question of burden of proof pales into insignificance and the evidence let in by both the parties is required to be appreciated by the court in order to record its findings in respect of each of the issues that may ultimately determine the fate of the suit. The High Court has also proceeded on the basis that initial burden would always be upon the plaintiff to establish its case but if the evidence let in by defendants in support of their case probabalises the case set up by the plaintiff, such evidence cannot be ignored and kept out of consideration.

14. At the outset, let us examine the legal position with regard to whom the burden of proof lies in a suit for declaration of title and possession. This Court in Maran Mar Basselios Catholicos v. Thukalan Paulo Avira reported in AIR1959 SC 31 observed that "in a suit for declaration if the plaintiffs are to succeed, they must do so on the strength of their own title." In Nagar Palika, Jind v. Jagat Singh, Advocate (1995) 3 SCC 426, this Court held as under:

"the onus to prove title to the property in question was on the plaintiff. In a suit for ejectment based on title it was incumbent on the part of the court of appeal first to record a finding on the claim of title to the suit land made on behalf of the plaintiff. The court is bound to enquire or investigate that question first before going into any other question that may arise in a suit."

15. The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. We are of the view that even if the title set up by the defendants is found against, in the absence of establishment of plaintiff's own title, plaintiff must be non-suited."

34. A similar view has been taken by the Hon'ble Supreme Court in the cases of **Gurunath Manohar Pavaskar and Others Vs. Nagesh Siddappa Navalgund and Others (Supra)** and **Sebastiao Luis**

Fernandes (Dead) and Others Vs. K.V.P. Shastri (Dead) and Others (Supra).

35. So far as the judgment, in the case of **Sampath Kumar Vs. Ayyakannu and Another (Supra)** of Hon'ble Supreme Court, relied by the learned counsel for the appellants in regard to amendment of pleadings is concerned, there may not be any quarrel on that, however it is not applicable on the issue involved in this case, therefore it is not of any benefit to the plaintiff-appellants.

36. The basis of suit, even if registered, is required to be proved in accordance with law and the presumption can not be made in respect of any such document as per Section 90-A inserted by State Amendment of Uttar Pradesh in the Indian Evidence Act 1872.

37. In the present case the Will deed dated 26.09.1969 is the basis of suit filed by the plaintiff-appellants because they are seeking declaration of title and possession on the basis of same, therefore without proof of the said will in accordance with law i.e. its execution in accordance with Section 63 of the Indian Succession Act 1925 and proof thereof in accordance with the aforesaid provisions made in the Indian Evidence Act 1872 and removal of doubts in regard to its execution, no declaration could have been made and direction for possession could have been given but the plaintiff-appellants have failed to prove them in accordance with law and also failed to remove doubts in regard to its execution. As discussed above the will can also not be presumed to be valid and enforceable, therefore also no such declaration could have been made, therefore consequential relief could also not be granted.

38. In view of above, this Court is of the view that learned appellate court has rightly and in accordance with law held that the plaintiff-appellants have completely failed to prove the will deed dated 26.09.1969 and the plaintiff-appellants have failed to dispel the

suspicious circumstances arising out of evidence of PW-2, the burden of which was on them and there is no admission of execution of the said will deed by the DW-1 and DW-2, on account of which it may be said that it is sufficient prove of execution of Will as against the respondent-defendants. Thus the aforesaid substantial questions of law no.1 and 2 framed in this second appeal, are answered accordingly.

39. In view of above and considering over all facts and circumstances of the case, this Court is of the view that the first appellate court has rightly and in accordance with law has allowed the appeal and set aside the judgment and decree passed by the trial court and dismissed the suit and this second appeal is misconceived and lacks merit, which is liable to be dismissed.

40. The second appeal is, accordingly, **dismissed**. No order as to costs.

(Rajnish Kumar, J.)

Order Date :- 08.04.2024
Haseen U.