

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

Second Appeal No. 09/2004
with
Second Appeal No. 343/2007

1. Second Appeal No. 09/2004

Appellants : Arik Merry D/o Peter Gregory through
 Legal Heirs

a. Eugene Rock Peter Gregory,
 R/o Rajiv Gandhi Nagar, IBM Road,
 Gittikhadan, Nagpur

b. Regina Sunil Demta,
 R/o Rajvi Gandhi Nagar, IBM Road,
 Gittikhadan, Nagpur

c. Benjamin Rock Peter Gregory,
 R/o Palloti Church, Gorewada Road,
 Nagpur

d. Anju Kishor Naidu,
 R/o Khalasi Line, Shiv Mandir Road,
 Nagpur

e. Vinisha Patrick Panchu,
 R/o Rajiv Gandhi Nagar, IBM Road,
 Gittikhadan, Nagpur

...Versus...

Respondents :

1. Lawrie Peter Gregory
 Aged 75 years Occ- Retired (Deleted)

2. Smt. Cormal W/o Lawrie Peter
 Gregory, Aged 66 years,
 Occ. Household (Deleted)

3. Claudius S/o Lawrie Peter Gregory, aged

about 43 years, Occ. Service, Nos. 1 to 3 R/o New Extension Area Sadar, Dist. Nagpur

4. Smt. Binarejina W/o Late Leaslie Lawrie Peter, aged about 34 years, Occ. Nil

5. Master Vickey s/o Late Leslie Lawrie Peter, through Natural guardian i.e His mother respondent no. 4 (i.e Smt. Binarejina) aged about 12 years, Occ. Nil (Minor)

Both No. 4 and 5 r/o Gittikhadan, Nagpur

6. Stanley s/o Lawrie Peter Gregory, (Deleted)

7. Basil s/o Lawrite Peter Gregory, aged 27 years, Occ. Mechanic, R/o New Extension Area, Sadar, Nagpur

8. Ms. Salvi Joseph Anthony, aged about 34 years, R/o 4-18-1, Ramrao Lambadipeth Street Vijaywada, (A.P)

Shri R.D. Upadhyay, Advocate for appellants
None for respondents

2. Second Appeal No. 343/2007

Appellant : Amarnath s/o Bachairam Gupta
Aged about 39 years, Occupation Business,
R/o Gawalipura, Sadar, Dist. Nagpur

...Versus...

Respondents : 1. Lawrie Peter Gregory and Smt. Cormal
W/o Lawrie Peter (Since both are
deceased are being represented by their

L.R's.)

- a. Claudius s/o Lawrie Peter Gregory, aged about 45 years, Occ. Service, R/o New Extension Area Sadar, Dist. Nagpur
 - b. Smt. Binarejina w/o Late Leaslie Lawrie Peter, aged about 35 years, Occ. Nil
 - c. Master Vickey s/o Late Leslie Lawrie Peter, through Natural guardian i.e. His mother (Appellat No. 4 (Respondent (b) aged about 14 years, Occ. Nil (Minor)
 - d. Basil s/o Lawrie Peter Gregory, aged 29 years, Occ. Mechanic, R/o New Extension Area, Sadar, Dist. Nagpur
 - e. Ms. Salvi Joseph Anthony, aged 36 years, R/o 4-81-1, Ramrao Lambadipeth Street Vijaywada, (A.P)
2. Aril Merry D/o Peter Gregory through its L.R's
- a. Benjamin Rock Peter Gregory, R/o Palloti Church, Opposite Gorewada Road, Nagpur
 - b. Regina Sunil Demta, R/o Rajiv Gandhi Nagar, IBM Road, Gittikhadan, Nagpur
 - c. Eugene Rock Peter Gregory, R/o Rajiv Gandhi Nagar, IBM Road, Gittikhadan, Nagpur
 - d. Anju Kishore Naidu, R/o Khalasi Line, Shiv Mandir Road, Nagpur
 - e. Vinisha Patrick Panchu, R/o Rajiv Gandhi Nagar, IBM Road, Gittikhadan, Nagpur
 - f. Johnnie Peter Gregory, R/o Tukaram

Chawl, Opposite Kasturba Peter Gregory
Vachnalaya, Sadar, Nagpur

g. Hridaya Mary William Gabriel, R/o
House No. 251 Gawkheda, F Station
Chakeri, Kanpur 208008

h. Mabel Gabriel, R/o House No. 251
Gawkheda, F Station Chakeri, Kanpur
208008

i. William Gabriel, R/o House No. 251
Gawkheda, F Station Chakeri, Kanpur
208008

Shri A.S. Jaiswal, Senior Adv. with Smt. Radhika Bajaj, Adv. for appellant
None for respondents

CORAM : A.S. Chandurkar, J.

DATE : 07/09/2017

Oral Judgment:-

1. Since both these appeals raise challenge to the judgment of the first appellate Court in Regular Civil Appeal No. 647/1993, they are being decided by this common judgment.

2. The appellant in Second Appeal No. 09/2004 is the original plaintiff. It is her case that she is the daughter of one Peter Gregory. Her father was living in house No. 177 and she was living along with him. During his lifetime, her father executed a Will on 19/02/1975 which was

duly registered on the same day. As per the said Will, the house property and other movables were bequeathed in favour of the plaintiff. Her father expired on 21/02/1975. Thereafter, the plaintiff continued residing in her suit house. On 21/12/1985, her brother forcibly evicted her and alongwith his family members, he started residing there. The plaintiff lodged a report and thereafter issued a notice demanding possession of the suit property. Ultimately, the plaintiff filed a Special Civil Suit No. 239/87 for possession of the suit property on the basis of title acquired through the Will.

3. The defendant no. 1 to 7 filed their written statement and took the stand that the Will dated 19/02/1975 was not a genuine Will. It was pleaded that the testator was not keeping good health and had lost his eye sight. He had also gone into coma and therefore, the said Will was not genuine. The plaintiff did not disclose about the execution of the Will for a period of almost 10 years, hence, it was prayed that the suit be dismissed.

4. The plaintiff examined herself and three more witnesses. The defendant no. 1 examined himself. After considering the evidence on record, the trial Court held that the Will dated 19/02/1975 was a genuine Will. It's execution was duly proved and therefore, the plaintiff had title to the suit property. After holding that the plaintiff had been forcibly

dispossessed from the suit property, the suit was decreed on 10/11/1993 in favour of the plaintiff.

5. The defendant filed an appeal challenging the aforesaid judgment. The first appellate Court found that one of the attesting witnesses had not supported the case of the plaintiff. The suspicious circumstances as to the health of the testator were not satisfactorily explained. The first appellate Court held the said Will to be not genuine and reversed the judgment of the trial Court. Being aggrieved, the plaintiff has filed the Second Appeal No. 09/2004. The appellant in Second Appeal No. 343/2007 has purchased the suit property from the original plaintiff on 08/11/2000. He has also impugned the said judgment of the first appellate Court. While admitting the second appeals, the following substantial questions of law were framed :-

1) “ *Is the judgment of Appellate Court required to be regarded as erroneous on account of having recorded the finding that the Will is liable to be disregarded being executed in suspicious circumstances namely:*

(i) *being authorized by the Thumb Impression while testator used to sign ?*

(ii) circumstances are not coming forwarded as to why other heirs have been excluded from any bequeathed under the Will ?

2) What circumstances are required to be proved in order to render a Will to be executed under suspicious circumstances.”

6. Shri A.S. Jaiswal, learned Senior counsel for the appellants in support of the appeals submitted that the Will at Exh. 85 had been duly proved as required by the provisions of the Evidence Act, 1872 (for short, the said Act). Both the attesting witnesses had been duly examined. Even if one of the attesting witnesses did not support the case of the plaintiff fully, that by itself, would not be a ground to disbelieve the entire case of the plaintiff. According to him, the entire evidence on record with regard to execution of the Will has to be taken into consideration and thereafter a finding as to its genuineness has to be recorded. It was submitted that the other attesting witness examined below Exh. 93 had deposed in favour of the plaintiff proving the attestation. It was then submitted that there was no specific pleadings by the defendants indicating any suspicious circumstances. Merely stating that the Will was not genuine or that the health of the testator was not good was not sufficient. The suspicious circumstances were required to

be pleaded and also proved. He referred to the deposition of the defendant to indicate that no suspicious circumstances were brought on record by him. It was, further stated that absence of draft copy of the Will was not very relevant when the original copy had been placed on record. Similarly, exclusion of other legal heirs from getting any benefit in the Will was also not a suspicious circumstance by itself. Merely because the testator expired shortly after executing the Will, the same would not be a suspicious circumstance. It was, therefore submitted that considering the entire evidence on record, the trial Court had rightly held that the said Will to be duly proved. The appellate Court set aside those findings without any sufficient reasons.

In support of his submissions, the learned Senior counsel placed his reliance on the decisions in case of *Babu Singh and others Vs. Ram Sahai Alias Ram Singh reported in (2008) 14 SCC 754* and in case of *Ved Mitra Verma Vs. Dharam Deo Verma reported in (2014) 15 SSC 578*. It was, therefore, submitted that the judgment of the trial Court deserves to be restored.

7. Shri R.B. Upadhyay, learned counsel for the appellants in Second Appeal No. 09/2004 adopted the arguments of the learned Senior counsel.

He did not dispute that the suit property was sold in favour of the appellant in Second Appeal No. 343/2007.

8. There was no appearance on behalf of the respondents on 31/08/2017 and 06/09/2017. Today also, there is no appearance on their behalf. Hence, I have heard the learned Senior counsel for the appellant at length and I have also perused the records.

9. The trial Court considered the entire evidence on record and in Para Nos. 11 to 15 recorded a finding that the plaintiff as the propounder of the Will had proved its execution with cogent and satisfactory evidence. It was found that the Will was genuine and the circumstances sought to be urged on behalf of the defendants were not sufficient for discarding the same.

10. The first appellate Court reversed this finding by holding that one of the attesting witnesses examined below Exh. 84 did not support the execution of the case, the proof of signature of Shri B.J. Gupta, Advocate on the copy of the Will at Exh. 83 was inconsequential, the other attesting witness was not a Doctor and the other children of the testator had been excluded from the benefits under the Will. On these counts, it was held that

the aforesaid Will was not genuine.

11. In so far as the health of the testator is concerned, it has been deposed by the plaintiff at Exh. 44 that the Will was executed in her presence as well as in the presence of witness. In her cross-examination, she has stated that her father was in a healthy condition before his death and that he died on account of old age. The age of the testator is stated to be about 83 years when the Will was executed. The attesting witness Dr. Rushi Vaidya had deposed that the contents of the Will were written down by the Advocate. He had signed it as an attesting witness. In the cross-examination, he has stated that the testator was capable of speaking clearly. The other attesting witness Jayant Kumar was examined below Exh. 84. Though this witness did not depose much as to the attestation, he has not stated anything about the health of the testator. The defendant examined himself below Exh. 98. He stated that when his father had expired at Nagpur, he was at Balharshah. He used to travel from place to place due to his job. He did not state anything with regard to the health of his father except for stating that the Will was showing the thumb impression of his father.

12. Thus, from the aforesaid evidence as to the health and disposing

mind of the testator, it cannot be said that the testator was not in a good health at the time of execution of the Will. There is no evidence brought on record as to his ill-health. In fact, it had been pleaded by the defendants that the testator had lost his eye-sight and was not in a good health. It was, further pleaded that he had also gone into coma on 18/02/1975. There is however no evidence to that effect. Hence, the state of health of the testator is not shown to be such on the basis of which he could not have executed the Will.

13. As regards the execution and attestation of the Will, the evidence on record indicates that the Will had been prepared by Advocate Shri B. L. Gupta on instructions of the testator. The son of said Advocate Shri B. L. Gupta was examined below Exh. 82 and he identified his father's signature on a copy of the Will that was at Exh. 83. The attesting witness at Exh. 84 deposed that the original Will at Exh. 85 was bearing his signature as a witness. He, however, did not know who were the other signatories and as to whom the thumb impression belongs to. He did not read the contents of the said documents.

14. The other attesting witness at Exh. 93 stated that he was M.B.B.S, D.H.B and N.D. The testator was his patient and in the year 1975,

he had been called by Advocate Gupta for preparing the Will. He deposed about the due attestation by himself and the other attesting witness. Though this witness was cross-examined as to the aspect of the attestation, except admitting that the other attesting witness was not present when he put his signature, nothing much has come in his cross-examination. It is to be noted that the Will was duly executed by the testator in presence of the Registrar. The plaintiff in her cross-examination admitted that after the testator put his thumb impression on the Will, the witnesses signed in his presence. The fact is corroborated by the attesting witnesses, PW-4 in his cross-examination. The necessary endorsements have also been made on the Will at Exh. 85.

15. Considering the entire evidence on record, I find that the deposition of the attesting witness at Exh. 93 is sufficient to prove due attestation as required by Section 68 of the said Act. It is to be noted that the provisions of Section 68 of the said Act require examination of atleast one attesting witness. Merely because two attesting witnesses have been examined and one of the attesting witnesses has not supported the case of the propounder, that by itself would not be sufficient to discard the entire evidence as to attestation. The entire evidence on record would have to be cumulatively assessed before accepting the deposition of an attesting

witness. Though the attesting witness at Exh. 84 admitted his signature on the Will, he did not entirely support the case of the plaintiff. Similarly, nothing much would turn with regard to signatures on the copy of the Will at Exh. 83. However, if the deposition of the other witness is taken into consideration, I find that the same is sufficient to come to the conclusion that due attestation of the Will has been proved.

16. It is further be noted that the Will in question was executed on 19/02/1975 and after the death of the testator, the plaintiff continued to reside there. It was only when she was dispossessed in the year 1985 that the question with regard to her title cropped up. The suit has been filed in the year 1987. It also cannot be ignored that the other issues of the testator have not challenged the Will and it is only the defendant no. 1 and his family who have raised the challenge. The witnesses had deposed after almost 18 years from the execution of the Will and hence that aspect also cannot be ignored.

17. The trial Court, in my view, had rightly appreciated the evidence on record before coming to the conclusion that the execution of the Will had been duly proved. It cannot be lost sight of that the same learned Judge who had recorded the evidence decided the suit. He had an occasion to

observe the demeanor of the witness. The first appellate Court gave importance to those circumstances which cannot be said to be suspicious circumstances. There were even no pleadings in that regard. On consideration of the entire evidence on record, I find that the judgment of the trial Court is liable to be restored.

18. Accordingly, the substantial questions of law as framed are answered by holding that the judgment of the appellate Court is erroneous as it has wrongly held that the Will was liable to be disregarded. The circumstances relied upon for the said purpose have been duly explained and they cannot be termed to be suspicious circumstances. The circumstances as alleged by the defendants to be suspicious have not been duly proved.

19. As a result of aforesaid discussion, the following order is passed:-

1. The judgment in R.C.A No. 647/1993 dated 02/05/2002 is quashed and set aside.

2. The judgment of the trial Court in Civil Suit No. 239/1987 dated 10/11/1993 is restored.

3. The second appeals are allowed in the aforesaid terms with no order as to costs.

JUDGE

Ansari