

SUPREME COURT OF INDIA

Girja Datt Singh

Vs.

Gangotri Datt Singh

C.A.Nos.194 and 195 of 1953

(S. R. Das, N. H. Bhagwati and S. J. Imam, JJ.)

25.01.1955

JUDGEMENT

BHAGWATI, J. :-

1. These two appeals by special leave arise out of two separate proceedings, one under the U. P. Encumbered Estates Act, E. E. Act Case No. 11 of 1936 and the other a title suit, being Regular Suit No. 71 of 1938 in the Court of the Civil Judge, Gonda in relation to a 10 annas share in the property left by one Bhaiya Baleshwar Datt Singh hereinafter referred to as the deceased.

2. The deceased died on 15-5-1933 leaving him surviving Bhaiya Girja Datt Singh, hereinafter referred to as Girja, the original Appellant, as his nearest collateral and heir. Bhaiya Gangotri Datt Singh, hereinafter referred to as Gangotri, was a remoter heir but claimed to succeed to the estate of the deceased under the terms of a will alleged to have been made and published by the deceased on 17-3-1928. Girja filed 29 applications for mutation of his name in place of that of the deceased in the Revenue Courts in respect of the properties left by the deceased. Gangotri contested these applications on the basis of the said alleged will. All these cases were consolidated and the case with respect to the village Nagwa was treated as the main case.

On 14-11-1933 three applications were made to the Revenue Court for reference to arbitration of the disputes between Girja and Gangotri:

- (1) Application Ex. 58 by Gangotri under S. 203, U. P. Land Revenue Act
- (2) Application Ex. 57 by Girja under S. 203 of the U. P. Land Revenue Act and
- (3) Joint application Ex. 59 by Girja and Gangotri.

stating that they had appointed Bhaiya Raghuraj Singh and Bhaiya Lot Baksh Singh, Taluqdars of Majhgawan as arbitrators and that whatever award would be given by the said arbitrators in respect of the property left by the deceased would be accepted by the parties and both the parties would abide by the same and that mutation might also be made according to the award. By an order dated 15-11-1933 the Revenue Court referred the matters to the arbitration of the said arbitrators. Gangotri tried to resile from the reference but ultimately the Board of Revenue held him bound by the reference.

The arbitrators published their award on 17-1-1934 in the terms following :

"We decide that out of the entire property of Baleshwar Datt Singh, only ten annas share out of the entire villages be given to Bhaiya Girja Datt Singh and six annas to Bhaiya Gangotri Datt Singh. The waqf property shall remain as such and Bhaiya Girja Datt Singh shall continue to be its mutwalli. The parties, their heirs and representatives shall be bound by the award generation after generation. The said award shall be binding on the parties in the revenue and civil courts."

Gangotri filed objections to the said award contending that the reference was not made by him by free consent, that the arbitrators had exceeded their powers and that the arbitrators were guilty of misconduct. By its judgment dated 18-1-1935 the Revenue Court rejected the objections and ordered mutations in terms of the award. An appeal by Gangotri against this order and judgment was dismissed on 14-5-1935.

3. On 11-4-1936 Girja filed an application under S. 4, U. P. Encumbered Estates Act, E. E. Act case No. 11 of 1936 for the liquidation of his debts. In the written statement dated 21-5-1936 filed under S. 8 of the Act the ten annas share in the properties left by the deceased was shown as belonging to Girja and as liable for the satisfaction of his debts. On 22-5-1937 Gangotri filed objections under S. 11 of the Act claiming the said properties as his own under the will dated 17-3-1928, alleged to have been executed by the deceased in his favour. On 18-5-1937 Gangotri filed Regular Suit No. 71 of 1938 in the Court of the Civil Judge, Gonda against Girja for recovery of possession of the 10 annas share of the properties left by the deceased and held by Girja under the terms of the award. Gangotri based his claim on the terms of the said will and contended that he was entitled to all the properties left by the deceased as the sole legatee. Girja resisted the suit mainly on two grounds, viz., (1) that the will Ex. A- 36 was not duly executed and attested, and (2) that the award which amounted to a family settlement was binding upon the parties.

4. Issue No. 6 in E. E. Act case No. 11 of 1936: "Is the Rent Court's decision about the award 'res judicata' and does no civil suit lie?" was tried as a preliminary issue and by his judgment dated 5-5-1938 the Special Judge held that the question as to the validity or invalidity of the award was 'res judicata' but a civil suit was not barred by reason of the decision of the Revenue Court. An appeal against this judgment was dismissed by the Chief Court of Oudh on 22-7-1942.

5. The E. E. Act Case No. 11 of 1936 and the Regular Suit No. 71 of 1938 were thereafter tried and heard and disposed of together, the learned advocates of the parties having agreed that the result of the suit should follow the result of the E. B. Act case: The Special Judge found that the will was proved to have been duly executed and attested, that the reference to arbitration was made by Gangotri of his own free will and he could not withdraw therefrom, that the award was not vitiated by fraud or partiality of the arbitrators, that the award did not amount to a family settlement and that it not being registered could not be used in the Civil Court. The claim of Gangotri was accordingly allowed and the properties in question were held not to belong to Girja. Following the said findings the Civil Judge decreed Suit No. 71 of 1938 in favour of Gangotri.

6. Girja preferred two appeals to the Chief Court of Oudh against these two decrees. The Chief Court of Oudh by its judgment dated 28-2-1947 dismissed both the appeals. Girja applied to the Chief Court of Oudh on 2-4-1947 for leave to appeal to the Privy Council but the same was refused on 12-8-1947. He thereupon applied to the Federal Court for special leave to appeal against the judgment and decree of the Chief Court of Oudh and by its orders dated 11-11-1948 the Federal Court granted special leave to appeal in both the matters. It is only necessary to state that Girja died on 5-11-1949 and the present Appellants were substituted in his place and stead as his heirs and legal representatives on 9-3-1951.

7. The two questions which arise in these appeals are (1) whether the will dated 17-3-1928 is proved to have been duly executed and attested and (2) whether the award published by the arbitrators on 17-1-1934 is binding on the parties. As our decision on the first question is determinative of these appeals we have not found it necessary to call upon the parties to argue the second question before us. We are of the opinion that the will dated 17-3-1928 is not proved to have been duly executed and attested and the Appellants are therefore entitled to succeed.

8. The facts in regard to the due execution and attestation of the will may be shortly stated as under. The deceased was a resident of the village of Nagwa Khas, Pargana Mahadeva, Tahsil Tarabganj, District Gonda. Prior to 17-3-1928 he had duly made and published two wills dated 27-8-1904 and 1-12-1915 and those wills were executed by him, when his wife was living. But she died after the execution of his second will and Gangotri, a distant relation of his became a member of his household when quite young somewhere in 1923. The deceased intended to execute a will in favour of Gangotri some time in March 1928. He also wanted to execute a deed of waqf dedicating 1.66 acres of land in Tehsil Tarabganj in favour of certain idols which he had installed in a Thakurdwara at the village Nagwa.

With that intention he came to Gonda on or about 15-3-1928 and put up at the Math of Mahant Gulabgir in Gonda. One Gur Charan Lal, a pleader of Gonda was his legal adviser and he approached Gur Charan Lal for the drafting of his will. Gur Charan Lal prepared a rough draft of the will on or about 16-3-1928, and the said rough draft was made fair and was scribed by Sant Bux, a clerk of Gur Charan Lal at the latter's place of residence on the morning of 17-3-1928. It appears that a fair draft of the deed of waqf was also prepared and scribed by one Hasinuddin on the morning of 16-3-1928 and the case of Gangotri was that both these fair drafts after having been scribed as aforesaid were taken by the deceased to Tarabganj and were executed by the deceased and duly attested by the attesting witnesses Uma Dutt Singh and Badri Singh under a Bargad tree in the compound of the registration office at Tarabganj.

After the execution and attestation of the documents they were on the same day presented for registration by the deceased before the Sub-Registrar at Gonda. The deceased admitted execution and completion of the said two documents and was identified before the Sub-Registrar by two persons, one Mahadev Pershad and the other Nageshur. Mahadeo Pershad and Nageshur appended their signatures under those of the Sub-Registrar at the foot of the endorsement in regard to registration.

9. In order to prove the due execution and attestation of the will Gangotri examined the two witnesses Uma Dutt Singh and Badri Singh. Girja examined Hasinuddin, the scribe of the deed of 'waqf'. The will Ex. A. 36 was scribed in blue ink and the signatures of the deceased and the two attesting witnesses Uma Dutt Singh and Badri Singh were also made in the same ink. The deed of waqf, Ex. A- 23 on the other hand was scribed in black ink and the signatures of the deceased and the attesting witnesses Uma Dutt Singh and Badri Singh were also made in the same black ink.

The evidence of Uma Dutt Singh and Badri Singh was that though both the documents had been scribed at Gonda they were not executed and attested at Gonda because Uma Dutt Singh, who was intended by the deceased to be an attesting witness to both the documents was not present in Gonda on 17-3-1928 and therefore the deceased asked Badri Singh, who was at Gonda on that day to accompany him to Tarabganj and both the documents were executed by the deceased and were duly attested by the two attesting witnesses Uma Dutt Singh and Badri Singh under the Bargad tree in the compound of the registration office at Tarabganj.

Uma Dutt Singh further stated in his evidence that he was at the village Karimpur for about 7 or 8 days before 17-3-1928, that a letter addressed by the deceased to him at his village Rampur Karehta was received by him at Karimpur and he managed an elephant and reached Tarabganj registration office at about 2 P. M. on 17-3-1928 where he found assembled the deceased, Badri Singh and six or seven other persons. It was after Uma Dutt Singh thus reached the Tarabganj registration office that it was alleged that both the documents Ex. A- 23 and Ex. A- 36 were executed by the deceased and duly attested by Uma Dutt Singh and Badri Singh as aforesaid, one after the other and were after due execution and attestation thereof presented by the deceased before the Sub-Registrar between 2 and 3 P. M. that day.

10. Hasinuddin on the other hand deposed that he scribed the fair draft of the deed of waqf at the house of Gur Charan Lal at Gonda, that the deceased and the two attesting witnesses Uma Dutt Singh and Badri Singh were present at the house of Gur Charan Lal and Ex. A- 23 was duly executed by the deceased and attested by the said attesting witnesses at the house of Gur Charan Lal in his presence. He had brought his ink pot and the pen with him and the fair draft was scribed by him and was also executed and duly attested by the deceased and the attesting witnesses in the same ink which was black ink. At the time when he was scribing the fair draft of the deed of waqf he also saw Sant Bux scribing a fair draft of some document but he did not know what that document was.

If the version of Hasinuddin as regards the due execution and attestation of the deed of waqf, Ex. A- 23 was correct, the two attesting witnesses examined by Gangotri, viz., Uma Dutt Singh and Badri Singh were obviously telling a lie when they stated that both the documents, Ex. A- 23 and Ex. A- 36 were duly executed and attested under the Bargad tree in the compound of the registration office at Tarabganj. It may be noted that Gur Charan Lal who was examined by Gangotri disavowed all connection with Ex. A- 23 but only deposed to the preparation and the scribing of the will, Ex. A- 36 and the deceased having taken away the fair draft to Tarabganj for execution and completion of the document.

11. The trial Court believed Uma Dutt Singh and Badri Singh and observed that in spite of very lengthly cross-examination nothing was elicited from them which could vitiate the registered will. As regards the difference in the inks with which- Exs. A - 23 and A- 36 were scribed executed and attested it observed that similar pens and inks to those which were used in Ex. A- 23 could be had at Tarabganj and therefore discarded the evidence of Hasinuddin that Ex. A-23 was executed and attested at Gonda.

The Chief Court of Oudh on the other hand stressed the difference in the inks on the two documents, Ex. A- 25 and Ex. A- 36 and opined that the statement of Hasinuddin that Ex. A- 23 was completed, signed and attested in his presence at Gonda might as well be true and concluded that the attesting witnesses were not telling the truth when they gave the reason why the will, Ex. A- 36 was not signed and attested at Gonda. It however accepted the evidence of the attesting witnesses to the extent that they saw the deceased sign Ex. A- 36 and that they also signed in his presence and thus agreed with the finding of the trial Court that the will Ex. A- 36 was duly executed and attested.

12. We have ourselves seen the original documents Ex. A- 23 and Ex. A- 36 and agree with the conclusion reached by the Chief Court of Oudh that the attesting witnesses were not telling the truth when they gave the reason why the will was not signed and attested at Gonda. Hasinuddin was a petition writer and usually carried his own ink pot and pen. That ink pot contained black ink and he scribed the fair draft of Ex. A-23 in that black ink. A perusal of his evidence does not justify the criticism which has been levelled against him by the trial Court, viz., that he was a witness who

could be purchased and was got up for the purpose of putting forward a false story that Ex. A-23 was executed and attested in the house of Gur Charan Lal at Gonda.

His evidence sounds quite natural and in spite of his poverty he does not appear to have been anxious to support the case of Girja as appears from the answer which he gave in cross-examination as regards the deceased being "a sensible man", The evidence of Hasinuddin accepted as it is by the Chief Court of Oudh goes to establish that the deed of waqf Ex. A-23 was scribed by him and was executed by the deceased and attested by Uma Dutt Singh and Badri Singh in his presence at the house of Gur Charan Lal. If Uma Dutt Singh and Badri Singh were both present in Gonda at the time of the execution of Ex. A-23 it is impossible to believe that the will, Ex. A-36 also was not executed by the deceased and attested by Uma Dutt Singh and Badri Singh at the same time.

The ink with which the fair draft of the will, Ex. A-36 was scribed was blue ink which would be the ink in the ink pot of Gur Charan Lal and when Uma Dutt Singh and Badri Singh were both present at the time of the execution and attestation of the deed of waqf Ex. A-23 it is but natural that the deceased, after Sant Bux had scribed the fair draft of the will, executed the same and the attesting witnesses Uma Dutt Singh and Badri Singh also attested the execution thereof at Gonda. That would explain the execution and attestation of the attesting witnesses in the same ink with which the fair draft of the will was scribed by Sant Bux.

The story which has been deposed to by Uma Dutt Singh and Badri Singh in regard to the execution and attestation of both the documents, Ex. A-23 and Ex. A-36 under the Bargad tree in the compound of the registration office at Tarabganj cannot be believed for the simple reason that if both these documents had been executed and attested there it is impossible to understand how the scribing, the execution and the attestation of each of these documents happens to be uniformly in different inks. Uma Dutt Singh had admitted in his statement before the Assistant Collector in the mutation case that there was one ink pot at Tarabganj when he reached the Tarabganj registration office and this statement of his was admitted by him to be correct, in the evidence which he gave before the trial Court.

None of these witnesses was able to explain the circumstances under which the execution and attestation of the deed of waqf, Ex. A-23 was in the same black ink with which the document was scribed and the execution and attestation of the will, Ex. A-36 was also in the same blue ink with which the document was scribed. These circumstances are in our opinion eloquent and go to show that not only was the deed of waqf, Ex. A-23 scribed, executed and attested at the house of Gur Charan Lal in the presence of Hasinuddin but the will, Ex. A-36 was also scribed and attested at the house of Gur Charan Lal and in the ink which was used by Sant Bux for scribing the fair draft of the will. But the attesting witnesses would not have the will Ex. A-36 executed and attested at Gonda.

13. It was urged before us by the learned counsel for Gangotri that the conclusion reached by the Chief Court of Oudh in regard to the execution and attestation of the will, Ex. A- 36 at Gonda was correct and the two attesting witnesses Uma Dutt Singh and Badri Singh were guilty of a lapse of memory when they deposed that both the documents Ex. A-23 and Ex. A-36 were executed and attested at Tarabganj under the Bargad tree in the compound of the registration office at Tarabganj. This contention is in our opinion untenable. The theory as regards the lapse of memory is negatived by the details which have been given by these witnesses as to why both the documents had to be taken to Tarabganj for execution and attestation.

Badri Singh stated that Uma Dutt Singh was not available at Gonda and he was the person desired

by the deceased to be one of the attesting witnesses. Uma Dutt Singh also confirmed this statement that he was not at Gonda on that day but got the letter addressed by the deceased to him at Rampur Karehta in the village Karimpur and managed an elephant and reached the Tarabganj registration office at 2 P. M. on 17-3-1928. There is the further statement of both these witnesses that the documents Ex. A-23 and Ex. A-36 were in fact executed by the deceased and attested by them under the Bargad tree in the compound of the registration office at Tarabganj.

All these details far from supporting the theory of a lapse of memory on their part only go to show that they were inventing a story with the intention of lending an air of verisimilitude to it. Gur Charan Lal for some reason or the other did not want to be involved in the matter of the execution of the will Ex. A-36 and it appears that somehow or the other the two witnesses Uma Dutt Singh and Badri Singh were persuaded to depose that the execution and attestation of the will Ex. A-36 took place at Tarabganj and not at Gonda. We are of the opinion that the version given by Uma Dutt Singh and Badri Singh in regard to the execution and attestation of the will Ex. A-36 under the Bargad tree in the compound of the registration office at Tarabganj is an invention and the will, Ex. A-36 was scribed by Sant Bux at Gonda, was executed by the deceased at Gonda and Uma Dutt Singh and Badri Singh also appended their signatures to the same in token of attestation at Gonda.

We are supported in this conclusion of ours by the fact that the identification of the deceased before the Sub-Registrar at Tarabganj was made not by Uma Dutt Singh and Badri Singh who according to their own story were present in the registration office at Tarabganj but by two other individuals Mahadeo Pershad and Nageshur.

14. It still remains to consider whether the attestation of the signature of the deceased on the will, Ex. A-36 was in accordance with the requirements of S. 63, Indian Succession Act. Section 63 prescribes that:

"(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"

In order to prove the due attestation of the will Ex. A-36 Gangotri would have to prove that Uma Dutt Singh and Badri Singh saw the deceased sign the will and they themselves signed the same in the presence of the deceased. The evidence of Uma Dutt Singh and Badri Singh is not such as to carry conviction in the mind of the Court that they saw the deceased sign the will and each of them appended his signature to the will in the presence of the deceased. They have been demonstrated to be witnesses who had no regard for truth and were ready and willing to oblige Gur Charan Lal in transferring the venue of the execution and attestation of the documents Ex. A-23 and Ex. A-36 from Gonda to Tarabganj for reasons best known to themselves.

If no reliance could thus be placed upon their oral testimony, where would be the assurance that they actually saw the deceased execute the will in their presence and each of them signed the will in the presence of the deceased. It may as well be that the signature of the deceased on the will was appended at one time, the deceased being there all alone by himself and the attestations were made by Uma Dutt Singh and Badri Singh at another time without having seen the deceased sign the will or when the deceased was not present when they appended their signatures thereto in token of attestation. We have no satisfactory evidence before us to enable us to come to the conclusion that

the will was duly attested by Uma Dutt Singh and Badri Singh and we are therefore unable to hold that the will Ex. A-36 is proved to have been duly executed and attested.

15. When this position was realised the learned counsel for Gangotri fell back on an alternative argument and it was that the deceased admitted execution and completion of the will Ex. A-36 and acknowledged his signature thereto before the Sub-Registrar at Tarabganj and this acknowledgment of his signature was in the presence of the two persons who identified him before the Sub-Registrar, viz., Mahadeo Pershad and Nageshur who had in their turn appended their signatures at the foot of the endorsement by the Sub-Registrar. These signatures it was contended were enough to prove the due attestation of the will Ex. A-36. This argument would have availed Gangotri if Mahadeo Pershad and Nageshur had appended their signatures at the foot of the endorsement of registration 'animo attestandi'.

But even apart from this circumstance it is significant that neither Mahadeo Pershad nor Nageshur was called as a witness to depose to the fact of such attestation if any. One could not presume from the mere signature of Mahadeo Pershad and Nageshur appearing at the foot of the endorsement of registration that they had appended their signatures to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witnesses. Section 68, Indian Evidence Act requires an attesting witness to be called as a witness to prove the due execution and attestation of the will. This provision should have been complied with in order that Mahadeo Pershad and Nageshur be treated as attesting witnesses. This line of argument therefore cannot help Gangotri.

16. The result therefore is that the will dated 17-3-1928 is not proved to have been duly executed and attested and cannot furnish a basis of title to Gangotri in regard to the ten annas share in the properties left by the deceased, the subject-matter of the two proceedings E. E. Act Case No. 11 of 1936 and Regular Suit No. 71 of 1938 in the Court of the Civil Judge, Gonda. The appeal will therefore be allowed, the objections filed by Gangotri in E. E. Act Case No. 11 of 1936 will be dismissed and so also the Regular Suit No. 71 of 1938 in the Court of the Civil Judge, Gonda. Gangotri will pay to Girja and his heirs and legal representatives the present Appellants in these appeals the costs incurred by them in these proceedings throughout, in this Court as also in the Courts below.

Appeals allowed.

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