

SUPREME COURT OF INDIA

Kartar Kaur

Vs.

Milkho

(K Ramaswamy and K Venkataswami JJ.)

29.10.1996

JUDGMENT

K. VENKATASWAMI, J.

1. Leave granted.

2. Heard counsel on both sides at length.

3. Even at the outset we would like to express our unhappiness over the disposal of the second appeal in two words 'No merit. Dismissed' by the Punjab and Haryana High Court especially when the controversy related to the genuineness of a will which is not a mere question of fact, but a mixed question of fact and law. The High Court should have gone into the matter in detail and its failure to do so made us to go through the entire records by ourselves.

4. The appellants are the plaintiffs in a suit for declaration that they are the joint owners in respect of rd share of the land measuring in all 429 kanal 7 marlas as entered in the jamabandi for the year 1983-84 situated in the area of village Kahneke. The plaintiffs also prayed for a further declaration that mutation No. 3030 dated 2.6.1986 sanctioned by the Assistant Collector 1st grade, Barnala was illegal and ineffective against the rights of the plaintiffs and consequently, relief sought for was to restrain the first defendant in the suit (the first respondent herein) from alienating the suit land on the strength of mutation No. 3030.

5. The admitted facts are that the husband of the first appellant, namely, Anna Singh was entitled to 1/3rd share of the total suit lands. The balance 2/3 belongs to his two brothers, namely, respondents 3 and 4 herein. The second appellant is the daughter of first appellant through the said Atma Singh. It appears that the appellants were living separately from Atma Singh. It is claimed by the first respondent who is the sister of Atma Singh that the said Atma Singh by a registered will dated June 14, 1979 bequeathed all his properties in her favour depriving the appellants in toto. Naturally, the appellants moved the trial court challenging the genuineness of the said will. It is specifically challenged that the said Atma Singh being an illiterate person, the will was made by impersonation and the alleged thumb impression was not that of said Atma Singh. The said Atma Singh died 7 years after the will. In resisting the suit, the first respondent claimed that the will was genuine one and the deceased Atma Singh out of love and affection and in view of services rendered by her has bequeathed his estate in preference to his wife and daughter. It is also brought on record that after

the execution of the said will, the said Atma Singh has said to have executed two sale deeds in favour of the second respondent who is none other than the son of the first respondent when he was a minor. It is further claimed by the first respondent that her brother Atma Singh brought up the second respondent as his adopted son and the second respondent lived with Atma Singh from his childhood.

6. The first appellant as first plaintiff apart from examining herself as a witness also examined two other independent witnesses to support her case that the will was forged one. It is an admitted fact that one of the attesting witnesses was the fourth respondent herein (brother of the testator) and another attester was from different village and cousin of the first respondent. It is also not clear when the genuineness of the will was seriously challenged why the original will was not produced, but only the certified copy was marked as D.W. 6-A. Likewise the sale deeds in favour of the second respondent also were not produced in original, but certified copies alone were marked on the side of defendants.

7. The learned trial Judge who had the benefit of observing the demeanour of the witnesses found that the propounder has not satisfactorily discharged the onus of proving the genuineness of the will especially when the will was attached with number of suspicious circumstances coupled with an unnatural bequest. The trial court found that one of the attesting witnesses, namely the cousin of the first respondent was not from the same village in which the testator was living. This fact assumed importance while noticing the attesting witnesses to sale deeds who belong not only to the same village, but also living nearer to the testator. That made the trial court to think that the said attester was deliberately procured. The trial court also pointed out that D.W. 6, the attesting witness hailing from different village while giving evidence clearly remembered the fact that he came to the petition writer straightaway from his village and also gave the time as 11.00 A.M. when the will was written, could not remember even roughly the year and month or the date of the will. Likewise he could not disclose the names of persons who joined the last rites of Atma Singh although he asserted that the said rites of the deceased were not performed by his widow and daughter, but were performed by his sister, the first respondent herein. The trial court also noticed that the first respondent was married 25 years ago in a neighbouring village and she has got 4 children and her husband living and that being the position, the question of her rendering any service to Atma Singh was not believable. Another strong circumstance pointed out by the trial court to doubt the genuineness of the will was that after the execution of the will and having regard to the claim of the propounder that the testator brought up her son as his own son could not have sold the lands under two sale deeds for consideration and still further if at all he had decided to deprive his wife and daughter succeeding to his estate, he could have in normal course bequeathed the properties in favour of the second respondent and not in favour of the first respondent. The sale deeds in favour of the second respondent, according to the trial court, were the handiwork of defendants who have prepared the fictitious will of Atma Singh and subsequently becoming apprehensive that the will may not be upheld as a genuine one and the properties conveyed under the sale deed could at least be saved.

8. One other circumstances brought to our notice by the learned Counsel for the appellant was that in the will the name of the daughter was given by the testator as Balwinder Kaur whereas her real name is Karamjeet Kaur. If really Atma Singh had given instructions to prepare the will, he could not have given the name of his daughter wrongly and there is nothing in the records to show that the second appellant was also known as Balwinder Kaur. Taking all these factors into consideration, the trial court decreed the plaintiffs, suit declaring that the plaintiffs are the true owners of 1/3rd share in

the suit land being the share of Atma Singh and the mutation No. 3030 dated 2.6.1986 was null and void and ineffective against the rights of the plaintiffs in the suit land. The trial court also restrained the defendants from alienating the suit land, namely 1/3rd share of the plaintiffs.

9. The aggrieved respondents Nos. 1 and 2 preferred the appeal to the Additional District Judge, Barnala who has reversed the judgment and decree of the trial court after meeting some of the circumstances pointed out by the trial court to suspect the genuineness of the will. The lower Appellate Court has not dealt with all the aspects pointed out by the trial court while reversing the judgment.

10. The important aspect that has been dealt with by the trial court for doubting the genuineness of the will was that propounder had not established beyond reasonable doubt that the disputed thumb impression of Atma Singh was really that of Atma Singh by comparing the same with his standard thumb impression or atleast with the thumb impressions appearing on the two sale deeds said to have been executed by the same Atma Singh in favour of second respondent herein. The Trial Court held as follows:

Merely because the will is a registered document is not sufficient to hold the same to be a genuine one. In this case the same had not been executed by Atma Singh as the defendants have not proved that it bears the thumb impression of Atma Singh, how it would have any effect even if it was got registered five years prior to the death of Atma Singh. D.W.11 Milkho does not know as to when Atma Singh had executed the will in her favour but to the utter surprise the mutation regarding the inheritance of Atma Singh was got entered only on 25.12.1985 i.e., only three days after the death of Atma Singh, as is clear from the copy of mutation Ex. D.5 and Milkho produced the will before Assistant Collector II grade, Tapa on 23.1.1986.

11. This aspect goes to the root of the matter; nonetheless this has not been touched by the lower Appellate Court.

12. One other aspect connected with this pointed out by the trial court was regarding the conspiracy suggested in the cross examination which has been initially accepted, but subsequently denied by the witnesses. The trial court observed as follows:

D.W. 6 Bhag Singh could not deny the question put to him that he and Mai Singh had talked with the husband of Milkho that they would prepare a will impersonating Atma Singh by producing some other person and that when the land is mutated in favour of Milkho, they would get the same transferred in their favour and only after having expressed ignorance to the whole question deposed again that it is not correct. In the way, I find that the will is shrouded with suspicious circumstances which have not been dispelled by the propounder of the same.

13. This has not been referred to at all by the lower Appellate Court.

14. Yet another important aspect ignored by the lower Appellate Court relates to the following observations of the Trial Court:

The ultimate beneficiary of the will is not defendant Milkho, rather it is the defendants Mal Singh and Gurdev Singh who have been reaping the fruit of the land in suit. It has been stated by DW 12 Gurudev Singh that Darshan Singh has come into possession of the land and which is cultivated by

him on a Theka share crop basis. DW 7 Mal Singh also stated that Darshan Singh is in possession of the house and land of Atma Singh. It has nowhere been stated by the witness that his brother cultivates the land on behalf of Milkho on a share crop basis, Gurdev Singh cultivating it for himself.

15. Yet other important circumstances are that it was claimed that the testator had brought up the second respondent as his adopted son. If that be so why should he not execute the will in his favour as adopted son and an adoption deed executed and registered? Instead why he had preferred to execute the will in favour of his sister, first respondent? Having executed the will why did he execute sale deeds in favour of second respondent, a minor? Why did he not make a reference to the registered will in the sale deeds subsequently executed? These are all tell tale crucial circumstance casting unchangeable clouds hovering around the genuineness of the will and the burden is always on the propounder to explain and prove to satisfy the conscience of the court but miserably failed to do so.

16. This Court in *Bhagwan Kaur v. Kartar Kaur* has observed that 'decision on due execution of will, strictly speaking, is not primarily arriving at a finding of fact, as it has an admixture of law due to the specific requirements of Section 63 of the Indian Succession Act, 1925 towards due execution.'

17. In *Bindeshri Prasad and Anr. v. Mst Baisakha Bibi and Ors.* reported in AIR (1920) PC 70 it has been held 'in a suit by heirs of a deceased person to declare that the alleged will of the deceased whereby they are deprived of the succession to his estate, is a forgery the burden of establishing without reasonable doubt that the will propounded is of the deceased is upon those propounding the will.'

18. In *Smt. Jaswant Kaur v. Smt. Amrit Kaur and Ors.*, this Court held that '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 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.'

19. In *H. Venkatachala Iyengar v. B.N. Thimmajamma and Ors.* [1959] Suppl.1 SCR 426 this Court observed as follows:

The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act. Proof in either case cannot be mathematically precise and certain and so the test should be one of satisfaction of a prudent mind in such matters. The onus must be on the propounder and in absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and signature of the testator as required by law may be sufficient to discharge the onus.

Where, however, there are suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the will can be accepted as genuine. If the

caveator alleges undue influence, fraud or coercion the onus will be on him to prove the same. Where are no such pleas but the circumstances give rise to such doubts, it is for the propounder to satisfy the conscience of the Court.

What are suspicious circumstances must be judged in the facts and circumstances of each particular case. If the propounder takes a prominent part in the execution of the will which confers substantial benefits on him, that itself is a suspicious circumstance attending the execution of the will and in appreciating the evidence in such a case, the court should proceed with an open but nevertheless vigilant and cautious mind.

20. In the light of these settled principles, we have carefully gone through the evidence and we find that the trial court was justified in doubting the genuineness of the will and rendering a finding that propounder has not dispelled the suspicious circumstances beyond reasonable doubt. As pointed out earlier, the lower Appellate Court while reversing the judgment of the trial court has simply overlooked or ignored many important aspects dealt with by the trial court. Unfortunately, the High Court without going through the matter dismissed the Second Appeal in two words.

21. So far as the alienations by Atma Singh in favour of the second respondent are concerned, we have already noticed that the trial court on evidence has found that the sale deeds were the handiwork of the defendants (respondents) as part of the conspiracy to deprive the appellants of their rightful succession to Atma Rain's estate. In this connection, the trial Court observed as follows:

It only goes to show that it was the handiwork of defendants to have prepared a fictitious will of Atma Singh and being apprehensive that the will may not be upheld as a genuine document further manoeuvred to get the sale deeds executed regarding a substantial amount of land, i.e., 86 kanals 11 marlas vide two different sale deeds in favour of Darshan Singh. The defendants kept the will in favour of a guarded secret from Atma Singh and that is why the same had not been got attested by an outsider i.e., a respectable of village Kahneka and only very close relatives of the defendant i.e., D.W.6 Bhag Singh and even defendant Mal Singh were made to attest the will. A conspiracy smacks to have been hatched by the defendants to grab the land of Atma Singh which would have otherwise been inherited by plaintiffs.

22. It has also come in evidence of DWs 1 and 12 that the sale deeds were executed when the second appellant was only about five or six years old and that he was represented before the sub-Registrar by Gurdev Singh, respondent No. 3 herein. It was this Gurdev Singh, who was said to have handed over the sale consideration. Further it is seen that no mention was made about the alleged will in the subsequent sale deeds. All these things clearly go to show that both the will as well as the sale deeds formed part of a conspiracy hatched by the defendants to deprive the appellants of their rightful succession to the estate of Atma Singh. The trial court was, therefore, right in making such observation. However, the trial court in the absence of a prayer for setting aside the sale deeds, did not grant the same. When these facts were pointed out to the learned Sr. Counsel appearing for the respondents, he submitted that no ground was taken in the SLP concerning the sale deeds and no appeal was filed before the lower appellate court against the adverse findings regarding the sale deeds by the appellants. As we are satisfied that the sale deeds were part of the conspiracy as mentioned above, we do not think that the technicalities can stand in the way of rendering complete justice to the parties while exercising jurisdiction under Article 136 and 142 of the Constitution of India. Accordingly, we hold that the two sale deeds in favour of the second appellant are not valid and binding on the appellants.

23. In the result, we hold that the alleged will said to have been executed by Atma Singh on 14.6.79 is not true and binding on the appellant. Likewise the two sale deeds executed by Atma Singh in favour of the second respondent were also not valid and binding on the appellants. The appeal is accordingly allowed and the appellants are entitled to 1/3 share of the land measuring in all 429 canals 7 marlas as entered in the jamabandi for the year 1983-84 with mesne profits for 3 years prior to the date of the suit which the trial court should determine on an application within six months from the date of receipt of the judgment above. There will be a decree accordingly. The appeal is allowed, however, there will no order as to costs.