(1966) 02 AHC CK 0003

Allahabad High Court

Case No: First Appeal No. 454 of 1955

Smt. Bishun Shri		APPELLANT
	Vs	
Smt. Suraj Mukhi and others		RESPONDENT

Date of Decision: Feb. 23, 1966

Acts Referred:

- Court Fees Act, 1870 - Section 7(ivA)
- Specific Relief Act, 1963 - Section 39
- Succession Act, 1925 - Section 2, 2(h)

Citation: AIR 1966 All 563

Hon'ble Judges: M.C. Desai, C.J; S.N. Dwivedi, J; S.D. Khare, J

Bench: Full Bench

Advocate: J. Swarup, for the Appellant; Gopi Krishna Sahai, for the Respondent

Judgement

S.N. Dwivedi, J.

Smt. Bishun Shri instituted a suit against Smt. Suraj Mukhi and others in respect of the estate of one Ganga Prasad. The plaintiff alleged that she was the daughter of the deceased. Smt. Suraj Mukhi is, it is admitted, the widow of the deceased. Ganga Prasad died in December 1939. Smt. Suraj Mukhi and the other defendants claimed title to the estate of Ganga Prasad on the strength of a will alleged to have been executed by him. The plaintiff instituted the suit as a presumptive reversioner to the estate of Ganga Prasad. The suit was contested, inter alia, on the ground that the court-fee paid was insufficient. The trial Court framed a specific issue on the question of sufficiency of the court-fee paid and answered it in the affirmative. On the merits, the suit was dismissed. Then the plaintiff filed an appeal in this Court. On the memorandum of appeal, as on the plaint she paid a court-fee of Rs. 18-12-0 only. The office reported that the court-fee paid on the two documents was insufficient. The total deficiency on both of them was Rs. 3,990.63 nP. according to the office. According to the office report the court-fee is to be calculated in accordance with the provisions of S. 7(iv-A) of the Court-fees Act as amended in this

State. The plaintiff contested the report, and the matter was placed before a Division Bench. The Division Bench referred the matter to a larger Bench, and hence the case is now before us.

2. We shall first find out what is the true nature and character of the relief claimed in the suit and in the appeal and then decide whether the true nature and character of the suit and the appeal brings them within the grip of S. 7(iv-A).

3. On the death of Ganga Prasad the plaintiff was not immediately entitled to inherit his estate. In the absence of the alleged will the estate would have devolved upon his widow, Smt. Suraj Mukhi. The plaintiff is only a presumptive reversioner. On the death of Smt. Suraj Mukhi she may succeed to the estate of Ganga Prasad only if she were to happen to be the immediate reversioner. Accordingly it cannot be said that she is claiming the inheritance in this case. She has challenged the genuineness of the will in the plaint. She has alleged that Ganga Prasad was unconscious on the date of the execution of the alleged will. He could not have executed the will. The will was fictitious. In Para. 7 of the plaint it is alleged that Smt. Suraj Mukhi, the first defendant, was an inexperienced and stupid woman and was under the influence of other defendants. All the defendants combined to get "executed a fictitious and fraudulent will on behalf of Ganga Prasad." In Para. 15 of the plaint it is said that the first defendant "has only life interest. On account of forged and fictitious will, the plaintiff is suffering a heavy loss, hence arose the necessity to sue". In Para. 16 the cause of action is alleged to have arisen in 1949 "when the plaintiff came to know about the fictitious and fraudulent steps mentioned in previous Paras Nos. 6 to 15." The plaintiff claimed three reliefs:
(1) A declaration to the effect "that the will of the defendants is quite fictitious and fraudulent and it has no effect on the property given below left by Ganga Prasad.";

(2) The costs of the suit;

(3) Any other relief to which the plaintiff may be entitled.

4. In the memorandum of appeal ground No. 6 is that the alleged will was brought in the existence by fraud in collusion and for the benefit of the defendants. Ground No. 9 is that the alleged will was fictitious and forged. It is evident from the allegations in the plaint and the grounds in the memorandum of appeal that the plaintiff has challenged the alleged will, inter alia, on the ground that it was obtained fraudulently. Indeed she wants a declaration to the effect that the will was fraudulent. In other words, the will is to adjudged void or voidable. This is necessarily involved in the first relief. So in its nature and character the suit is not for a mere declaratory relief. It is more than that; it is really asking for a relief that the alleged will should be adjudged void or voidable. Being a presumptive reversioner she could not ignore the will during the lifetime of Smt. Suraj Mukhi, the widow of Ganga Prasad; nor could she be said to be claiming inheritance.

5. Section 7(iv-A) of the Court-tees Act, in so far as it is material to the case reads-

in suits for or involving cancellation of or adjudging void or voidable a decree for money or other property having the market value, or an instrument securing money or other property having such value:

.....

The amount of deficiency reported by office is not challenged. The only question is whether this provision applies to the present case. It is said that a will is not "an instrument securing money or other property having such value." Reliance is placed on Chief Inspector of Stamps Vs. Ramesh Chandra adopted son of B. Sheo Prasad, and on Vannappan Servai v. Sinnathayee Animal AIR 1948 Mad 501. In both these cases it was held that a will is merely a declaration of the intention of the testator with respect to his property to take effect after his death and is accordingly not an instrument "securing money or property." These cases and some others were considered by a Bench of this Court consisting of O.H. Mootham, C.J. and H.S. Chaturvedi, J. in Udai Pratap Gir and Another Vs. Shanta Devi and Others, . The Division Bench overruled Chief Inspector of Stamps Vs. Ramesh Chandra adopted son of B. Sheo Prasad, , and other similar decisions of this Court and held that "A testamentary disposition by a Hindu is a form of gift and stands substantially on the same footing as a gift. Accordingly a will is an instrument securing property." With respect, we agree with the Bench decision.

6. The word instrument in S. 7(iv-A) includes formal or legal documents in writing. It is sufficiently broad to include wills also (Words and Phrases (Permanent Edition), Vol. 214, p. 521). The word "securing" is the present participle from verb "to secure". It has got various meanings (Words and Phrases (Permanent Edition), Vol. 38, p. 458) "Secures", as used in a contract whereby a vendor agrees to execute a conveyance thereof as soon as the vendee secures the payment of purchase money, means not a payment in money, but the giving by the vendees of something by means whereof payment at some future time can be procured or compelled (Ibid). Webster defines "secures" to mean "to make certain", "to put beyond hazard". "To secure" is to make safe, to put beyond hazard of losing or of not receiving, as to secure a debt by a mortgage; it also means to get safely in possession, to obtain to acquire certainly, as to secure an inheritance or a price (ibid. 459).

7. The question is whether a will can be regarded as a legal document which makes any property secure or safe. Section 2(h) of the Indian Succession Act defines a will as a "legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. "It is well known that during the life-time of the executant, the will is ambulatory. It could be revoked by him at his will. Accordingly a will does not secure any property during the lifetime of the executant. Section 7(iv-A) does not require that an instrument should secure money or property having money value from the moment of its birth. It seems to us

that whether an instrument secures money or property having money value within the meaning of S. 7(iv-A) is to be decided with reference to the date of the institution of the suit. It is to be seen whether a particular instrument secures on the date of the institution of the suit money or property having money value. This reference necessarily follows from a collocational reading of this section with S. 39 of the Specific Relief Act. If this is so, as we think, then there is little doubt that on the date of the institution of the suit in this case the will did secure property. Ganga Prasad the testator had died, and after his death the will became irrevocable. Upon his death his estate would be disposed of in accordance with his directions in the will. Accordingly it can be said that on the death of the testator the will secures money or property having money value. We, therefore, hold that the court-fee paid on the plaint and the memorandum of appeal is insufficient. The amount of deficiency mentioned in the office report should now be paid by the plaintiff within three months.

Khare, J.

8. I had the advantage or reading the judgment proposed to be delivered by the Hon''ble Chief Justice and my learned brother Dwivedi, J. I need not reiterate the facts of the case.

9. I entirely agree that in the circumstances of the case the suit as well as the appeal involve cancellation of the will or its being adjudged void or voidable.

10. Had the plaintiff merely pleaded that no will had been executed or the will set up by the defendants was a fictitious document no question of the cancellation of the will or its being adjudged void or voidable could arise. In that case the plaintiff''s suit must have failed if the execution of the will could be established and could have been decreed only if the execution of the will could not be proved. In other words, the plaintiff could succeed only in the absence of a will. However, in the case out of which this appeal arose the plaintiff had sought a further declaration that the will even though executed by Ganga Prasad could not be given effect to because it sought to create a trust in favour of an institution which was fictitious and non-existent. That prayer clearly envisages the cancellation of the will or its being adjudged void or voidable.

11. I, however, with great respect, differ on the point that the will is "an instrument securing money or other property" within the meaning of S. 7(iv-A) of the Court-fees Act.

12. Section 7(iv-A) of the Court-fees Act reads as follows:-

In suits for or involving cancellation or adjudging void or voidable a decree for money or other property having a market-value, or an instrument securing money or other property having such value:

(1) where the plaintiff or his predecessor-in-title was a party to the decree or the decree or the instrument-according to the value of the subject-matter, and

(2) where he or his predecessor-in-title was not a party to the decree or instrument according to one-fifth of the value of the subject-matter, and such value shall be deemed to be-

if the whole decree or instrument is involved in the suit, the amount for which or value of the property in respect of which the decree was passed or the instrument executed, and if only a part of the decree or instrument is involved in the suit, the amount or value of the property to which such part relates.

Explanation-"The value of the property" for the purposes of this sub-section, shall be the market-value, which In the case of immovable property shall be deemed to be the value as computed in accordance with sub-s. (v), (v-B) or (v-A) as the case may be". The word ''instrument'' has nowhere been defined in the Court-fees Act. It has, therefore, to be given its ordinary meaning. A will being a document which can be legally enforced can well be regarded to be an instrument within the meaning of S. 7(iv-A) of the Court-fees Act.

13. The next question for consideration is whether a will is "an instrument securing money or other property". A will merely expresses the intention of the testator regarding the manner in which his property should, after his death, go to the persons named in the document. Every testator can change his intention at any time during his lifetime. Under the law only the last will of the testator prevails over the general rules of inheritance. During his lifetime a person may execute as many wills as he likes and he may keep on changing his intention about the disposition of his property from will to will. It follows that till the death of the testator it cannot be said regarding any will executed by him that it will be his last and final will and, therefore, from the very nature of things no will can, during the lifetime of the testator, be described as "an instrument securing money or other property". In all the cases decided by this Court it has been consistently held that a will during the lifetime of the testator is not an instrument "securing money or other property" within the meaning of S. 7(iv-A) of the Court-fees Act. Reference might in this connection be made only to the following two Division Bench cases of this Court:-

(a) Chief Inspector of Stamps Vs. Ramesh Chandra adopted son of B. Sheo Prasad, ;

(b) Udai Pratap Gir and Another Vs. Shanta Devi and Others, .

14. The next, and the most important, question which arises for consideration is whether a will becomes an "instrument securing money or other property" after the death of the testator, and whether in a suit instituted after the death of the testator the last will executed by him, therefore, is an "instrument securing money or other property" within the meaning of Section 7(iv-A) of the Court-fees Act. This question has been answered in the affirmative by this Court and the erstwhile Oudh Chief

Court in the cases of-

(a) AIR 1944 29 (Oudh) .

(b) Gulab Chand Vs. Jaswant Singh and Others, .

(c) Udai Pratap Gir and Another Vs. Shanta Devi and Others, .

and in the negative by a single Judge of this Court in the case of the The Chief Inspector of Stamps, U.P. Vs. The Sunni Central Board of Waqf, U.P., , and by the Madras High Court in the case of-

(a) Kattiya Pillai alias Sernthaya Pillai and Another Vs. Ramaswamia Pillai (insane) by wife and next friend and Others, , and

(b) AIR 1948 Mad 501.

The reasons given for holding that after the death of the testator a will becomes an "Instrument securing money or other property" within the meaning of S. 7(iv-A) of the Court-fees Act are clear from the following observations made in the cases of (S) Gulab Chand Vs. Jaswant Singh and Others, and Udai Pratap Gir and Another Vs. Shanta Devi and Others, .

The relevant portion of the judgment delivered by Agarwala, J. in the case of Gulab Chand Vs. Jaswant Singh and Others, , reads thus-

After the death of the testator, however, a will becomes a document by which a right or liability is created, transferred, limited, extended, extinguished or recorded. It is enforceable in a Court of law as an instrument conferring title on a party. It, therefore, becomes an instrument securing money or other property within the meaning of S. 7(iv-A), Court-fees Act.

15. In the case of Udai Pratap Gir and Another Vs. Shanta Devi and Others, , Mootham, C.J. and Hari Shankar, J. observed that-

A will is defined in the Indian Succession Act (S. 2, Cl. (h)) as ''the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death; and we entertain no doubt that during the testator''s lifetime a will, revocable as it is at the testator''s pleasure, secures nothing.

On the death of the testator, however, the position changes; the expression of the testator''s intention is no longer revocable; it has, so to speak, crystallized. The opinion of a Bench of this Court in Chief Inspector of Stamps Vs. Ramesh Chandra adopted son of B. Sheo Prasad, , that a will is not an instrument securing property does not, therefore, conclude the matter as the testator to whose will reference was made in that case was alive.....The death of the testator, it appears to us, does ''make secure'' to the executor or the former''s property.

According to the decisions quoted above the material date is the date of the institution of the suit, and, therefore, the effect of the instrument has to be considered not on the date of tile execution of the instrument but on the date of the institution of the suit.

16. The contention of the learned counsel for the appellant, however, is that the words "an instrument securing money or other property" used in S. 7(iv-A) of the Court-fees Act have got to be interpreted with reference to the date on which the instrument was executed and not with reference to the date on which the suit is instituted. It has also been contended that neither money nor property having a market value is secured merely by the execution of the will, and nothing is secured unless it is established that-

(a) the testator is dead; and

(b) the will relied upon is the last will of the testator.

It is further contended that if it becomes doubtful as to which should be the relevant date of which the instrument should secure money or other property, preference must be given to an interpretation which favours the subject, because the Court-fees Act is a fiscal Act.

17. The arguments addressed by the learned counsel for the appellant have good deal of force in them. With great respect to the learned Judges who decided the cases of AIR 1944 29 (Oudh) , Gulab Chand Vs. Jaswant Singh and Others, and Udai Pratap Gir and Another Vs. Shanta Devi and Others, , I find it difficult to hold that the last will of the testator, after his death, becomes "an instrument securing money or other property" within the meaning of S. 7(iv-A) of the Court-fees Act. Briefly stated, my reasons are as stated below:-

(a) It is very clear and has also been held the decided cases that a will on the date of its execution is not an instrument "securing money or other, property". In fact on that date it secures nothing.

(b) On the date of its execution the will is nothing more than a legal declaration of the intention of the testator with respect to his property and continues to be so even after the death of the testator.

(c) A document dependent on the proof of several outside facts (such as the death of the testator and there being no later will) cannot in my opinion be regarded to be ''an instrument securing money or other property''. If money or other property is secured it is not by the instrument but because of other facts, such as the death of the testator and his declared intention which remained unsuperseded.

(d) It is not at all clear from the provisions of S. 7(iv-A) of the Court-fees Act whether the word ''securing'' which occurs in that section refers to the date of the execution of the instrument or to the date of the institution of the suit. The provision,

contained as it is in a fiscal law, has to be construed very strictly. When the Court-fees Act clearly mentions that it should be "an instrument securing money or other property" it may not be permissible to say that although the instrument secures nothing but read with certain other facts it does secure property on a particular date sometimes before the institution of the suit.

18. I am, therefore, of the opinion that a will, even after the death of the testator, is not an "instrument securing money or other property" within the meaning of S. 7(iv-A) of the Court-fees Act. The court-fee already paid on the plaint and the memo of appeal is sufficient.

19. In view of the opinion of the majority we hold that the court fee paid on the plaint and the memorandum of appeal is insufficient. We direct that the plaintiff should make good the deficiency mentioned in the office report within three months.