(1995) 08 AHC CK 0164

Allahabad High Court

Case No: First Appeal From Order No. 316 of 1981

Mahendra Pal Singh		APPELLANT
	Vs	
Mukundi Lal, Prabandhak, Ramesh Kalyankari Junior High School and Others		RESPONDENT

Date of Decision: Aug. 11, 1995

Acts Referred:

- Evidence Act, 1872 - Section 68
- Succession Act, 1925 - Section 276, 59, 63

Citation: (1996) AWC 393 Supp

Hon'ble Judges: S.R. Singh, J

Bench: Single Bench

Advocate: C.B. Misra and Mr. Kant, for the Appellant; Haji Iqbal Ahmad, for the Respondent

Final Decision: Dismissed

Judgement

S.R. Singh, J.

Present appeal has its origin in the order dated 1.5.1981 passed by the then District Judge, Fatehpur, granting probate in favour of Mukundi Lal, Prabandhak, Ramesh Kalyankari Junior High School, Khaga, District Fatehpur u/s 276 of the Indian Succession Act.

2. The facts of the case as are essential and necessary for decision of the moot point giving rise to the present appeal are that one Ayodhya Singh was the tenure-holder of the properly in dispute. Appellant, M. P. Singh happens to be the sister''s son of Ayodhya Singh, who died on 11.3.1977. Mukundi Lal, Prabandhak, Ramesh Kalyankari Junior High School and Ramesh Kalyankari Junior Basic School, moved an application u/s 276 of the Indian Succession Act before the District Judge, Fatehpur with the allegations that Ayodhya Singh had executed a will on 11.2.1977 in favour

of the Institutions afforestated of which the applicant namely, Mukundi Lal claimed himself to be the Manager. The application was contested by the Appellant who claimed to be the successor-in-interest of deceased Ayodhya Singh with respect to property in question which would have been entailed on him sans the Will. It was alleged by the Appellant that the will was a sham transaction and Ayodhya Singh deceased was not in a sound state of mind and body at the time of the alleged execution of the will and that the applicant was not entitled to the grant of probate in his favour.

3. Learned District Judge, upon a conspectus of the facts and circumstances of the case, deduced that the Will, Ext. 1 was the last testament of Ayodhya Singh in favour of Kalyankari Junior High School and Kalyankari Junior Basic School, which institution has since been re-christened as Ramesh Kalyankari Junior High School and Ramesh Kalyankari Junior Basic School and Mukundi Lal was the Manager of the institutions. The learned District Judge, also found that due execution and attestation of the will was established on the basis of the record. Accordingly, the objection was rejected and the application for grant of probate was allowed vide order under appeal.

4. I have heard Sri Shree Kant Misra, counsel appearing for the Appellant and Sri Haji Iqbal Ahmad, counsel appearing for the Respondents.

5. The learned Counsel for the Appellant canvassed that due execution and attestation of the will in question was not proved by the evidence on record and the learned District Judge failed to reckon with the surrounding and attending circumstances which breed enough suspicion about the genuineness of the will. The learned Counsel for the Respondents refuted the submissions advanced by the counsel appearing for the Appellant and contended that the learned District Judge fell in error in granting probate in favour of the applicants.

6. As regards the submission that the attestation of the will is not proved on the dint of evidence on record, it was argued by the learned Counsel appearing for the Appellant that the attesting witness Ram Sajeevan did not state in his statement before the court that he and the other attesting witnesses, had signed in the presence and under the directions of the testator. The statement of Ram Sajeevan, P.W. 3 examined on behalf of the applicant Respondent, it was urged, did not amount to proving the attestation within the meaning of Section 63 of the Indian Succession Act read with Section 68 of the Indian Evidence Act. The contention finds support from a Single Judge decision of this Court in Vishwanath Singh v. Uma Nath Singh 1985 RD 240 , wherein it has been held while construing Section 63 of the Indian Succession Act that the attesting witness must testify that he had seen the testator signing or affixing thumb-impression and had also seen the other attesting witness signing the will in the presence and upon the direction of the testator. in other words, it has been held therein that in order to prove attestation of a will, It must be testified that each of the attesting witnesses had signed the will in the presence and upon direction of the testator. The proposition laid down in

Vishwanath Singh''s case (supra), however, cannot be countenanced in view of Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta, in which It has been propounded by the Apex Court as under:

It cannot be laid down as a matter of law, that because the witnesses did not state in examination-in-chief that they signed the will in the presence of the testators, there was no due attestation. It will depend upon circumstances elicited in evidence whether the attesting witnesses signed in the presence of the testator.

7. It is, therefore, difficult to accept the contention of the learned Counsel for the Appellant that the attestation of the will was not proved merely because the attesting witness Ram Sajeevan did not say in his statement on oath that he and the other attesting witness had signed in presence and on dictate of the testator. The statement, in the examination-in-chief of Ram Sajeevan "Ext. I Par Ramesh Chauhan Ne Mere Samne Apne Dastakhat Kiye The Jin Ki Shinakhta Karta Hoon. Maine Bhi Vasiyat Noma Likhe Jane Ke Baad Apne Dastakhat Kiye. The "clearly" signifies that the witness had signed in presence and on dictate of the testator. The scribe Mohd. Ikhlaq P.W. 1 in his statement-in-chief clearly deposed "Mane Use Likhne Ke Baad Ramesh Chauhan Ko Padhkat Suna Diya Tha, Unhoney Iske Sunney Aur Samajhaney Ke Baad is Dastavez Par Apna Dastakhat Kiya. Gavahan Ne Bhi Dastakhat Kiye. Ya Sab Dastakhat Mere Samne Hua." P.W. 2 Mukundi Lal also stated that the will was scribed in his presence by Mohd. Ikhlaq and it was read over and explained to Ramesh Chauhan who put his signatures in the presence of the witnesses. It was also stated by Mukundi Lal that attesting witnesses Chandra Mohan and Ram Sajeevan Singh also put their signatures on the will. Statements of these witnesses taken in their entirety prove due attestation of the will as per requirement of Section 63 of the Succession Act read with Section 68 of the Evidence Act, notwithstanding the fact that the attesting witness Ram Sajeevan P.W. 3 did not specifically testify that he and the other attesting witnesses had signed the will in presence and on dictates of the testator.

8. The legal position as to due execution of a will is much too well-settled. The mode of proving a will does not ordinarily differ from that of proving any other document except as to special requirements of attestation prescribed in the case of a will by Section 63. The onus of proof is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity as envisaged by Section 59 of Indian Succession Act, 1925 and the signature of testator as required by law is sufficient to discharge the onus. Where, however, there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court. in the instant case, the learned District Judge has given credence to the testimony of the witnesses examined on behalf of the applicant-Respondent and on the evidence on record, it falls short of being established that the testator was. at the time of the execution of the will, in such a state of mind that he was not in a position to perceive the consequence of what he

was doing. On the contrary, it is conspicuous in the evidence of Mukundi Lal that the testator used the converse to the people trickling in to take his welfare and his condition had established since the time of initial stroke. The entries made in the bed-head-ticket on which credence was placed by the Appellant, can be characterised as hearsay evidence and no reliance can be placed as proof aliunde. It would be an exercise in futility in the absence of the evidence of the Doctor, who made the enixies and examined the testator while he was undergoing treatment in the hospital, to delve, on the basis of the bed-head-ticket, into the question whether the Petitioner was suffering from hamiplegia as contended by the learned Counsel for the Appellant or by haemophilia, as urged by the learned Counsel appearing for the Respondents. That apart, even according to the entries made in the bed-head-ticket, general constitution of the testator upto 8.3.1977 was reported to be satisfactory and it relapsed to unsatisfactory on 11.3.1977 and sank to ''hopeless'' at 10.30 p.m. when it was reported to be critical. There is nothing in the bedhead-ticket to be elicited, on the dint of which it could be assumed that the general condition of the testator was quite unsatisfactory on the date the will was executed. The will has been executed, in favour of institutions and not in favour of any individual. The testator had no issues being bachelor and I am confronted with no material as to stimulate me to impeach the statement occurring in the will that the institutions were founded by the testator himself. The impact of the statement made in the adjournment application dated 3.2.1977 moved on behalf of the testator in suit No. 436 of 1970 has been fully reckoned with by the learned District Judge and I do not find any infirmity in the view taken by the learned District Judge. The fact that the will was executed in hospital while the testator was in the advanced stage of tuberculosis and the fact that the will is conspicuously silent about the testator being admitted in the hospital at the time of execution of his will, are in my opinion, not enough to impeach the testimony of the witnesses relied upon by the learned District Judge. It stands proved on the basis of the evidence examined on behalf of the propounder that the will dated 3.2.1977 was duly executed and attested. The order under appeal, however, warrants a little modification. The learned District Judge has directed the probate of the will to be issued in favour of Mukundi Lal but in my view the probate should have been granted in favour of committee of management, Ramesh Kalyankari Junior High School and Ramesh Kalyankari Junior Basic School through its Manager.

9. Accordingly, the appeal fails and is dismissed except that the operative part of the order dated 1.5.91 is hereby modified to the extent that the probate of the will would be granted in favour of the committee of management, Ramesh Kalyankari Junior High school and Ramesh Kalyankari Junior Basic School, Khaga, Fatehpur through its Manager instead of any single individual eo nomine, be it the Manager or anybody else.