Daulat Ram & Ors vs Sodha & Ors on 16 November, 2004

Equivalent citations: AIR 2005 SUPREME COURT 233, 2004 AIR SCW 6523, 2004 (3) BLJR 2117, 2005 (1) UJ (SC) 202, 2005 UJ(SC) 1 202, 2004 (7) SLT 49, 2005 (1) SRJ 242, 2005 (1) HRR 149, 2005 (1) SCC 40, 2004 (9) SCALE 442, 2004 (4) LRI 770, 2004 BLJR 3 2117, 2005 BOM CRSUP 185, (2004) 5 CTC 790 (SC), (2005) 1 ALLMR 166 (SC), (2005) 1 CLR 75 (SC), 2005 HRR 1 149, 2005 (1) ALL CJ 672, (2004) 10 JT 50 (SC), (2005) ILR (KANT) 1221, (2004) 4 RECCIVR 841, (2005) 1 CIVILCOURTC 471, (2005) 1 HINDULR 107, (2005) 2 MAH LJ 170, (2005) 1 SCJ 130, (2004) 8 SUPREME 1, (2005) 1 ICC 460, (2004) 9 SCALE 442, (2005) 1 WLC(SC)CVL 63, (2005) 1 BLJ 614, (2005) 2 CIVLJ 156, (2005) 1 CURLJ(CCR) 16, (2004) 4 CURCC 252, (2005) 1 ALL WC 527, (2005) 2 KCCR 157

Bench: Ashok Bhan, S.H. Kapadia

CASE NO.:
Appeal (civil) 5032 of 2002

PETITIONER:
Daulat Ram & Ors.

RESPONDENT:
Sodha & Ors.

DATE OF JUDGMENT: 16/11/2004

BENCH:
ASHOK BHAN & S.H. KAPADIA

JUDGMENT:

J U D G M E N T BHAN, J.

This appeal, by grant of special leave, is directed against the judgment and order dated 26.9.2001 of a Single Judge of the High Court of Himachal Pradesh in Second Appeal No. 212 of 1995. The High Court by the impugned judgment has confirmed the judgment and decree passed by the first Appellate Court and decreed the suit filed by the Respondent No. 1.

Facts giving rise to this appeal, in short, are:

> One Prati, son of Kamna, executed a Will on 11.01.1977 in favour of his nephews, appellants herein, bequeathing his entire property in their favour. In the Will no provision was made by Prati either for his wife Gulabo or for his daughter Sodha

Respondent No. 1 herein from his another wife Radhi. This Will was duly executed, attested and registered. Thereafter, on 08.05.1983 Prati executed another Will wherein he revoked/cancelled his earlier Will dated 11.01.1977 and bequeathed his property to his daughter, Respondent No. 1. This Will was duly executed and attested but was not registered.

Prati died on 10.05.1983. After his death Respondent No. 1 filed Suit No. 102 of 1983 on 14.07.1983 for injunction restraining the appellants from interfering with her possession over the property of her deceased father claiming herself to be the owner in possession of the said property or in the alternative for possession thereof by virtue of Will executed in her favour dated 08.05.1983.

Appellants contested the suit denying that the Respondent No. 1 was the daughter of Prati. That the alleged Will propounded by the Respondent No. 1 was prepared in collusion with the scribe and the attesting witnesses. According to them Prati had died issueless. They propounded the Will dated 11.1.1977 executed by Prati wherein the entire property was bequeathed by him in their favour and claimed themselves to be the legal heirs and only successors to the estate of deceased Prati.

Trial Court dismissed the suit filed by the Respondent No. 1. It was held that she was not the daughter of Prati. That Prati did not execute any Will in favour of Respondent No. 1. It was further observed that the Will dated 11.01.1977 in favour of appellants was valid and by virtue of the same appellants were entitled to the estate left by Prati. Being aggrieved, Respondent No. 1 preferred civil appeal. First Appellate Court after reappraising the entire evidence set aside the judgment and decree passed by the Trial Court. The suit filed by the Respondent No. 1 was decreed by observing that Respondent No. 1 was the daughter of deceased Prati and a valid Will had been executed in her favour by Prati. It was held that she had become the owner and therefore entitled to the possession of the same. It was observed after close scrutiny of both the Wills that the Will dated 11.01.1977 was procured by the appellants under pressure from Prati which was subsequently revoked by him by executing the second Will dated 08.05.1983.

Appellants preferred a regular second appeal against the judgment and decree passed by the first appellate Court which was dismissed being without any merits. The judgment and decree passed by the first Appellate Court was confirmed. It was observed that the first appellate Court had rightly concluded that Respondent No. 1 was the daughter of deceased Prati from his wife Radhi and the Will dated 08.05.1983 was validly executed by him while in sound disposing mind in the presence of the attesting witnesses and the scribe.

Being aggrieved the appellants have preferred this appeal.

The only point raised before us is that the second Will dated 08.05.1983 executed by Prati was surrounded by suspicious circumstances and the same was forged.

Though appellants in their written statement had averred that the Will dated 08.05.1983 was forged but no issue was framed on this point. No evidence was led by the appellants to prove the forgery.

Will being a document has to be proved by primary evidence except where the Court permits a document to be proved by leading secondary evidence. Since it is required to be attested, as provided in Section 68 of the Indian Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. In addition, it has to satisfy the requirements of Section 63 of the Indian Succession Act, 1925. In order to assess as to whether the Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so.

Respondent No. 1 has successfully discharged the onus of proving the due execution of the Will. The two attesting witnesses, PW-3 and PW-5, have clearly stated in their depositions that Prati was in sound disposing mind at the time of the execution of the Will and had put his thumb mark on the said Will after the same was read over to him in their presence and that they had signed the Will in the presence of the testator and in the presence of each other. They have deposed that Respondent No. 1 was the daughter of Prati and Prati of his own volition had executed the Will in favour of Respondent No. 1. PW-5 is a former Member of Legislative Assembly. PW-3 is a close relation of deceased Prati. There is nothing on record to indicate that they have deposed falsely. Rather their testimonies inspire confidence. PW-2 is the scriber of the Will and neighbour of deceased Prati. He has also deposed that Respondent No. 1 is the daughter of Prati and that he had scribed the Will at the instance of Prati. He has also deposed that Prati had executed the will of his own while in sound disposing state of mind. The Will propounded by the appellants has been specifically revoked/cancelled by the Prati in his later Will stating therein that the earlier Will was got written from him forcibly by the appellants. Assertion in the second Will by the testator about the earlier Will having been forcibly got executed from him by the appellants is corroborated by the fact that in the earlier Will it was shown that the testator had no child or heir except the appellants and the fact of presence of Respondent No. 1, daughter of testator, was suppressed. From the reading of the first Will it is clear that appellants were aware that Prati had a daughter who could at any time lay her claim to the property of her father.

The only suspicious circumstance surrounding the Will pointed out is that Prati had thumb-marked the second Will, whereas the earlier Will had been signed by him. According to the appellants this shows that Prati was physically incapable of executing the Will. According to them, Prati was unconscious for 2 3 days prior to his death which took place a day next to the execution of the Will. Counsel for the appellants referred to the statement of DW-6, Devi Ram a purohit, who has

stated that he had gone to the house of Prati a day or two earlier for pundhan which was done by one of the appellants as Prati was not in a position to do so being unconscious. We do not find much substance in this submission as it has come on record that though Prati was illiterate he had learnt to put his signatures, but most of the time he used to put his thumb impression. He was 84-85 years of age. In the face of unequivocal and trustworthy statements of scribe PW-2 and the attesting witnesses PW-3 and PW-5, much reliance cannot be placed on the testimony of DW-6. No other witness has been examined to show that Prati was unconscious at the time of the execution of the Will.

The burden to prove that the Will dated 8.5.1993 executed by Prati in favour of his daughter was forged or was obtained by undue influence or by playing a fraud was on the appellants which they have failed to discharge. No evidence was led by them on either of these points.

Be that as it may, the second Will executed by Prati has been proved to be genuine and validly executed by him wherein he has bequeathed his entire property to his daughter, Respondent No. 1. The earlier Will executed in favour of the appellants has been specifically revoked. Since the earlier Will stands revoked it cannot be given effect to.

We agree with the findings recorded by the High Court that Respondent No. 1 is the daughter of Prati and Prati had executed a valid will in her favour.

There is no merit in this appeal and the same is dismissed with no order as to costs.