Before N.K. Sud, J

SUNEHRI & ANOTHER,—*Defendant/Appellant*

versus

LALA RAM (DECEASED) THROUGH HIS L.Rs. AND OTHERS,—*Plaintiff/Respondents*

R. S. A. NO. 380 of 1980

7th January, 2005

Code of Civil Procedure, 1908—Execution of a registered will by a widower in favour of two daughters of his brother—Challenge by a son of another brother—Both the Courts accepting execution of will—Allegation that executant was not in a sound & disposing mind at the time of execution of will—Onus to prove—Lies on the person so alleging—Findings of the Courts below that the defendants failed to prove that the executant was of sound and disposing mind are clearly not based upon a correct application of the legal principles governing the proof and acceptance of will and are completely perverse—Onus to prove that the will to be voluntary also lies on the plaintiff by leading evidence—Findings of the Courts below placing onus on the propounders of the will are based on application of rules of evidence and not sustainable—Appeal allowed, suit of plaintiff dismissed.

Held, that once a will is proved, there is no further onus on the propounders to prove that the testator was in a sound disposing mind at the time of execution of the will. However, when a will is challenged on the ground of the testator's mental incapacity, the onus lies on the person so alleging. He is required to prove the same by leading evidence to that effect. Thus, when a will has to be rejected on the ground that the testator was not in a sound and disposing mind, a definite finding is required to be recorded to that effect. However, in the present case, the finding recorded is that the defendants (appellants herein) "have failed to prove that at the time of execution of the will, he was of sound and disposing mind". This finding is clearly not based upon a correct application of the legal principles governing the proof and acceptance of will and is completely perverse. In the absence of any evidence led by the plaintiff to this effect, it cannot be held that Badhawa was not in a sound and disposing mind at the time of execution of the will.

(Paras 24 and 25)

Further held, that Mam Raj is not even the beneficiary of the will although his wife is. However, there is no allegation that he had actively participated in the execution of the will muchless an allegation of coercion. Even the Courts below have not recorded any positive finding of any coercion on his part. The effective finding is that the appellants have failed to prove the will to be voluntary which is a finding based on misapplication of rules of evidence by wrongly placing onus on the propounders of the will. If the plaintiff were to make such an allegation, he ought to have pleaded the same in the pleadings and proved it by leadings evidence. This had clearly not been done. Thus, the second finding of the Courts below that the will has not been proved to be voluntary, is also not sustainable.

(Para 30)

V. K. Jain, Sr. Advocate with

Anil Bansal, Advocate, for the appellants.

Sanjay Bansal, Advocate, for the respondents.

JUDGMENT

N. K. SUD, J.

(1) This regular second appeal is directed against the order of the Additional District Judge, Ambala, dated 4th December, 1979, whereby the appeal of the appellant-defendants against the judgement and decree of the Sub Judge IInd Class, Ambala Cantt, dated 2nd February, 1979 has been dismissed.

(2) Before adverting to the controversy, the relevant facts may first be noticed :—

(3) There were three brothers ; Biru, Bakhtawar and Badhawa, all sons of Raja Ram, residents of Village Manu Majra, Teshil and District Ambala. Badhawa, a widower, died in 1972. He had no issues. His brothers had predeceased him. He had executed a registered will on 3rd August, 1970 in favour of the appellants ; Sunehri Devi and Sona Devi, both daughters of his brother Biru and tested his entire property in their favour. Aggrieved by the said will, Lala Ram (respondent-plaintiff) son of his other brother Bakhtawar, brought a suit on 15th June, 1973 claiming possession of 1/2 share in the

property which formed subject matter of the will, on the grounds ; that the will was never executed and was a fabricated and forged document nor was the testator in sound and disposing mind when he executed the Will ; that the testator was incompetent to make the Will as parties concerned, being primarily agriculturists, were governed by custom; that the will was the result of collusion of the appellants and others and could not be binding on his rights. It may be mentioned that besides Lala Ram, Bakhtawar also had six daughters. However, the suit was filed by Lala Ram alone. In the suit, all the five children of Biru Ram ; namely, son Sarup Singh and daughters Sunehri Devi, Sona Devi, Icchra and Jogindro, were impleaded as defendants. Mam Raj husband of Sona Devi was also impleaded as a defendant.

(4) The suit was contested only by the appellants Sunehri and Sona Devi, the beneficiaries under the Will, and the other defendants were proceeded against *ex-parte*. They contended that the Will was the outcome of love and affection that the deceased had for them and was the result of services rendered by them ; that the property in question was not ancestral as alleged in the plaint ; that the deceased had contracted a Kareva marriage with Bakhtawari; and that the Will was made by the deceased while he was in sound and disposing mind.

(5) Lala Ram filed a replication and re-affirmed the allegations made in the plaint. He specifically controvered the claim of the defendants that Badhawa had contracted Kareva marriage with Bakhtawari.

(6) On the pleadings of the parties, the trial Court framed the following issues :—

1. Whether Badhawa deceased was the owner of the property in question ? OPP

2. If issue No. 1 is proved to what share, if any, the plaintiff is entitled to claim the property left by said Badhawa son of Raja Ram ? OPP

3. Whether the said Badhawa left any valid will in favour of the defendant, if so, its effect ? OPD

4. Relief."

(7) After appraising the evidence led by the parties, issue No. 1 was decided in favour of the plaintiff and it was held that Badhawa was the owner of the property in question. The trial Court did not record any finding on the question about the property being ancestral or not as no such issue was pressed. Under issue No. 2, it was observed that this issue was material only if under issue No. 3 it were to be held that the will alleged to have been executed by Badhawa in favour of Sunehri Devi and Sona Devi was not proved. It was, therefore, held that if the will is not proved, then, plaintiff—Lala Ram would be entitled to 1/6th share against his claim of 1/2 share in the property left behind by deceased—Badhawa. This issue was, accordingly decided partly in favour of the plaintiff and partly against him. Under issue No. 3, it was held that although the defendants had succeded in proving that the will dated 3rd August, 1970 was executed by Badhawa but they had failed to prove that at the time of execution of the will, he was of a sound and disposing mind and that the will had been voluntarily executed by him. Thus, issue No. 3 was decided against the defendants.

(8) Aggrieved by the judgement and decree of the trial Court, defendants—Sunehri Devi and Sona Devi filed an appeal before the Additional District Judge, Ambala. In appeal, contentions were raised only with regard to issue No. 3. The lower Appellate Court upheld the findings of the trial Court on issue No. 3 and consequently dismissed the appeal.

(9) It is in the above factual background that the present appeal has to be considered. At the very outset, counsel for the appellants was asked to explain as to how the concurrent findings of fact recorded by the courts below that Badhawa was not in a sound and disposing mind when the alleged will was executed and that this act was not voluntary can be interfered with.

(10) Mr. V. K. Jain, learned counsel for the appellants, pointed out that the findings of the courts below are not only based on misapplication of rules of evidence but are also perverse as material evidence has either been ignored or misread. To elaborate this point, he referred to the finding of the trial Court in para 16 of the judgement wherein it has been held that the appellants (defendants) **" have failed to prove that at the time of execution of the will he was of sound and disposing mind and the will Ex. D1 was voluntarily**

executed by him". He contended that there was a presumption of sanity of the executant and the onus of proving that he was not of sound and disposing mind when the will was executed was on the person so alleging. He contended that plaintiff—Lala Ram had placed no material on record whatsoever to prove that Badhawa was not of a sound and disposing mind when the will was executed. He was bound to prove this allegation by leading evidence and could not succeed on the ground that the defendants had failed to prove the reverse. In support of his contention, he placed reliance on the following judgements :—

1. **Charan Singh and another** *versus* **Balwant Singh and others, (1)**

2. **Smt. Bhagya Wati** *versus* **General Public and others, (2)**

3. **Bishnupriya Mohapatra and others** *versus* **Bata Krushna Mohapatra and others, (3)**

4. **Madhukar D. Shende** *versus* **Tarabai Aba Shedage (4),**

5. **Baij Nath Chaudhary** *versus* **Dilip Kumar and others, (5) and**

6. **Ramabai Padmakar Patial (Dead) through LRs and others** *versus* **Rukminibai Vishnu Vekhande and others, (6)**

He, therefore, contended that in the absence of any evidence led by the plaintiff in support of his allegation that Badhawa was not in a sound and disposing mind, the will could not be rejected on this ground. He further contended that even otherwise, the evidence on record clearly shows that Badhawa was hale and hearty when the will was executed. For this purpose, he referred to the statement of DW-1 Darshan Kumar, the scribe of the will, who had clearly stated that

(1) 1997 PLR 118 (P&H)
(2) (1994-2) PLR 649 (P&H)
(3) AIR 1993 Orissa 218
(4) (2002)2 S.C.C. 85
(5) (2001) 9 S.C.C. 316
(6) (2003) 8 S.C.C. 537

Badhawa Ram was in a healthy (tandrust) state when he had scribed the will for him. He, then, referred to the statement of DW-2 Dhani Ram, Advocate, an attesting witness, who also testified that on the day of execution of the will, Badhawa was in a healthy (tandrust) state. This assertion of Darshan Kumar and Dhani Ram was not questioned in the cross-examination. No suggestion was put to them about Badhawa not being of a sound and disposing mind. Learned counsel, then, referred to the statement of DW-3 Sher Singh, who is also an attesting witness. He also testified that Badhawa was in a healthy state. However, in the cross-examination, the only suggestion put to him was as to whether Badhawa had undergone any medical examination at Ambala when he had come to execute the will. In reply, Sher Singh had said that Badhawa had not undergone any such medical examination as he was fit and fine *(Theek Thak)*. No suggestion about Badhawa not being of a sound and disposing mind on that day was put even to him. Thus, it was agrued that the evidence on record clearly shows that Badhawa was hale and hearty on the day will was executed by him.

(11) Learned counsel, then, contended that the finding that the appellants had failed to prove that the will had been voluntarily executed by Badhawa again suffers from the same defect. He pointed out that firstly this finding is beyond pleadings. He referred to the contents of the plaint and the replication to show that there was not even a whisper of the allegation that the will had been executed under some influence or coercion. Still further, the learned counsel contended, even if such a plea could be raised by the plaintiff, the onus was on him to prove that the will was not voluntary. No such evidence had been led by the plaintiff in this behalf. He pointed out that the authorities below have not mentioned the name of any person who had allegedly exerted any pressure on Badhawa to execute the will. It was further pointed out that the Courts below have placed the onus on the defendants to prove that the will was voluntary. This, according to the learned counsel, is contrary to the basic rules of evidence. No such negative onus could have been placed on the defendants. He, again, referred to the evidence of DW-1, DW-2 and DW-3 to show that no suggestion was put to them about the will having been executed under any pressure or coercion. The scribe Darshan Kumar has clearly stated that he had scribed the will at the instance of Badhawa Ram and he had read it over to him. This was done in the presence of witnesses Dhani Ram, Advocate,

Dalip Singh and Sher Singh. This assertion had remained uncontroverted in the cross-examination. Dhani Ram, Advocate had also stated that Badhawa Ram had got the will executed in his presence and that the will had been read over and explained to him and it is only thereafter that Badhawa had put his thumb impression on the same. This had also remained uncontroverted in the cross-examination. To the same effect is the testimony of DW-3.

(12) The learned counsel, then, contended that the courts below have wrongly drawn an adverse inference against the defendants on the ground that Mam Raj, who was, admittedly, present at the time of execution of the Will and had been impleaded as defendant No. 6, had neither filed any written statement nor entered the witness box. Such an inference was totally unwarranted as neither in the plaint nor in the replication had any allegation been made against Mam Raj about his having brought any pressure on Badhawa to execute the Will. The only role assigned to Mam Raj was that he had accompanied Badhawa when the Will was executed. It was, therefore, contended that this fact alone could not be treated as a suspicious circumstance leading to an inference that he had coerced or pressurised Badhawa to make the Will. Reliance was placed on the judgement of Supreme Court in **Smt. Malkani** *versus* **Jamadar and others, (7)**. Under these circimstances, there was no occasion for Mam Raj to deny exerting any pressure on Badhawa either by filing a written statement or by appearing in person.

(13) Learned counsel also pointed out that the objections of the trial Court about Dalip Singh, an attesting witness, not being examined or there being no witness from the Village of Badhawa, are of academic interest only because the trial Court has accepted the execution of Will by Badhawa. At any rate, he referred to the provisions of Section 68 of the Indian Evidence Act, 1872, to show that for proving a document, production of only one witness is sufficient. He pointed out that two out of three witnesses had been produced and, therefore, no adverse inference could be drawn from the non-production of the third witness Dalip Singh. For this purpose, he placed reliance on the judgement of the Supreme Court in **Palanivelayutham Pillai and others** *versus* **Ramachandran and others, (8)**. He also contended that

(7) (1987) 1 S.C.C. 610
(8) (2000) 6 S.C.C. 151

there was no requirement in law that the witnesses should be from the same Village or from the same locality. For this purpose, he relied on **Tara Singh** *versus* **Smt. Shanti and others, (9)** and **Sadasivam** *versus* **K. Doraisamy, (10).**

(14) It was next argued that the courts below had wrongly observed that Badhawa had given no reasons as to why he was making the Will only in favour of two daughters of his brother Biru by excluding the other legal heirs. The learned counsel pointed out that this observation is factually incorrect. He referred to the Will in which Badhawa has clearly stated that his nieces Sona Devi and Sunehri Devi look after him and he has special love and affection for them. Accordingly, it was contended that the findings of the trial Court in para 14 are factually incorrect.

(15) Mr. Sanjay Bansal, appearing on behalf of the respondent, supported the orders of the Courts below.

(16) I have heard the counsel for the parties and perused the relevant record.

(17) For appreciating the contentions raised on behalf of the appellants, it is necessary to refer to the findings recorded by the trial Court which have been upheld by the lower Appellate Court. The findings recorded in para-16 are as under :—

> "16. For the reasons given above I am of the view that the defendants have succeeded in proving that the Will Ex. D1 was executed by Badhawa Ram but they have failed to prove that at the time of execution of the Will he was of sound and disposing mind and the Will Ex. D1 voluntarily executed by him. The will Ex. D1 has been proved to be voluntary and valid and as such issue number 3 is decided against the defendants and in favour of the plaintiff".

(18) From the above, it is clear that the execution of the Will by Badhawa stands proved and its fact has been accepted by the Courts below. Even before me, the learned counsel for the respondent did not dispute this fact. The substantial question of law for consideration, therefore, is as to whether the Courts below were justified

(9) 1988 (1) P.L.R. 413 (P&H)
(10) (1996) 8 S.C.C. 624

in placing the onus on the defendants to prove that Badhawa was in a sound and disposing mind at the time of execution of Will and that the Will had been made voluntarily by him.

(19) In **Charan Singh's case** *(supra)*, this Court (at page 122) has observed as under :—

> "As a general rule, until the contrary is established, a testator is presumed to be sane and to have mental capacity to make a valid Will. Accordingly, where a testamentary writing is rational on its face, legal in form, and it is shown to have been duly executed, the presumption of testamentary capacity arises. The said presumption obtains over the Will in the absence of credible evidence to the contrary. A testamentary deposition of property is usually not consistent with the ordinary course of succession. Therefore, any departure from the usual course of succession in which a person prompted by ordinary instincts and natural impulsions, would have his property go, is presumed to have been made by the testator because of reasons rationally conceived, which are satisfactory to him. No presumption of testamentary incapacity is permissible by the mere fact that the testator was advanced in years."

(20) In **Smt. Bhagya Wati's case** *(supra)*, this Court held that "the testator is presumed to be sane having a mental capacity to make a valid will until contrary is proved".

(21) In **Madhukar D. Shende's case** *(supra)*, the Apex Court held that there has to be evidence on record to show that the testator was physically or mentally incapacitated from executing the Will. The mental and physical capacity could not be doubted on the ground of absence of any medical evidence of a doctor which would show that the testator was in a sound and disposing state of mind. The Apex Court held that there is no rule of law or of evidence which requires a doctor to be kept present when a Will is executed.

(22) Similarly, in **Baij Nath Chaudhary's case** *(supra)*, a Will was sought to be challenged on the ground that the testator was a lunatic. This contention was rejected on the ground that there was nothing on record to show that he was not a man of sound mind.

(23) In **Ramabai Padmakar Patial's case** *(supra)*, it was held that in the absence of any evidence to show that the testator's faculties were impaired at the time of execution of Will, it could not be said that she was not in a sound disposing mind at the time of execution of the Will.

(24) From the above authorities, it is clear that there is a presumption of sanity of the testator. Once a Will is proved, there is no further onus on the propounders to prove that the testator was in a sound disposing mind at the time of execution of the Will. However, when a Will is challenged on the ground of the testator's mental incapacity, the onus lies on the person so alleging. He is required to prove the same by leading evidence to that effect. Thus, when a Will has to be rejected on the ground that the testator was not in a sound and disposing mind, a definite finding is required to be recorded to that effect. However, in the present case, the finding recorded is that the defendants (appellants herein) "have failed to prove that at the time of execution of the Will, he was of sound and disposing mind". This finding is clearly not based upon a correct application of the legal principles governing the proof and acceptance of Will and is completely perverse.

(25) On a specific query from the Bench, Mr. Sanjay Bansal, learned counsel for the respondent, fairly conceded that no evidence had been led by the plaintiff to prove the mental incapacity of Badhawa. On the other hand, it has been correctly pointed out by the learned counsel for the appellants that the evidence of DW-1, DW-2 and DW-3 clearly shows that Badhawa was hale and hearty at the time of execution of the Will. Their statements to this effect had remained uncontroverted as no suggestion was put to them about any mental incapacity of Badhawa. Thus, in the absence of any evidence led by the plaintiff to this effect, it cannot be held that Badhawa was not in a sound and disposing mind at the time of execution of the Will.

(26) Similarly, the finding of the Courts below that the Will has not been proved to be voluntary is, again, perverse, not based on correct application of principles governing the proof and acceptance of Will. It has been correctly pointed out that it was nowhere pleaded by the plaintiff that any person had exerted influence on Badhawa or had coerced him into making the Will. In the absence of any such pleadings, no such finding could have been recorded by the courts below.

(27) Still further, there would be a presumption of a registered Will being voluntary unless contrary is proved. The onus clearly would be on the person who alleges the Will to be not voluntary. For this purpose, reference may be made to the judgement of the Supreme Court in **Meenakshiammal (deceased by LRs) and others** *versus* **Chandrasekaran and another,** (11), wherein in para-20, it has been held as under :—

> "When the Will is alleged to have been executed under undue influence, the onus of proving undue influence is upon the person making such allegation and mere presence of motive and opportunity are not enough."

(28) In the present case, the trial Court has, again, wrongly placed onus of proving the Will to be voluntary on the appellants. The onus clearly rested on the plaintiff-respondent to prove the same by leading evidence. In the present case, neither any undue influence or coercion by any one was pleaded in the pleadings nor any evidence led to that effect. However, on the basis of arguments raised before the trial Court, pressure or coercion is sought to be attributed to Mam Raj, husband of Sona Devi by drawing an adverse inference from the fact that he had not filed any written statement nor had he appeared in the witness box. Such an inference is totally unwarranted. It has been correctly pointed out that in the absence of any allegation of coercion on the part of Mam Raj in the pleadings, non-filing of a written statement by him could not give rise to such an inference at all.

(29) Still further, the only role ascribed to Mam Raj is that he had accompanied Badhawa at the time of execution of the Will. This has not been denied by either the defendants or by Mam Raj. However, this fact by itself, in the absence of any allegation or evidence, cannot led to the inference that he had exerted any pressure on Badhawa to make the Will.

(30) In **Smt. Malkani's case** *(supra)*, it was held that mere active participation in the execution of the Will by the beneficiary by itself does not create doubt regarding testamentary capacity of the executor or the genuineness of the Will. If any coercion is alleged, the same has to be proved. In the present case, Mam Raj is not even the beneficiary of the Will although his wife is. However, there is no

(11) 2004 AIR SCW 6254

allegation that he had actively participated in the execution of the Will muchless an allegation of coercion. Even the courts below have not recorded any positive finding of any coercion on his part. The effective finding is that the appellants have failed to prove the Will to be voluntary which, as already observed, is a finding based on misapplication of rules of evidence by wrongly placing onus on the propounders of the Will. If the plaintiff were to make such an allegation, he ought to have pleaded the same in the pleadings and proved it by leading evidence. This had clearly not been done. Thus, the second finding of the courts below that the Will has not been proved to be voluntary, is also not sustainable.

(31) From the above discussion, it is crystal clear that the execution of the Will is not in question. It stands duly proved. In the absence of any evidence to show that Badhawa, the testator, was not of a sound and disposing mind at the time of execution of the Will or that he had made the Will under some pressure or coercion from anyone, the Courts below were not justified in holding that the Will was not valid and deciding issue No. 3 against the appellant-defendants. Accordingly, the findings of the trial Court on issue No. 3 are set aside and the issue is decided in favour of the defendants.

(32) Before parting, I may also refer to the other circumstances on the basis of which the Will has been doubted.

(33) The objections about non production of Dalip Singh, one of the attesting witnesses or there being no witness from the same village or area do not survive in view of the fact that the execution of the Will stands duly proved and even accepted by the Courts below. It has not even been challenged before me. Even otherwise, as per Section 68 of the Indian Evidence Act, 1872, production of only one witness in support of the execution is sufficient whereas in the present case two of the three attesting witnesses have been produced. In **Palanivelayutham Pillai's case** *(supra)*, only one of the three attesting witnesses of the Will was examined. The trial Court as well as the High Court took the view that the will had duly been executed. This view was affirmed by the Apex Court.

(34) Similarly, there is no requirement in law that the witnesses should be from the same locality or the same village. In **Tara Singh's case** *(supra)*, this Court has held that merely because the witnesses of

a Will are from a different village does not itself constitute a suspicious circumstance particularly when they were not shown to be interested in the plaintiff or biased against the defendant. In the present case also, there is no finding that the witnesses were biased against the respondent-plaintiff or were interested in the appellant-defendants.

(35) Similarly, in **Sadasivam's case** *(supra)*, it has been held by the Apex Court that the fact that a Will has not been witnessed by a person of the same locality, does not normally constitute a suspicious circumstance.

(36) The finding of the Courts below that failure of the testator to give any reason for making the Will only in favour of two daughters of his brother Biru by excluding other heirs was also a suspicious circumstance, is clearly based on a wrong factual premise. A perusal of the Will shows that Badhawa had clearly stated that since his said two nieces looked after him, he had a special affection for them. It is also relevant to note that Badhawa had no Class-I heirs. He was only survived by 12 children of his brothers ; Bakhtawar and Biru Ram. Bakhtawar had 7 children including Lala Ram, the plaintiff, and Biru Ram had 5 children including Sona Devi and Sunehri Devi, the beneficiaries of the Will. No other legal heir except Lala Ram, plaintiff, had challenged the Will.

(37) It may also be mentioned that the defendants in the written statement had claimed that Badhawa had contracted a Kareva marriage with Bakhtawari. This fact was, however, denied by the plaintiff in the replication and was not further pressed and no issue in this behalf had been framed. Thus, exclusion of Bakhtawari from the Will could not be treated as a suspicious circumstance as the marriage itself was not proved. At any rate, if Bakhtawari were to be treated as wife of Badhawa, which fact has been vehemently denied even by the respondent-plaintiff, she, being Class-I heir, would be entitled to succeed to the entire estate of Badhawa in exclusion of plaintiff, who was merely a Class-II heir. It is for this reason, counsel for the respondent had conceded before me that exclusion of Bakhtawari could not be a ground for doubting the Will.

(38) Consequently, the suit of the plaintiff is dismissed and the appeal is allowed. No costs.

R.N.R.