The State v. Ram Singh

Falshaw, J.

charged with being in possession of 26 ounces of illicit liquor.

I am certainly in agreement with the learned counsel for the respondent that both in the questions put to the accused and in the charge the element of guilty knowledge mentioned in section 25 should also be mentioned. If this point had been raised in appeal or revision against a conviction, it would be necessary to see whether any prejudice has been caused to the accused by the failure to include these words in the questions and charge, and in cases where the defence taken was a total denial of possession of any incriminating article, I should be inclined to hold that no prejudice had been created against the accused by the omission of these words, and should therefore not be inclined to set aside the conviction simply on this account or if I did so, in a suitable case, I might order a retrial. Although the same principle might be applied in an appeal filed by the State against an acquittal, I do not think that the present case is of a sufficiently serious nature to justify the ordering of retrial, and I consider that it will serve the purpose of the State in instituting this appeal sufficiently if we merely correct the erroneous views of the learned Sessions Judge. With these remarks I would dismiss the appeal.

Gurnam Singh J.

GURNAM SINGH,—I agree.

APPELLATE CIVIL

Before Bishan Narain and Chopra, JJ.

MEHTAB SINGH,—*Plaintiff-Appellant*

versus

AMRIK SINGH AND OTHERS,—*Defendants-Respondents*

Regular Second Appeal No. 345 of 1950.

1956

Nov., 6th

Indian Evidence Act (I of 1872)—Section 90—Will—More than 30 years old—Production of certified copy—Whether can justify the presumption of due execution of the original will—Formalities laid down in section 50 of the Indian Succession Act (XXI of 1865) or section 63 of the

Indian Succession Act (XXXIX of 1925) whether applicable to wills made before 1927—Will—Construction of—Rule stated.

Held, that the production of the certified copy of the will which is more than 30 years old cannot be considered to be sufficient to justify the presumption of due execution of the original will under the provisions of section 90 of the Indian Evidence Act.

Held, that the formalities laid down in section 50 of the 1865 Act, or in section 63 of the 1925 Act are not applicable to a will made in 1901 and long before 1927.

Held, that it is well established that it is not proper and indeed dangerous to construe one will according to the construction placed on the other wills. Same word in different contexts may have different meaning and significance. The document may show that the executant ascribed a particular meaning to a word which is different from the ordinary meaning or different from the sense in which the same word has been used by some other person.

Basant Singh and others v. *Brij Raj-Saran Singh and others* (1), relied on.

Second Appeal from the decree of the Court of Shri Sher Singh, District Judge, Jullundur, dated the 15th day of April, 1950, affirming the decree of Shri Vidya Sagar Vashisht, Sub-Judge, 1st Class, Jullundur, dated the 17th June, 1949, dismissing the plaintiff's suit with costs, and it was further ordered that the plaintiff-appellant would pay the costs of the respondents.

F. C. MITTAL and SHAMAIR CHAND, for Appellant.

S. D. BAHRI and S. C. MITTAL, for Respondents.

JUDGMENT.

BISHAN NARAIN, J.—This second appeal has been filed by Mehtab Singh plaintiff against the dismissal of the suit by both the lower Courts. According to Bishan Narain, J.

(1) A.I.R. 1935 P.C. 132.

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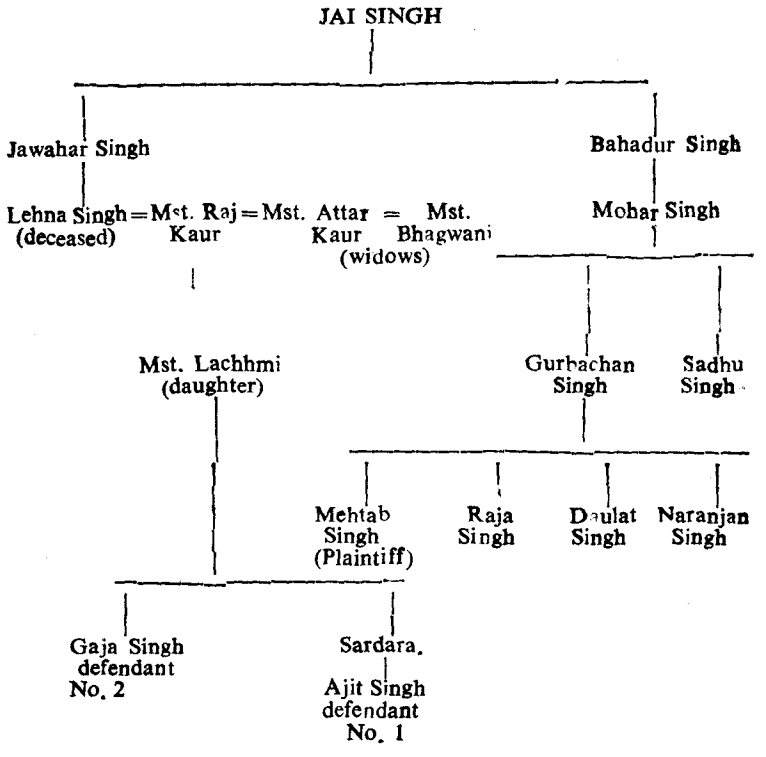
the plaintiff's allegations the parties are related to each other though a little distantly and the genealogical table set up by the plaintiff so far as it is relevant to the present case is as follows:—



The property in dispute orginally belonged to Jawahar Singh son of Jai Singh. He had a son Lehna Singh who died in the life-time of his father leaving three widows. Jawahar Singh is alleged to have executed a will on 2nd April, 1901 and it is alleged that he got it registered. Jawahar Singh died on 7th December, 1901 and after his death the three widows of his predeceased son took possession of the property. Subsequently Attar Kaur and then Raj Kaur died and then Bhagwani alias Bhagwan Kaur alone got possession of the property. She executed a will on 8th March, 1937, bequeathing the property to Mehtab Singh. She then gifted the same property to him by a

deed of gift and transferred possession to him. Thereafter a consent decree was obtained by Mehtab Singh against Mst. Bhagwani relating to this very property. Bhagwan Kaur died on 30th January, 1944. The revenue authorities did not accept the right claimed by Mehtab Singh to these lands and ordered mutation in favour of Ajit Singh and Gaja Singh, descendants of Mst. Lachhmi. This order led Mehtab Singh to file the present suit for declaration of his title on the basis of his relationship with Jawahar Singh under custom and also on the basis of the will of Mst. Bhagwan Kaur. The suit has been filed against the descendants of Mst. Lachhmi who set up the registered will of Jawahar Singh dated 2nd April, 1901 in support of their title. The trial Court held that the plaintiff had failed to prove his relationship with Jawahar Singh, that secondary evidence of the 1901 will was admissible as the original will was lost, and that its execution by Jawahar Singh was amply proved on the record. The trial Court also held that under the will the widows got only limited estate and Bhagwan Kaur had no right to gift or bequeath or transfer the property to the plaintiff. On these findings the suit was dismissed. On appeal the District Judge upheld the trial Court's finding regarding plaintiff's failure to prove his relationship with Jawahar Singh. He also held that his claim was barred by time even if the plaintiff was related to Jawahar Singh as alleged by him. As regards the 1901 will the District Judge held that the original will was in possession of the plaintiff or was lost and its secondary evidence was admissible. The execution of the will and his disposing mind were held to have been proved by the certified copy of the will and the statement of the Sub-Registrar who had registered it. Construing the will the District Judge held that Mst. Bhagwan Kaur was only a limited owner, that she could not transfer the property to the plaintiff, and that the defendants were entitled to the

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property under the will of Jawahar Singh. On these findings the District Judge dismissed the appeal and the plaintiff has filed this second appeal in this Court.

Only two points have been urged on behalf of the appellant before us. (1) That there is no proof that Jawahar Singh executed the will or that it was validly executed or attested, and (2) that construing the will Mst. Bhagwan Kaur became full owner of the property and could gift or bequeath it to Mehtab Singh appellant.

I shall first deal with the point relating to the execution of the will of 1901. The original will has not been produced. The lower appellate Court has held that it was in possession of Mst. Bhagwani and is being withheld by the plaintiff, and that in any case it is lost and, therefore, secondary evidence is admissible. The learned counsel for the appellant has not contested the correctness of this finding. The defendants have produced a certified copy of the will which was obtained from the Registration office. This will is more than 30 years old but production of a copy cannot be considered to be sufficient to justify the presumption of due execution of the original will under the provisions of section 90, Indian Evidence Act [*Basant Singh and others* vs. *Brij Raj Saran Singh and others* (1)]. It is, therefore, necessary to see in the present case if there is any evidence on the record to justify the lower Courts' finding that the execution of the original will has been proved. The copy produced is a certified copy of the original will. It has been produced by the registration clerk from his office. It bears the endorsement of the Sub-Registrar which records that Jawahar Singh, whom he personally knew, admitted before him that he had written and completed the will and that he thumb marked it in his presence. This endorsement under section 60 of the Registration Act is admissible for

(1) A.I.R. 1935 P.C. 132.

the purposes of proving that the executant admitted the execution of the will that was produced before him. The will was made about 50 years ago and I would consider this endorsement as sufficient evidence in support of the finding that Jawahar Singh in fact executed it. In this case, however, there is the statement of Bishan Das Sub-Registrar who has deposed in Court that he had made the endorsement on the will, and that he knew Jawahar Singh previously who had admitted its execution before him. He has also stated on oath that Jawahar Singh was in a disposing mind and the will had been read out to him. This evidence to my mind conclusively proves execution of the will and disposing mind of the testator. The lower Courts have also come to the same conclusion The will is a natural one and is attested by two witnesses. There is nothing suspicious about it. It has been acted upon and the widows took possession of the property in accordance with the directions given in the will. It was only in 1937 that Mst. Bhagwan Kaur decided to ignore it. I am, therefore, clear in my mind that Jawahar Singh did in fact execute the will and got it registered in 1901.

Mr. Mital, however, strenuously argued that its due execution has not been proved on the record. He argued that there is no evidence that the testator signed or affixed his mark on the will and the attesting witnesses attested it in accordance with section 63 of the Indian Succession Act, 1925. Now, this question, determination of which depended upon evidence, was not specifically raised in the pleadings nor was it referred to in the Lower Courts in the course of arguments. In any case, there is no discussion of this point in the judgment of the lower Courts. Moreover, there is no merit in this argument. The will in question was executed in 1901, by Jawahar Singh at Banga in Jullundur District. The parties are governed by Hindu

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Law as modified by custom. The Indian Succession Act, 1865, did not apply to wills executed by Hindus. In 1870 the Hindu Wills Act was passed to regulate the Hindu wills. It made section 50 of the 1865 Succession Act applicable to Hindu wills made on or after 1st of September, 1870, within certain prescribed territories (not including the Punjab) or in relation to immovable property situated within that area. Section 50 laid down that a will could be executed only by observing certain formalities but this provision of law was not applicable as I have already said to Hindu wills executed in the Punjab. The legislature then enacted Indian Succession Act in 1925, amalgamating the 1865 Act, the Hindu Wills Act, 1870, and other similar enactments. This Act as it stands since 1927 has *inter alia* made the provisions of section 63 (corresponding to section 50 of the Succession Act of 1865) applicable to all Hindu wills or codicils etc., with effect from 1st January, 1927, and therefore, any will made by a Hindu on or after 1st January, 1927, must be in writing and must be executed by the testator and attested by two witnesses as laid down in section 63 of the Act [Section 57(c), Indian Succession Act, 1925]. It is, therefore, clear that the formalities laid down in section 50 of the 1865 Act, or in section 63 of the 1925 Act are not applicable to the will now under consideration as it was made in 1901 and long before 1927. It follows that once it is proved that Jawahar Singh had in fact executed the will it must be held to be a legal devise in accordance with its terms even if it is not proved that the will was attested by witnesses according to the formalities laid down in the Indian Succession Act. In this view of the matter it is not necessary to discuss the case law brought to our notice in support of the proposition that proof of execution does not necessarily prove due execution of the will. The result is that this contention of the learned counsel fails and is hereby rejected.

The next question that requires determination in this appeal is that of construction of the will. Its operative portion reads:—

"I bequeath as under:—

"I will remain the owner of the property so long as I remain alive. After my death all the three widows of Sardar Lehna Singh shall be the owners and possessors, like me, in equal shares. But they shall not have any power to alienate the property. They shall simply be entitled to the produce on payment of the revenue, in equal shares. If any of the said widows dies or contracts a second marriage, the other widows shall remain the owners and possessors and enjoy the produce. When all the three widows of Sardar Lehna Singh die, Sardara and Gaju, daughter's sons of Lehna Singh, shall be the owners and possessors, in equal shares, of the aforesaid property generation after generation."

It is argued that the testator made the three widows owners of the property like himself and that the subsequent provision limiting that right must be ignored. Reading the will as a whole it appears to me, however, that the language used by the testator shows that his intention was to give limited estate to his predeceased son's widows and full ownership to his grand daughter's children. It is true that the testator did state that the widows were to be the owners of the property like himself but in the same statement he proceeded to say that they will have no right to alienate it and then laid down the rule of devolution upon the demise or re-marriage of each widow with the

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ultimate devise to his grand-daughter's children by name stating that they shall be owners of the property generation after generation. Both the lower Courts have construed the will as giving life estate to the widows and I see no reason to differ from their conclusion. Shri F. C. Mital refers us to certain decisions of the Privy Council in which certain wills were construed in a particular way. But it is well established that it is not proper and indeed dangerous to construe one will according to the construction placed on the other wills. Same word in different contexts may have different meaning and significance. The document may show that the executant ascribed a particular meaning to a word which is different from the ordinary meaning or different from the sense in which the same word has been used by some other person. It is, therefore, unnecessary to discuss these decisions. I am of the opinion that Bhagwan Kaur had no right under the 1901 will to give the property to Mehtab Singh by gift or by will or by a device of a consent decree. Therefore, the plaintiff is not entitled to the declaration sought by him and his suit was rightly dismissed by both the lower courts.

For all these reasons I dismiss this appeal with costs.

Chopra, J.

CHOPRA, J.—I agree.

REVISIONAL CRIMINAL

Before Kapur, J.

THE STATE,—*Petitioner*

versus

AMRU AND ANOTHER,—*Accused-Respondents*

Criminal Revision Application No. 543 of 1956.

1956

Nov., 8th

Indian Penal Code (XLV of 1860)—Section 381—Expression, "Shall also be liable to fine"—Meaning of—Whether the imposition of fine mandatory.

Held, that the word "Liable" means a future possibility or probability happening of which may or may not actually occur. So interpreted the Magistrate has the