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Chief Justice's Court

Case :- SPECIAL APPEAL No. - 482 of 2015

Appellant :- Shobh Nath Dubey
Respondent :- Smt. Tara Devi
Counsel for Appellant :- Narendra Mohan,R.P. Mishra
Counsel for Respondent :- Rajesh Kumar Singh

Hon'ble Dr. Dhananjaya Yeshwant Chandrachud,Chief Justice
Hon'ble Yashwant Varma,J.

(Per Hon'ble Yashwant Varma, J.)

The appellant before us was the original plaintiff in a testamentary suit, which came to be instituted on the original side of this Court seeking grant of letters of administration to the estate of the deceased Kashi Nath Dube with the Will annexed. Kashi Nath Dube is stated to have died on 9 February 2007 leaving behind his widow Smt. Tara Devi and a married daughter Smt. Vijay Laxmi from his first wife, who died in 1954. The appellant is the brother of the deceased. The Will in question is dated 14 December 2003 and is an unregistered document in terms of which the estate of the deceased stands bequeathed to the appellant. Smt. Tara Devi, the widow filed her objections on affidavit and consequently treating the matter as having become contentious, the proceedings for grant of letters of administration stood converted into a testamentary suit by the order of the Court dated 22 January 2009.

The learned Single Judge found that the plaintiff had failed to dislodge the suspicious circumstances surrounding the execution and making of the Will dated 14 December 2003. The Court accordingly, proceeded to dismiss the suit by the judgement dated 3 July 2015. This appeal lays challenge to

the said order of the learned Single Judge.

The learned counsel appearing for the first respondent raised a preliminary objection to the maintainability of this appeal. He contended that an appeal under the provisions of the **Indian Succession Act, 1925**[1] lies to the High Court against the order made by a District Judge. He contended that since the suit in question had been tried by a learned Single Judge of this Court itself, no appeal would lie against the judgement impugned. In the alternative, it was submitted that the provisions of Chapter VIII Rule 5 of the **Allahabad High Court Rules, 1952**[2] also did not sanction an appeal against the order of the learned Single Judge passed in respect of testamentary proceedings. The learned counsel for the respondents submitted further that since the Act did not provide for an appeal against an order of the learned Single Judge exercising testamentary jurisdiction, the provisions of Chapter VIII Rule 5 of the Rules, 1952 could not be pressed into service.

Insofar as the objection taken by the learned counsel for the respondents with reference to the provisions of the Act is concerned, it appears that in terms of Section 300 thereof, the High Court exercises concurrent jurisdiction with the District Judge in respect of all matters including the grant of letters of administration. It is true that Section 299 of the Act, 1925 provides for an appeal to the High Court against every order made by a District Judge alone. The question which however, falls for consideration is whether the present appeal would not be maintainable in the absence of a provision being made under the Act for an appeal being tried by the High Court against the judgment of a Single Judge of the Court exercising

1 The Act
2 The Rules

concurrent jurisdiction.

By virtue of the provisions of Section 300 of the Act, 1925 read with the provisions of Chapter XXX of the Rules, 1952, the High Court exercises original jurisdiction in respect of grant of letters of administration and probate. The question as to whether an intra court appeal would lie against a judgement rendered by a learned Single Judge in the exercise of original jurisdiction would therefore, have to be answered with reference to the provisions of the Allahabad High Court Rules 1952. The absence of a provision for an appeal under the Act cannot in our opinion take away the appellate forum which may be otherwise provided for under the Rules. We have also not been shown any provision under the Act which may confer finality upon proceedings taken by a Single Judge of the High Court exercising concurrent jurisdiction.

We then turn to the provisions of Chapter VIII Rule 5 of the Rules. As we read the provisions of Rule 5, it is apparent that an appeal lies to the Court from a judgement of one Judge except in those situations, which are set forth in Rule 5. Rule 5 of Chapter VIII <u>excludes</u> an intra court appeal in various contingencies, which are as follows:

(*a) a judgement passed in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to its superintendence;*

(b) an order made in the exercise of revisional jurisdiction;

(c) a judgement made in the exercise of the powers of superintendence of this Court;

(d) a judgement rendered in the exercise of criminal jurisdiction;

(e) a judgement made in the exercise of jurisdiction conferred by Articles 226 or 227 of the Constitution of India in respect of any judgement, order or award of a Tribunal, Court or statutory arbitrator made in the exercise of jurisdiction under any U.P. Act or under any Central Act with respect to matters enumerated in the State List or the Concurrent List of the Seventh Schedule to the Constitution of India;

(f) a judgement made in the exercise of jurisdiction conferred by Articles 226 or 227 of the Constitution of India in respect of any judgement, order or award of the Government or any Officer or authority exercising appellate or revisional jurisdiction under any Uttar Pradesh Act or under any Central Act made with respect to matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India.

The provisions of Rule 5 of Chapter VIII are also liable to be viewed bearing in mind the provisions of the ***U.P High Court (Abolition of Letters Patent Appeals) Act, 1962***[3]. The exclusions which stand enumerated in Rule 5 of Chapter VIII primarily give effect to the provisions of the aforesaid Act of 1962. This because while Rule 5 of Chapter VIII made provision for an intra court appeal, it was to be ensured that the class of cases in respect of which appeals stood abolished by the Act of 1962 were not understood to have been included. The above position attains further clarity when one views the contents of the two provisions in comparison:

"The Allahabad High Court Rules, 1952	***The U.P. High Court (Abolition of Letters Patent***

3 Act, 1962

	Appeals) Act, 1962
5. Special appeal.-- An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of Appellate Jurisdiction in respect of a decree or order made by a Court subject to the Superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of Superintendence or in the exercise of criminal jurisdiction [or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award (a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution or (b) of the Government or any Officer or authority, made or purported to be made in the exercise or	***3. Abolition of appeals, from the judgment or order of one Judge of the High Court made in the exercise of appellate jurisdiction.--****(1) No appeal, arising from a suit or proceeding instituted or commenced, whether prior or subsequent to the enforcement of this Act, shall lie to the High Court from a judgment or order of one Judge of the High Court, made in the exercise of appellate jurisdiction, in respect of a decree or order made by a Court subject to the superintendence of the High Court, anything to the contrary contained in clause 10 of the Letters Patent of Her Majesty, dated the 17th March, 1866 read with clause 17 of the U.P. High Courts' (Amalgamation) Order, 1948 or in any law notwithstanding.* *(2) Notwithstanding anything contained in sub-section (1) all appeals pending before the High Court on the date immediately preceding the date of enforcement of this Act, shall*

purported exercise of Appellate or Revisional Jurisdiction under any such Act of one Judge.	*continue to lie and be heard and disposed of as hereto before, as if this Act, had not been brought into force."*

The objection taken by the learned counsel for the respondents may now be tested. Undisputedly, the learned Single Judge while trying the testamentary suit was exercising original jurisdiction. While he was trying the testamentary suit, he was not a Court exercising appellate jurisdiction nor was it a Court subject to the superintendence of the High Court. The orders passed by the learned Single Judge exercising testamentary jurisdiction are also not liable to be described as being orders made in exercise of the revisional jurisdiction or in exercise of powers of superintendence. It was surely not in exercise of jurisdiction under Articles 226 or 227 of the Constitution of India and therefore, the latter part of Rule 5 of Chapter VIII of the Rules, 1952 clearly had no application. When Rule 5 speaks of a Court subject to the superintendence of the Court, it must necessarily means superintendence of the High Court. This is also evident from the language employed by Section 3 of the Act, 1962. In light of the above, we overrule the preliminary objection as taken by the learned counsel for the respondents; and hold that the present appeal would be clearly maintainable under the provisions of Chapter VIII Rule 5 of the Rules, 1952.

Having dealt with the preliminary objection, one may then consider the rival submissions on merits as they fell for consideration before us.

Assailing the judgement of the learned Single Judge on merits, the learned counsel for the appellant has contended

that the judgement impugned suffers from errors apparent on the face of the record inasmuch as the respondents had not filed any pleadings which may have impacted the primary issue of due execution of the Will in question. The learned counsel for the appellant submitted that the respondents had admittedly not seen a copy of the Will in question and therefore, they could not have denied the due execution and making of the Will dated 14 December 2003. It was further submitted that the judgement of the learned Single Judge suffers from apparent contradictions inasmuch as while on the one hand the judgement records that the Will had been duly proved upon the statement of P.W.-2 and yet the suit was dismissed. It was contended that the learned Single Judge has clearly recorded that the various statements said to have been made by Kamal Chandra Srivastava in mutation proceedings were not liable to be admitted in evidence and yet the contents thereof have been taken into consideration for recording the conclusion that the execution of the Will was surrounded by suspicious circumstances. The learned counsel for the appellant has further submitted that the respondents having not been able to disprove the due execution and making of the Will in question the entire onus of which lay upon them, the suit could not have been dismissed and the letters of administration were liable to be granted to the appellant.

We find that the following facts were not disputed by the parties:

(a) The Will which is dated 14 December 2003 is stated to have been typed on a stamp paper purchased in the name of the testator on 16 December 1997.

(b) The respondent is stated to have made a Will

bequeathing all the properties she had inherited from the testator in favour of the son of the appellant by a Will dated 26 May 2007. This registered Will executed by the respondent was cancelled on 3 July 2007.

(c) Till 3 July 2007, the Will dated 14 December 2003, was not disclosed by the appellant in any proceeding even though the testator had died on 9 February 2007.

(d) The first respondent in her examination-in-chief had categorically stated that her deceased husband had not executed the Will dated 14 December 2003 and that on the date of its execution, the contesting witness Kamal Chandra Srivastava had not come to the house. Reference was also made by the respondent in her statement to the affidavit filed by Kamal Chandra Srivastava in original suit No. 614 of 2008, stating that he had not signed the Will as an attesting witness.

(e) Kamal Chandra Srivastava appeared in the proceedings as P.W.-2. He however, as the learned Single Judge records, offered no explanation for his vacillating stand nor did he deny the filing of the affidavit in the original suit as stated by the respondents.

The degree and nature of proof which is required in a proceeding for the grant of letters of administration or probate were succinctly set forth by the Hon'ble Supreme Court in **Shashi Kumar Banerjee and others Vs. Subodh Kumar Banerjee**[4] as follows:

"4. The principles which govern the proving of a will are well settled; (see H. Venkatachala Iyengar v. B. N. Thimmajamma, 1959 (S1) SCR 426 : AIR 1959(SC) 443) and Rani Purniama Devi v. Khagendra Narayan

4 AIR 1964 S.C. 529

Dev, 1962 (3) SCR 195 : AIR 1962(SC) 567). The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by S. 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the 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 before the Court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indication in the will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the will was duly executed and attested."

The above proposition in law was reiterated by the Supreme Court in **Smt. Indu Bala Bose and others Vs. Manindra Chandra Bose and another**[5] in the following

5 AIR 1982 S.C. 133

terms:

> *"7. This Court has held that the mode of proving a will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a will by S.63 of the Successions Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the 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 before the court accepts the will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the disposition made in the will being unnatural, improbable or unfair in the light of relevant circumstances, or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes a prominent part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. (See AIR 1964 SC 529, 1959 Suppl. (1) SCR 426 : (AIR 1959 sc 443) and (1962) 3 SCR 195: (AIR 1962 SC 567).*
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> *8. Needless to say that any and every circumstance is not a 'suspicious' circumstance. A circumstance would be 'suspicious' when it is not normal or is not normally expected in a normal situation or is not expected of a normal person."*

What follows from the above is that while ordinarily the onus of proving the Will is on the propounder, the due

execution and making of the same must be established to the satisfaction of the Court concerned and the Court would be well within its rights to expect that all legitimate suspicions are completely removed before the instrument is certified as being the last Will of the testator. Circumstances which given rise to doubts must also be duly explained and laid to rest as it is the duty of the propounder to satisfy the conscience of the Court.

We find that the learned Single Judge does make an observation that the statement of Kamal Chandra Srivastava duly proved the Will. We also find that the learned Single Judge has recorded that since only a photocopy of the affidavit stated to have been filed by Kamal Chandra Srivastava in the suit was filed and that consequently, it was not admissible in evidence, the contents therefore of are stated to have been taken cognizance of. What the learned counsel for the appellant however, misses is that while holding that Kamal Chandra Srivastava had proved the Will, he had failed to remove and allay the doubts of the Court which arose on account of the suspicious circumstances surrounding the execution of the Will. The learned Single Jude was faced with a situation where the testator is alleged to have bequeathed all his properties to the appellant and thus, ignoring his surviving wife altogether. The Will itself is stated to have been made on 14 December 2003, was typed out on a stamp paper admittedly purchased on 16 December 1997. The Will came to light only post 3 July 2007 i.e. after the cancellation of the Will dated 26 May 2007 by the respondent. In the Will dated 26 May 2007, the son of the appellant was the major beneficiary. We find that the learned Single Judge taking into account the statements of Kamal Chandra Srivastava in the course of proceedings taken before it, found that his statement was not

trustworthy and that the statements in question cast serious doubt on his presence at the time of execution of the Will. Lastly, the first respondent in her examination-in-chief is stated to have clearly deposed with respect to the statements of Kamal Chandra Srivastava upon affidavit made in original suit No. 614 of 2008 which was not controverted either by evidence or by Kamal Chandra Srivastava himself who appeared in the proceedings.

In light of the aforesaid suspicious circumstances which were not satisfactorily explained by the propounder to the satisfaction of the learned Single Judge, we are of the opinion that no exception can be taken to the consequential dismissal of the suit. We accordingly, dismiss the instant appeal.

Order Date :- 27.07.2015
LA/-

(Yashwant Varma,J.) (Dr. D.Y. Chandrachud, C.J.)