

Rangarao and anr. Vs. Gopal and ors.

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Court : Mumbai

Decided On : Nov-25-1957

Reported in : AIR1959Bom287; (1958)60BOMLR675; ILR1959Bom210

Judge : J.R. Mudholkar, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 100; [Succession Act, 1925](#) - Sections 70, 75 and 89; [Evidence Act, 1872](#) - Sections 114; Hindu Law

Appeal No. : Second Appeal No. 440 of 1953

Appellant : Rangarao and anr.

Respondent : Gopal and ors.

Advocate for Def. : S.A. Sohoni and ;D.B. Padhye, Advs.

Advocate for Pet/Ap. : S.N. Kherdekar, Adv.

Judgement :

1. This is a plaintiffs' second appeal from the dismissal of their suit for possession of certain immovable property.
2. It is not disputed before me that eh property in suit was the self-acquired property of one Bhagwan who died on 29-10-1943 leaving behind him a widow Smt. Jankibai and a married daughter Smt. Saraswatibai. It is also not disputed that on 19-9-1945 Jankibai took the plaintiff No. 1 in adoption.

3. The Property in suit is admittedly in the possession of the defendant No. 1 Gopal in his capacity as wahiwatdar of the Bhagwan Sansthan at Makrampur. His contention is that the aforesaid property was bequeathed to the Saunsthan by Bhagwan under a will executed by him on 6-5-1943. He therefore denied the plaintiffs' right to the possession of the property in suit.

4. The execution and due attestation of the will as well as the testamentary capacity of the testator Bhagwan are all denied by the plaintiffs. In addition, it is contended (a) that the will even if proved to have been executed must be presumed to have been revoked by Bhagwan before his death, since the original will is not forthcoming, (b) that the will is void for uncertainty (c) and that the bequest not having been made to a juristic person cannot therefore take effect.

5. In so far as the first two contentions are concerned, i.e. due execution and attestation of the will and the testamentary capacity of Bhagwan, the findings of the lower appellate Court, being those of fact, cannot be challenged here.

6. The contention that the will is void for uncertainty is based upon the decision to the Nagpur High Court in *Jairam v. Bhagirathi*, ILR (1949) Nag 765 : AIR 1952 Nag 242. In that case it would appear that the bequest was to vest in the trustees of the Devasthan which was not in existence and the testator had not indicated with certainty as to how certain directions in the will were to be carried out. It was held that the bequest in the circumstances must be held to be void as it was for an uncertain object. It seems to me that this decision cannot apply to the present case because the property is not bequeathed to any trustee as such. Gopal, the first defendant to the suit, is referred to in the will only as the manager of the Saunsthan which was said to be already in existence.

7. The contention that the will should be presumed to have been revoked because the original is not forthcoming is based upon the decision of this High Court in *Aditram v. Bapulal*, ILR Bom 906 : AIR 1921 Bom 143. In that case a Division Bench following the decision of their Lordships in *Allan v. Morrison*, (1990) AC 604, has held that when a person, who is known to have executed a will, and to have had that will in his possession, dies and the will is not found after his death, a presumption arises that he has revoked the will during his lifetime. In the Privy

Council case up on which reliance is placed by this Court the facts were that the will was in the testator's repository, the keys of which were in his possession and no access could be obtained to it without either his permission or a fraudulent abstraction of his keys. It was not proved not to be in existence at the moment of the testator's death. Their Lordships pointed out that the possibility of its having been destroyed after his death was a circumstance to be taken into account in arriving at the result of the evidence. Their Lordships accepted the finding of the Court below that it had not been shown that the will was destroyed after the death of the testator. In the instant case, though there is some evidence to show that the will was kept in an iron box by the testator, there is no evidence to show that its key was always with the testator. On the other hand, it would appear from the circumstance that Jankibai was blind and that Namdeo (D. W. 2) was managing the property of the deceased at that time and was a man of his confidence that the key was possibly with him. It would not therefore be safe to conclude from this that the will was in the actual physical possession of the testator at all sometime before his death. Reference may further be made to the decision of their Lordships in *Padman v. Hanwanta*, AIR 1915 PC 111 in which they observed:

'The principle underlying the rule in *Welch v. Phillips*, 1 Moo PC 299 - (1900) AC 604 that when a will is traced to the possession of the deceased and is not forthcoming at his death, the presumption is that he has destroyed it, must be applied with considerable caution to the wills of the people of India.'

A series of decisions on this point have been noticed in a recent decision of the Orissa High Court in *Brundaban v. Ananta*, : AIR1956 Ori151 in which it has been held that a presumption of a will having been destroyed can be raised in favour of the person objecting to the will, provided that he satisfies the Court that a search had been made among the papers of the deceased by an independent person and no such document could be found among his effects.

8. In *Jarman on Wills* (Eighth Edition) Vol. I, page 170, it is stated:

'If a will is traced into the testator's possession, and is not found at his death, the presumption is that he destroyed it for the purpose of revoking it; but the presumption may be rebutted, and it will be more or less strong according to the

character of the custody which the testator had over the will. It is difficult to lay down any general rule as to the nature of the evidence which is required to rebut the presumption of destruction..... Where the will makes a careful and detailed disposition of the testator's property, and nothing happens to make it probable that he wished to revoke it, the presumption raised by the disappearance of the will may be rebutted by slight evidence, especially if it is shown that access to the box, or other place of deposit where the will was kept, could be obtained by persons whose interest it is to defeat the will. In fact, it may almost be said that in such a case the presumption is the other way, namely, that the testator did not intend to die intestate.'

9. In the instant case, there is no evidence whatsoever of a search having been made immediately after the death of the testator or even at any other time. All that we have in evidence is that the original will is not forthcoming. There are indications to suggest that Saraswati and her husband whose interests were adversely affected by the will had access to the effects of the testator after his death. In these circumstances, I agree with the learned Judge of the lower appellate Court that no inference of the kind contended for by the learned counsel for the plaintiffs can be drawn in this case.

10. What remains to be considered then is the last contention and that is whether the Bhagwan Saunthan is a juristic person. It is contended on behalf of the defendant no. 1 that the Bhagwan Saunthan is a religious endowment and as such is a juristic person. There is no doubt that it has been held by their Lordships of the Privy Council in *Vidya Varuthi v. Baluswami Ayyar*, 48 Ind App 302 : AIR 1922 PC 123 that a religious endowment is a juristic person and can hold property. Consequently, if it is found that the Bhagwan Saunthan is a religious endowment it can hold property and a bequest made to it will have to be upheld. The question however is whether it is a religious endowment.

11. In Mayne's Hindu Law, Eleventh Edition, at page 915 it is stated:

'Gifts for the installation, consecration, worship and service of idols and gifts to idols already installed and consecrated, gifts for the building and renovation of temples, for the processions of idols and their vehicles and for religious festivals,

in other words, gifts to religious institutions or for religious purposes of every kind are valid religious endowments.'

At page 917, it is stated:

'Illustrations of bequests for charitable purposes are those for sadavartas, for dharma-salas, resthouses and annasatrams (choultries,) for feeding the poor, for the establishment and support of schools, colleges and universities, for dispensaries and hospitals for medical help to the sick and the infirm, for the construction and maintenance of tanks, wells and reservoirs of water and for the provision of drinking water for men and animals..... If dedicated 'to such a purpose, land or other property would be dedicated to an object both religious and of public utility, just as much as is a dharmasala or a math, notwithstanding that it be not dedicated to any particular deity. But a direction that money should be spent on the building of a tomb and its maintenance does not constitute a charitable endowment.' *Draivasundaram v. Subramania*, ILR 1945 Mad 854 : AIR 1945 Mad 217.

It is also pointed out at page 918:

'..... that a gift or bequest to dharma or dharam is void for vagueness and uncertainty.'

The word 'dharma' when used in connection with gifts of property by a Hindu, as held by Subramania Ayyar J. in *Parthasarathy Pillai v. Thruvengada pillai*, ILR Mad 340, has a perfectly well-settled meaning and denotes objects indicated by the term 'istha' and 'purta' donations.

12. Now, from all this it will be clear that an endowment cannot be regarded as a religious or charitable endowment unless it has one of the objects which have been referred to in the above passages cited from Mayne. Indeed, it is clear from the decision in ILR 1945 Mad 854 : AIR 1945 Mad 217 following *Kunhamutty v. Ahmad Musaliar*, ILR Mad 204 : AIR 1935 Mad 29, that a provision in a will that the testator should be buried in a samadhi and that a matam should be erected over it, where pooja to Shiv was to be performed daily, did not amount to a dedication of

property to a public charity. It has further been held in that case that the direction that money should be spent on the building of a tomb and its maintenance did not constitute a charitable endowment, and that such a direction was not lawful and that such a gift was not valid.

13. Now, it is true that in the instant case, the will itself does not say that a samadhi of the deceased testator should be constructed. But this is clear from the particulars supplied by the defendants in this case. In those particulars it is stated:

(He wished that a samadhi should be built on the place at which he would be buried on his death and that the said samadhi should be called Bhagwan Sansthan. No idol of any deity was to be installed there).

14. This statement was sought to be explained by Gopal in his evidence thus:

'Whatever is stated in this para is correct. Even then I say that Sansthan was erected in Bhagwan's lifetime.'

Then he has stated thus:

Bhagwan used to worship Pandurang. Bhagwan has established Sansthan in his lifetime. He used to worship Pandurang and he desired that after his death his samadhi should be made at the very place. He made the will to make sansthan out of his own samadhi. He had asked me to make his samadhi after his death. I call that sansthan.'

It seems to me that this explanation of his is rather an afterthought and cannot be accepted. This would be clear by reference to some earlier statements made by him in his evidence. In paragraph 6 he has stated:

'Bhagwan made a will of his estate at Makrampur giving it for building temple for him and to perform the anniversary of his death.'

Then in paragraph 7:

'He used to go to the field near Dharmal and do prayers and Bhajan there. He expressed his desire that his samadhi should be erected there.'

From all this it would be clear that his object in establishing the saunsthan was neither religious nor charitable. In this connection, a reference may also be made to the will executed by the testator in the year 1941. In that will he has clearly stated that his idea was to bring into existence a 'Saunsthan' in his own name, and indeed, the Saunsthan which is referred to in the will bears his own name. The object of creating a Saunsthan as stated earlier was to perform his punyatithi. In the present will the object on which the money is to be spent are stated to be 'yatra, punyatithi and building etc.' Considering the material as a whole, it would be clear that the building referred to is in connection with the Saunsthan and the yatra and punyatithi refer to the testator himself. In these circumstances I accept the contention of Shri Kherdekar who appears for the appellants and hold that the Bhagwan Saunsthan is not a religious endowment. It is not alleged to be a corporation or a trust. Therefore it is not a juristic person and as such it cannot hold property. A bequest made thereto is accordingly void.

15. For these reasons, I allow the appeal, set aside the decrees of the Courts below and instead pass a decree for possession in favour of the plaintiffs and mesne profits as determined by the lower appellate Court. I however direct that the costs throughout shall be borne as incurred.

16. Appeal allowed.

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