

Santu Vs. Maiku and ors.

Santu Vs. Maiku and ors.

SooperKanoon Citation : sooperkanoon.com/466908

Court : Allahabad

Decided On : Nov-08-1939

Reported in : AIR1940All175

Appellant : Santu

Respondent : Maiku and ors.

Judgement :

Thom, C.J.

1. This is an appeal by an objector to an application for probate. The applicants presented an application for probate of the will of one Sita Ram alleged to have been executed and registered by him on 3rd May 1929. That Sita Ram who died on 22nd February 1934, did execute a will on 3rd May 1929, does not, in our judgment, admit of any doubt whatever. The learned District Judge who heard the application for probate has upon a consideration of the evidence held that the will, a certified copy of which only has been produced was executed by Sita Ram on that date. The two attesting witnesses had died by the time the application came before the learned Judge for final disposal. One of these witnesses, Baldeo Prasad, however had made at an earlier stage of the proceedings a declaration which is referred to in the application itself. The declaration is as follows:

I, Baldeo Prasad, one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present and saw the said

testator affix his signature thereto.

2. Furthermore the scribe Chandu Lal gave evidence and deposed that the will in respect of which probate is sought was executed by Sita Ram. The endorsement shows that Sitaram was duly identified before the Sub-Registrar. It is unnecessary to refer further to the evidence on this point. We see no reason whatever to differ from the conclusion which has been reached by the learned District Judge. The applicants having failed to produce the original will it was for them to show that the will had not been revoked by the testator before his death. In this connection it is appropriate to refer to the provisions of the will. In the will the testator declares:

I have arrived at an age of sixty years, I have no male or female issues, my wife has died. I have purchased out of my own hard earned money, two houses.... I am not living in my houses and carry on business separately for a long time. I have no co-sharer or co-partner in my moveable and immovable property and both the houses have not been transferred in any way or stand hypothecated anywhere. I think it proper that I should make some proper arrangement of my property in my life time so that after my death my property may not be wasted. I, therefore, while in a sound state of body and mind and in the full enjoyment of my senses, without compulsion and coercion on the part of anyone else and of my own accord I have executed, after due consideration and in consultation with my well wishers, the will in the following terms So long as I, the executant, shall remain alive, I shall be the owner in possession of all my moveable and immovable property, outstanding debts, household goods, ornaments, cash, utensils and clothes I shall have every proprietary power to bring the things to my own use and make transfers in respect thereof. After the death of me, the executant, Sri Thakur Krishnaji installed in the temple in house No. 19/127 situate in Patkapore Bazar, Ram Narain, city of Cawnpore shall be the owner in possession of my moveable and immovable property, household goods, outstanding debts, ornaments and cash, etc.

3. It will be seen that by the aforementioned provisions the testator made an endowment of his entire property. The later provisions in his will make provision for the creation of a trust to manage the endowed property. Bight trustees were appointed, the first named being Maiku Lal one of the petitioners. It is alleged by

the petitioners in their petition that the original will had been mislaid since the testator's death. The evidence adduced by the petitioners in regard to the disappearance of the will was directed to proving that one of the trustees mentioned in the will namely Shri Kishan appropriated the will on the day after the death of the testator and had refused to make it available. In the course of his evidence Maiku Lal deposed:

He (the testator) himself until his death managed the property on behalf of Thakurji. In the interval between the execution of the will and the testator's death I did not see the will. When the testator's property was examined after his death no list was drawn up. The household property was left as it had been. The money and documents were found by the idol of Thakurji. Shri Kishan opened the door next day in my absence and took the money and the will away. I read out the will aloud in front of all present after the testator's death. I asked Sri Kishan for the will four or five days later. He said he had it under lock and key and would let me have it later. After that I asked for it several times but he always made excuses saying he would give it to me later. This went on for two or three months. I then gave up asking for it. Two or three months after that he gave me the key. I then opened the Kothri in the absence of Sri Kishan but in the presence of others, that was two or three months after the death of the testator and the day after I had been given the key. The Kothri is in the same house as mandir. Various things were found of which a list was made and others signed the list. The will was not found. I have the list but not with me at the moment. There was no note on the list that the will was not found. The will was not asked for from Sri Kishan after that.

4. On the point of the finding of the will on the day of the testator's death Maiku Lal is supported by the witnesses Ramanuj and Dr. Suraj Narain. (After dealing with the evidence of these witnesses their Lordships proceeded further.) We would observe in the first place that a witness's evidence should not be rejected merely because he has appeared nervous in the witness-box. Many witnesses are nervous when giving evidence in Court. In the second place it is to be noted that nowhere in his evidence has Suraj Narain deposed as the learned District Judge seemed to think he did that he had seen Sri Kishan remove the will. What the witness said was:

In the morning Sri Kishan in my presence took the money and gave it to Sheo Mangal. He left the will himself.

5. We have examined the original deposition and it appears that what the witness stated was that 'he kept the will himself.' We do not see any inconsistency on this point in the evidence of Maiku Lal and Dr. Suraj Narain. According to the evidence of Maiku Lal after the will was read it was given into the custody of Sri Kishen. Later apparently the money which was also given to Sri Kishan was handed over to Sheo Mangal. The will was kept according to Suraj Narain by Sri Kishen. There is nothing therefore in Dr. Suraj Narain's evidence to justify the observation that he had stated that he saw Sri Kishen remove the will. In regard to the learned District Judge's criticism of the statement of the witness that he had been often shown the will by the testator we would observe that this was an answer given in cross-examination and it may well be that the witness simply agreed to an answer suggested by the cross-examiner. We are satisfied after a review of the evidence of the witnesses adduced by the petitioners and in the light of other considerations to which we shall now refer that there is no reason not to accept their testimony. The learned District Judge upon the question of the discovery of the will after the testator's death appears to have accepted the evidence of Sri. Kishan who denied that there was a will discovered after the testator's death. The learned District Judge however appears to have overlooked the statement made at an earlier stage of the proceedings in his Court by Sri Kishen. This statement is as follow:

The fund relating to the property dedicated by Sita Ram Halwai, resident of Patkapore, to Sri Radha Krishnaji, is not with me, it is with Sheo Mangal. He might have spent something out of it but the remaining amount is with him. He might be having about Rs. 800 with him.

6. There is clearly an implied admission in this statement that there had been a dedication by Sita Ram; this dedication could only have been by the will executed on 3rd May 1929. Whilst rejecting the evidence produced by the petitioners and accepting in part at least the evidence produced by the objector the learned District Judge has nevertheless granted probate. At the conclusion of his judgment he observes:

I have not been enlightened on the law on the subject, and I have probably got it wrong; but it appears to me that in circumstances such as these where execution of a will some years prior to the testator's death is proved and the will is not forthcoming and nothing whatsoever can be said further about the will, the proper presumption to make is that the will was still subsisting when the testator died. It is of course possible in such circumstances and therefore in the present case that the testator himself cancelled the will by destroying it. But that is obviously only one of several possibilities, and I do not see why the Court should be called up to presume that is actually what happened. At all events as I have already said, I have not been referred to any law to that or indeed to any other effect. It appears to me that the more proper presumption to make in the absence of any evidence on which it can be held that the testator cancelled the will by destroying it or otherwise, is that the will continued to subsist and to remain in full force up to the testator's death.

7. The learned District Judge has misdirected himself in law. The law upon the question is well settled and it is not as the learned District Judge has stated it. On this point reference may be made to the case in *Allan v. Morrison* (1900) AC 604. This was a case decided by the Privy Council and in the course of their judgment the Board observe:

It was not denied that there is a presumption, to use the language of Lord Wensleydale in *Welch v. Phillips* (1836) 1 Moo PC 299 that if a will traced to the possession of the deceased and last seen there is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect unless there is sufficient evidence to rebut it. Whether this should be called a presumption of law or fact does not seem material. It may of course be rebutted, and as said by Cockburn C.J., in *Sugden v. Lord St. Leonards* (1876) LR 1 PD 154, the presumption will be more or less strong according to the character of the custody which the testator had over the will.

8. Reference may be made further upon the point under discussion to *Anwar Hossein v. Secretary of State* (1904) 31 Cal 885, in which the law on the subject was exhaustively discussed. In the present case however there is evidence which

satisfies us that the will was in existence at the time of the testator's death. As we have observed we do not see any reason to reject the testimony of Maiku Lal, Dr. Suraj Narain and Ram Anuj. Further, there is no evidence whatever to justify the conclusion that the testator had changed his intention in regard to the disposition of the property as that intention was embodied in the will which he executed on 3rd May 1929. On the contrary the facts and circumstances point to the continued intention of the testator that his wishes as embodied in that will should be given effect to. It was the testator who had established the idol in his own house. This is a matter upon which there can be no question. He, right upto the day of his death, resided in the house and maintained the idol. Further more it is plain from the terms of the will itself that its execution was not the result of hasty decision. The testator was a comparatively old man, he had no issue and he desired in these circumstances to make provision for the disposal of his property in the event of his death. There is nothing to indicate that there was any reason for his departing from his intention by revoking his will. The revocation of the will would no doubt be to the benefit of the objector who is a distant relation, but there is nothing to show that the testator changed his mind and destroyed the will with the intention that the property should go to his heirs. The facts that the testator up to the day of his death maintained the idol in his house is quite inconsistent with a departure from the intention that his property should be dedicated to the idol after his death.

9. We would further observe that the objector has produced no evidence in respect of the averment contained in his written statement 'that the deceased had great affection for the objector and his son Manna and the relations continued to be very cordial.' As observed the objector is a distant relation and in the course of the will the testator has referred particularly to the fact that he had no male and female heirs. There is no reference in the will to his distant relations. After a full consideration of the evidence upon the record we are satisfied that the will a certified copy of which has been produced is the last will and testament of Sitaram and that the will was in existence at the time of the testator's death. In these circumstances the applicants who are trustees appointed by the testator to manage the endowed property are entitled to probate. In the result the appeal is dismissed with costs.

