

Dilip Kumar Mohapatra Vs. Subhadra and ors.

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Court : Orissa

Decided On : Apr-02-1973

Reported in : AIR1974Ori130

Judge : R.N. Misra and ;B.K. Ray, JJ.

Acts : [Succession Act, 1925](#) - Sections 2, 61, 74, 222 and 232

Appeal No. : First Appeal No. 172 of 1966

Appellant : Dilip Kumar Mohapatra

Respondent : Subhadra and ors.

Advocate for Def. : L.K. Dasgupta and ;G.N. Sengupta, Advs.

Advocate for Pet/Ap. : B.K. Pal, ;A. Mohanty and ;S.C. Roy, Advs.

Disposition : Appeal allowed

Judgement :

R.N. Misra, J.

1. This is an appeal directed against the judgment of the learned Subordinate Judge at Balasore refusing to grant probate of a will (Exhibit 1) dated 7-3-1964 by one Maguni Charan Mohapatra in favour of the appellant.

2. One Gangadhar Mohapatra had two sons -- Prafulla and Maguni. Prafulla is said to have been unheard of for many years. The appellant claims that Prafulla was serving in the Postal Department and was murdered while the respondents contend that he has remained unheard of for several years. His wife Satyabhama and a son and a daughter -- Manoranjan and Bhaktilata respectively are the three respondents. It was claimed that Gangadhar and his two sons had separated. Maguni's wife developed illicit love with some other person and ultimately deserted Maguni and married that person. Maguni developed chronic stomach ailment, led a miserable life, was ill-treated by the members of the family including his father and out of disgust and disappointment he went out of the family having fallen out with Gangadhar. He came to live with the appellant and his father. He was well looked after with devotion and care and given medical treatment throughout the period of his illness. Out of satisfaction and gratitude and having no other person in the world to care for and benefit, Maguni executed a registered will dated 7-3-1964 in respect of his properties -- both movable and immovable -- in favour of the appellant when he was in sound state of health and mind. Maguni is said to have died on 18-6-1964 Gangadhar also died 8 days thereafter. It was alleged that Maguni possessed Ka, Kha and Ga Schedule immovable properties and the Gha schedule movable properties at the time of his death and in terms of the will the appellant was entitled to those properties. The appellant claimed that he performed the last rites of the testator according to Hindu custom. The application for Probate was made on 22-3-1965.

3. Upon citation being made, the respondents entered caveat. They filed a joint written statement denying the allegation of partition and contended that the family has been continuing joint. Due execution and attestation of the will by Maguni was denied. It was contended that the testator was addicted to drink and was wandering here and there as a vagabond when ultimately the father of the appellant, a designing man, brought Maguni to live with him keeping an eye on the share of Maguni in his joint family assets. The appellant's father found Maguni a weak and debilitated person always suffering from various kinds of ailments. When Maguni thus came under his complete clutches and was not in a position to obtain any independent legal advice, the will along with a power of attorney to manage his properties was planned to be taken from Maguni. From the beginning of 1964

Maguni's ailment increased and gradually he took more and more of drink. That provided the opportunity to the appellant's father to fulfil his design and at that point of time, actually the documents were taken. The scribe and the attestors were the henchmen of the appellant's father and Maguni without knowing what he was doing --because he had no capacity to understand the contents of the documents or the consequences of his own acts--signed the documents. The will is thus the outcome of fraud and undue influence and cannot be probated.

4. The learned Subordinate Judge raised two issues, namely, whether the will was duly executed by the testator and if the plaintiff was entitled to any relief. At the trial seven witnesses in all were examined in support of the application and four in support of the defence plea, P. W. 1 is an attesting witness. P W. 2, an employee in the office of the Sub-Registrar at Balasore, acted as Maguni's identifier at the time of registration of the Will. P. W. 3 is the scribe. P. W. 4 came to support the plea of partition in the family of Gangadhar. He also spoke about the funeral ceremony of the testator having been conducted by the appellant and his father. P. W 5 described himself as a congress worker and claimed that Maguni was also in the congress organisation. This witness appears to have been examined to disprove the allegation of the testator being addicted to liquor. P. W. 6, a pleader's clerk, deposed about the drafting of the will and the power of attorney, and reading, over the contents to Maguni. P. W. 7 is the legatee.

The trial Court on an assessment of the evidence came to find:--

- (1) The testator had developed hatred against his father, nephew and sister-in-law;
- (2) The facts and circumstances were such that the testator would have been inclined to execute a will in favour of the propounder because he was under obligation to his father as he had helped him in different ways;
- (3) The unduly prominent part taken by the plaintiff and his father in execution of the will when the testator's mind appeared to be feeble and debilitated on account of prolonged illness, however, strengthens the belief that the testator had executed the document under undue influence of the propounder's father and the will had not been executed voluntarily.

On the findings it dismissed the petition for probate. The plaintiff has appealed against this decision.

5. Mr. Pal for the appellant contends that the trial Court has gone wrong in holding that undue influence has at all been established. The Probate Court, he argues, is concerned with proof of testamentary capacity and the signature of the testator (AIR 1964 SC 529) in the absence of suspicious circumstances surrounding the execution of the will. On his own finding as indicated above, probate should have been granted.

Mr. Dasgupta, on the other hand, contends that there is no valid testamentary disposition under the deed and no probate could, therefore, have been asked in respect of the document Exhibit 1. He further contends that there are many suspicious circumstances surrounding the execution of the document. There has been no due execution: the testator was not of sound mind and understanding at the time of execution and the document was obtained by undue influence.

Though not raised by Mr. Dasgupta, there is also the question of maintainability of the application for probate in the absence of the appellant being the appointed executor under the will.

6. Since an undivided interest can also be the subject-matter of a testamentary disposition under the Hindu Succession Act, it is not necessary to deal with the evidence of partition. While considering the case of probate the Court is to be satisfied that the document before it, probate whereof is sought, was the last will of the testator duly executed by him. The Judicial Committee in AIR 1949 PC 272, *Gomtibai v. Kanchhedilal* has laid down :

'The law is well settled that the onus probandi lies on the person who propounds the will, and this onus is in general discharged by proof of capacity, and the fact of execution, from which the knowledge and the assent to its contents by the testator will be assumed: *Barry v. Butlin*, 2 Moore PC 480. But where a will is prepared and executed under circumstances which excite the suspicion of the Court 'it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document' (*Tyrrell v.*

Paiton, 42 WR 343). See also Charles Harwood v. Baker, (1840) 13 ER 117. Where once it has been proved that a will has been executed with the solemnities by a person of competent understanding and apparently a free agent -- that is, when, the propounder of the will has discharged the onus -- 'the burden of proving that it was executed under undue influence is on the party who alleges it' (Boyse v. Rossborough, (1856-57) 6HLC 2 at p. 48). In the case just cited it is also stated that 'influence in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will must be an influence exercised either by coercion or by fraud' To the same effect is the statement in the earlier case, Barry v. Butlin. 'The undue influence and the importunity which if they are to defeat a will must be of the nature of fraud or duress' As observed in Craig v. Lamoureux. (1920) AC 349 the burden of proving undue influence is not discharged by merely establishing 'that a iperson has the power unduly to overbear the will of the testator. It must be shown that in the particular case the power was exercised, and that it was by means of the exercise of that power that the will was obtained."

The principle indicated in. the aforesaid case has been accepted by their Lordships of the Supreme Court. The first question for examination, therefore, is whether there are any suspicious circumstances relating to the execution of the will. There is clear evidence and in fact it can be safely stated to be the admitted case of the parties that the testator had fallen out with his father Gangadhar and had gone out of the family. The testator's wife left him and got married to somebody else. By the time of his death, the testator was about 40 years of age. He had no children. From the evidence it is apparent that Maguni was leading a very unhappy life and did not have any connection with his own family. Satyabhama, the main contestant in the proceeding, has stated in cross-examination:

'Maguni had no ailment when he left our house. Even though Maguni had left the house 3 years before his death he used to come to our house at times. At that time he was not staying in our house. My father-in-law used to scold him whenever he used to come to our house, About 6 months before his death Maguni came to our house. He was then living in the house of Sashi Kumar. Neither myself nor my father-in-law had taken any step for his treatment.'

D. W. 3 has stated,

'Two to three years before his death Maguni and his father were not pulling on well. After he left the house, neither his father, his brother's wife nor his nephew called him to their house.'

D. W. 1 has stated,

'The parents of Maeuni began to dislike Maguni in 1958 when he took to drink. I was on talking terms with Maguni. Maguni took to drink on account of stomach trouble. None of the members of Gangadhar's family except Maguni was suffering from stomach trouble. I cannot say if he was taking liquor, to get relief from stomach trouble. Maguni has no independent source of income when he was living joint with his father.'

The evidence on record shows that Maguni was being maintained and looked after in the family of the appellant. The conclusion of the learned trial Judge--

'It is true that the facts and circumstances are such that the testator would have been inclined to execute a will, in favour of the propounder because he was under obligation to the father of the pro-pounder as he helped him in different ways.'

appears to be the only conclusion which can be reached on an assessment of the materials placed on record.

7. In this case the defence is that the testator was feeble and debilitated on account of prolonged illness and by exercise of undue influence the document has been taken. We have already indicated the dictum laid down by the Judicial Committee that the burden of proving undue influence cannot be discharged by merely establishing that a person -has the power unduly to overbear the will of the testator. It must be shown that in the particular case the power was exercised, and that it was by means of the exercise of that power that the will was obtained. The evidence in this case in support of the plea of undue influence is not at all convincing. All that the cavea-tors have been able to establish is that Maguni had protracted illness. There is some evidence in support of the plea that Maguni was addicted to drink. We are prepared to accept that evidence and we would hold that

to relieve himself of the stomach pain Maguni had taken to drink. Merely, the facts that Maguni had taken to drinking, the members of his family were not looking after him and he was living in the family of the appellant full of obligation to him cannot establish the plea of the defendants that the will is the outcome of exercise of undue influence.

8. As we have already said, Maguni had no other person in the world to be interested in. He must have been full of anguish and we are prepared to accept Mr. Pal's submission that the testator must have been mentally prepared to benefit his beneficiaries, that is, the appellant and his father and at the same time to see that his property does not go to the callous members of his family who had forsaken him. In the circumstances it is difficult to assume exercise of undue influence merely because the testator came to execute the will. D. W. 3 has stated that Maguni was an intelligent person. There is no evidence to show that at the time when the will was executed Maguni was not in his proper senses or that he had been deprived of his intelligence.

P. W. 3 is the scribe of the will. He has categorically stated that the document was scribed under the instructions of the testator. Maguni read through the contents of the document and after understanding the contents put his signature. At the foot of the document the testator in his own hand has endorsed that he read through the document and acquainted himself with its contents and thereafter signed it. The manner of writing by Maguni clearly goes to show that he was sufficiently educated and on the date he wrote at the foot of the document and put his signatures on the various pages of the will he was in a fit state of mind and had his normal capacity of understanding matters. The very legible and clear writings of his are corroborative intrinsic evidence - of the highest order. Nothing in cross-examination of P. W. 3 contradicts his evidence. P. W. 1 is one of the attesting witnesses. He has stated that Maguni executed the will after fully understanding the contents and the purport of the said document, and Maguni was in sound health and mind when he executed Exhibit 1. P. W. 1 has further endorsed the evidence of P. W. 3 about Maguni's reading the document himself. According to P. W. 1 he had asked Maguni before he actually signed the document whether he was satisfied with the contents and he replied in the affirmative. P. W. 2 who

identified Maguni before the Sub-Registrar has also stated that the Sub-Registrar enquired from Maguni regarding the factum of execution of the will and Maguni admitted due execution of the document and answered other questions put to him. Maguni was in normal condition of health and fit state of mind. The endorsement of the Sub-Registrar of the fact of admission of the execution by Maguni also corroborates the fact of execution. There is nothing on record to disbelieve P. Ws. 4, 2 and 3 in regard to the execution of the will. Attestation, is not in dispute. Therefore, we must hold that Exhibit 1 has been duly executed and attested.

Mr. Dasgupta for the respondents contended that though the appellant was in no way related to Maguni, in the will he has been described as a nephew. We agree with Mr. Dasgupta's submission that the relationship of the legatee with the testator has not been established. Therefore, we shall assume that he indeed is a stranger. Merely because such a statement has been made, we are not in a position to discard the genuineness of the will. It is quite possible that the helpless testator had been looking upon Sashi Kumar as his own brother and the appellant was being considered as a nephew. In appreciating the mind and approach, of the testator one has to place himself in his situation. We do not attach any importance to the description of the legatee as the nephew. On the evidence on record and the fact that the document has been duly registered we are prepared to hold that whatever little suspicious circumstance is claimed to have been existing at the time the will was executed has been sufficiently explained by the propounder and he has been able to remove the suspicion. As indicated by their Lordships of the Supreme Court in AIR 1968 SC 1332 what are suspicious circumstances must be judged in the facts and circumstances of each particular case. There is no clear evidence that the propounder and his father had taken undue initiative or had played a prominent part in the execution of the document. The scribe has stated that it was the testator not Sashi Kumar or the appellant who instructed him for scribing the document. The defence mainly was one of undue influence. The caveators have miserably failed to establish such defence particularly by the standard indicated by the Judicial Committee in the decision referred to above. On the self same day along with Ext. 1 a power of attorney (Ext. 3) had been taken from the testator. As already stated, the testator had gone out of his family. He was keeping constantly ill. It was necessary for some capable person to enforce

his right in the property which was in the hands of Gangadhar. From the fact that such a document was taken we cannot also persuade ourselves to accept the contention of Mr. Dasgupta that the legatee and his father were out to grab the property by some means. In fact under the will the plaintiff had obliged himself to maintain Maguni until his death. It may not be an enforceable term of the will, but in view of such an undertaking it was quite reasonable to expect both the testator and the legatee to think of a contemporaneous power of attorney. We would, therefore, reiterate our finding that Ext. 1 has been duly executed by the testator and the defendants have failed to establish their plea of exercise of undue influence.

9. We must now deal with Mr. Dasgupta's objection that in the absence of clear disposition of property. Ext. 1 cannot be considered to be a will. Under Section 2(h) of the Succession Act, the term "will" has been defined as 'the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.'

In Exhibit 1. the relevant portion recites--

'In lieu of the services rendered, I execute this will in respect of my properties -- movable and immovable -- in your favour.....'

(translation is ours)

Certain terms and conditions were appended in a schedule. The fourth one thereof authorised the appellant (legatee) to obtain the testator's share through Court if need be.

As we find, the intention to execute a will was manifest. Section 74 of the Succession Act provides:--

'It is not necessary that any technical words or terms of art -- be used In a will, but only that the wording be such that the intentions of the testator can be known therefrom.'

In Gnambal Ammal v. T. Raju Ayyar, AIR 1951 SC 103, their Lordships stated :--

'The cardinal maxim to be observed by Courts in construing a will is to endeavour to ascertain the intentions of the testator. This intention has to be gathered primarily from the language of the document which is to be read as a whole without indulging in any conjectures or speculation as to what the testator would have done if he had been better informed or better advised. In construing the language of the will as the Privy Council observed in Venkata Narasimha v. Parthasathy 41 I. A. 51, at page 70, 'the Courts are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances the position of the testator, his family relationship, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure -- the Court is entitled to put itself into the testator's arm-chair' A question is sometimes raised as to whether in construing a will the Court should lean against intestacy It seems that a presumption against intestacy may be raised if it is justified by the context of the document or the surrounding circumstances; but it can be invoked only when there is undoubted ambiguity in ascertainment of the intention of the testator.'

The rule of Presumption against intestacy was also adopted by their Lordships of the Supreme Court in N. Kasturi v. D. Ponnammal, AIR 1961 SC 1302.

On an analysis of the evidence which clearly indicates preponderance of circumstances in favour of the execution of a will by the testator together with the narrations in the document, we have no doubts left in our mind that the document (Exhibit 1) is indeed a will. We agree with the contention of Mr. Dasgupta that the nomenclature is not the guiding feature but here there is clear indication that a will was intended to be executed. And in fact Ext. 1 was a will.

10. Even on these findings the appellant would not be entitled to probate of the will. On examination of Ext. 1, we do not find that any executor had been appointed by the will. Section 222 of the Indian Succession Act provides:--

(1) Probate shall be granted only to an executor appointed by the will.

(2) The appointment may be expressed or by necessary implication.'

We do not find any material in the will itself from which we can hold that an executor had been appointed by necessary implication. Mr. Pal relied upon *Kamamma v. Somasekharappa*, AIR 1963 Mys 136; *S. Venkatarama Iyer v. Sundarambal*, AIR 1940 Bom 400; *Arumilli Viramma v. Arumilli Seshamma*, AIR 1931 Mad 343 in support of the contention that the appellant by necessary implication may be taken to have been appointed as the executor. We find nothing useful in the first two cases to support Mr. Pal's contention and the Madras case had a different set of facts on the basis of which the principle of appointment by Implication was found applicable. Consequently probate cannot be granted. On the other hand it would be appropriate, on our finding regarding the will to grant letters of administration with the will annexed to the legatee as provided under Section 232 of the Succession Act.

11. We would, accordingly allow the appeal, set aside the judgment and decree of the learned Subordinate Judge and direct that letters of administration be granted to the appellant with a copy of the will annexed thereto as provided under Section 232 of the Indian Succession Act. We direct the parties to bear their own costs throughout.

B.K. Ray, J.

12. I agree.