

Garib Shaw Vs. Sm. Patia Dassi W/O Narayan Chandra Shaw and ors.

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Court : Kolkata

Decided On : Jun-11-1936

Reported in : AIR1938Cal290

Appellant : Garib Shaw

Respondent : Sm. Patia Dassi W/O Narayan Chandra Shaw and ors.

Judgement :

1. This is an appeal by an objector from a decision of the Subordinate Judge, First Court, Alipore, granting probate of a will alleged to have been left by one Narayan Shaw. The history of the life of the testator Narayan Shaw, which is given in the will itself and which has not been disputed before us, is that in his early boyhood he came out to Bengal for the purpose of earning money and after spending some time here and there he ultimately came to Titaghur where he was employed in one capacity or another for some time and eventually became the Sardar of coolies of some mills at that place; that by his honesty and perseverance he succeeded in enlisting the sympathy and indulgence of some of the European officials of the mills and began to obtain very pro-Stable contracts from them. He thereafter married and brought his father down to his native village, acquired some properties and settled down at Titaghur. At the time of his death, he had a fixed place of abode at Titaghur and some properties movable and immovable there and at other places. For some months before his death he was suffering from diabetes and carbuncle. The will in question is alleged to have been executed by him on the morning of 19th January 1933 and he died the next day, that is the

20th. In the will it is stated that the testator had acquired properties in his own name and also in the name of his father and that he had been enjoying and possessing all those properties. It is also stated that on account of the diseases that he was suffering from there was very little hope for his life. It is recited also that he had two sons Hari har Prosad and Tara Prosad as also his wife Patia Dassi and a daughter-in-law Dhaneswari the wife of Harihar Prosad. The existence of certain other relations was also mentioned in the will. As the motive for making the will, it is stated in it, that Harihar Prosad was of bad character and addicted to drinking and other vices, that he was disobedient to the testator and did not behave well with him, that he did not care for his wife and children and had already squandered away large sums of money. After this recital of motive, it is stated that the testator was not willing to give any of his properties to the said Harihar Prosad. It is then said that the younger son Tara Prosad was a minor. It is next stated that the wife Patia Dassi and the daughter-in-law Dhaneswari, namely the wife of Harihar Prosad, were being appointed executrices to the will.

2. Some provision was then made as regards one of the properties, creating a debutter in respect of it. Then there is a passage in the will which says that upon the demise of the testator, his wife Patia Dassi and his daughter-in-law Dhaneswari will get the properties left by him in equal shares and in all those properties they would have only a life-interest and they would not be entitled to transfer any of them by way of sale or gift. It is next provided that on the demise of the wife Patia Dassi, the younger son Tara Prosad would get a half share of the properties left by the testator in absolute right. Lastly, it is provided that on the demise of the daughter-in-law Dhaneswari, the sons of Harihar Prosad will get in equal shares and in absolute right the remaining 8 annas share in the properties left by the testator. Other provisions in the will need not be referred to for our present purposes. On 15th February 1932, Patia Dassi and Dhaneswari as executrices applied for probate of the will. On 3rd April 1933, two persons of whom the appellant was one and the other being Purusuttam Shaw, put in an objection stating that they were the sons of the testator by another wife named Samratia Dassi. Certain proceedings then followed to which it is not necessary to refer and eventually the case was transferred from the file of the District Delegate to that of the Subordinate Judge as a contesting probate case. In the meantime, Puruauttam

Shaw withdrew his objection and on 13th September 1933, the appellant Garib Shaw put in a fresh objection to contest the proceedings that were then to be held. In substance, the objection was that the will was not a genuine document and that in any event the testator had no sense or free disposing power at the time of the alleged execution of the will. On 23rd November 1933, an application was made on behalf of the propounders asking for an additional issue to be framed raising the question of locus standi of the appellant.

3. The propounders' case is, and that case had already been adumbrated in some of his previous petitions, that neither Garib Shaw nor Ma brother Purusuttam Shaw had any locus standi to contest the proceedings, their mother Samratia not having been the wife of the testator. It is not necessary to go into details of the case that was put forward on behalf of the propounders in this respect for reasons which we shall presently give. On the petition filed as aforesaid by the propounders on 23rd November 1933, no action appears to have been taken by the Court at the time and the only order that was then passed thereupon was that the petition would be considered at the time when the case would be taken. But in the meantime, witnesses began to be examined on commission; Patia Dassi was examined on commission from 3rd December 1933 to 24th November 1934; Dhaneshwari from 5th March 1934 to 9th March 1934 and Chalani Dassi, the mother of the testator, from 10th March 1934 to 17th March 1934. On a perusal of the evidence of these witnesses that was taken on commission, it appears that the question as to whether the appellant had any locus standi or not was a question which was directly in the minds of the parties and much evidence on that question was offered and received. The case thereafter came up before the Court for trial, On 10th April 1933, when the witnesses were about to be examined in Court, an application supported by a medical certificate was filed on behalf of the appellant stating that from the day before, he had been suffering from dysentery and an adjournment on that ground was applied for. On behalf of the plaintiffs, a partition supported by an affidavit was filed stating that the appellant had been seen quite hale and hearty the day before. The Judge rejected the application for adjournment and decided to proceed with the suit. Thereafter witnesses were examined on behalf of the propounders and also on behalf of the appellant : and ultimately the learned Judge granted the probate which is now being contested in

this appeal.

4. One of the contentions urged on behalf of the appellant is that the document in respect of which probate has been granted is not a will but is a document upon which a trust was created which was to take effect during the lifetime of the testator and not merely after his death. There are certain provisions in the will which were intended to take effect on its execution but those provisions related to the debutter that was intended to be created by him in respect of one of the properties that was specifically described in the document. Clause 3 of the provisions contained in the will, however runs in these words:

Upon my demise my wife Sreemati Patia Dassi and my daughter-in-law Sreemati Dhaneswari will in equal shares get the properties left by me but in all these properties they will have life-interest only. They will not be entitled to transfer the said properties by way of any gift or gale, On the demise of my wife my younger (son) Tara Prosad will get half share of the properties left by me in absolute right. God forbid if daring the lifetime of my wife my younger son dies, then the person or persons who will be the legal heirs of the said younger son of mine at the time of the death of my wife will get the said eight annas share in absolute right.

5. Then follow certain other provisions; and thereafter in Clause 4 it is provided thus:

On the demise of my elder daughter-in-law Sreemati Dhanaswari Dasai, the sons of my eldest son will get in equal shares the remaining eight annas share of my properties in absolute right.

6. Then other provisions follow. These provisions referred to above clearly satisfy the requirements of the definition of a will as contained in Section 2, Clause (n), Succession Act, where it is said that a 'will' means the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. That being the position, the document must be regarded as containing (provisions which make it a will and, therefore is a document in respect of the probate which may legally issue. Questions whether some provisions contained in the document would take effect immediately and whether

other provisions contained in it are valid or otherwise are questions which cannot be entertained by a Court of probate and will have to be determined if proper proceedings are started for the construction of the document. This contention, therefore must be overruled. Another matter about which there was a good deal of controversy in the Court below and on which the Court below was inclined to take the view that the appellant's case must fail was the question of his locus standi. The learned Judge upon a consideration of the materials on the record came to the conclusion that the appellant or for the matter of that his brother Purushuttam Shaw as well were not sons of the testator Narayan Shaw, nor that Samratia was a legally married wife of the testator. The learned Judge was not inclined to accept the appellant's story that the marriage between the testator and Samratia had been performed in sagai form as was the appellant's case, nor was he disposed to believe that the appellant or Samratia ever lived in the house of the testator. Furthermore the explanation that was given before the Court for not producing Samratia as a witness was that her present whereabouts were unknown and that was an explanation which the learned Judge was not able to accept. So far as these findings are concerned, a complaint has been made before us that the issue on the question of locus standi of the appellant was not framed until 12th April 1932, that is to say, until the witnesses for the parties had been already examined before the Court. It has also been argued that the learned Judge ought to have granted the application for adjournment that was made to him on behalf of the appellant on 10th April 1934 and was wrong in refusing to grant the same. It has been next argued that there was no point in framing an issue after all the witnesses had been examined and inasmuch as that procedure was adopted in the present case the appellant had been prejudiced. Now we must say that it was quite wrong on the part of the learned Judge to frame an issue after the examination of all the witnesses and we are deeply of opinion that this issue which was framed on 12th April 1934 should have been framed in due time before the trial began and at such a time as would have given the parties full notice of the fact that, that was an issue which had to be tried. We are of opinion that an issue of this character, namely on the question of locus standi of the objector to contest the proceedings is an issue which ought to have been tried and determined as a preliminary proceeding. We therefore disapprove of the way in which the learned

Judge has proceeded with regard to this question of locus standi. But as we have already observed, it was perfectly well known to the parties from a very early stage of the proceedings that the locus standi of the appellant to come in and object to the grant of probate was a question which arose in the case and would have to be decided and even when witnesses were examined on commission this question was present in the minds of both the parties. Seeing that this question of locus standi was not dealt with as a preliminary question and it having been dealt with only in the judgment itself along with the other issues, we are of opinion that it is not necessary for us to go into this question in the present appeal and that it would be more satisfactory if we proceed to deal with the appeal itself on its merits. The findings of the learned Judge, therefore, on the question of the appellant's locus standi are findings which we do not propose either to uphold or to reject at the present stage. We wish to make it clear that such findings will not be regarded hereafter as having concluded the appellant from maintaining in any future proceedings, if he ever desires to do so, that he is a son of the testator by a legally married wife.

7. Turning now to the merits of the case, it has already been stated that the will itself recites in very clear terms the motive which actuated the testator to make it; the motive being that Harihar Prosad, the elder son of the testator, was a person to whom the testator was not willing to leave any property on account of his character and antecedents. In the arguments that have been addressed to us nothing has been said to show that this motive, recited as aforesaid, was not true. (After discussing the evidence their lordships concluded that there could not be the faintest doubt that a will containing provisions of this description was a most likely document to be executed by the testator, and proceeded.) Probability, however, is not the main thing to be considered in connexion with the question as to whether probate should or should not be granted. We have to be satisfied as to whether the will was, as a matter of fact, executed and if so executed, by a free, capable and willing testator. Now amongst the witnesses who have been examined in this case there are four whose names appear as attesting witnesses to the will and their evidence which has been placed before us in all its details fully satisfies us that the will was, as a matter of fact, executed by the testator. (Their Lordships after discussing the evidence proceeded.) The view which the learned Judge has

taken of this matter seems to us to be correct. As regards the evidence relating to the mental capacity of the testator, the four witnesses to whom reference has been made have very clearly stated that there was nothing wrong with the mental faculties of the testator. It has been urged before us that blood was injected and transfused into the system of the testator after Dr. B. C. Roy had seen him but it is not at all correct to say that because an operation of this character had to be done, there must have been something wrong with the mental capacity of the testator. The positive evidence of these witnesses coupled with the evidence of another witness who has been admitted to be the headman of the caste to which the testator belonged satisfy us about the mental capacity of the testator. That witness is one Sitaram Chowdhury. He admittedly is a Chowdhury and was the head man of the caste to which the testator belonged and he has proved that the testator was in his senses on the day the will was executed. Nextly, it has been urged that the writer of the will has not been called although as a matter of fact he was seen in the company of those who were looking after the case. We see nothing wrong in the omission to call the writer, so long as the other witnesses have been examined and they have given evidence of a convincing nature.

8. Some point was sought to be made of the fact that the testator signed his name on the will as Narayan Shaw, whereas his full name was Narayan Chandra Shaw. This point appears to have been made before the trial Court and the trial Court has observed that even if the testator had in some document signed his name as Narayan Chandra Shaw, the mere fact that in this will he chose to sign his name simply as Narayan Shaw should not be regarded as giving rise to any suspicion. As a matter of fact, however, it does not appear that there is any positive evidence indicating that the testator used generally to sign his name as Narayan Chandra Shaw. The fact is that an application was made on behalf of the objector praying that certain record might be called for, in order to prove this point but that application was rejected. We have considered all the arguments addressed to us and, having done so, we have come to the conclusion that the view which the learned Judge has taken is correct. The appeal is accordingly dismissed with costs hearing-fee 3 gold mohurs.

