

Tapesh Kumar Majhi Vs. Birbal Majhi

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Court : Kolkata

Decided On : Dec-19-1957

Reported in : AIR1958Cal698

Judge : Renupada Mukherjee and ;B.N. Banerjee, JJ.

Acts : [Succession Act, 1925](#) - Section 283; ;[Evidence Act, 1872](#) - Section 114

Appeal No. : A.F.O.D. No. 12 of 1956 (Probate)

Appellant : Tapesh Kumar Majhi

Respondent : Birbal Majhi

Advocate for Def. : Lala Hemanta Kumar and ;Sudhir Kumar Dutta, Advs.

Advocate for Pet/Ap. : Chandra Narayan Laik and ;Rebati Nath Sarkar, Advs.

Disposition : Appeal dismissed

Judgement :

Renupada Mukherjee, J.

1. This appeal arises out of an order passed by the learned District Judge of Birbhum refusing to grant letters of administration with a copy of the Will annexed in respect of a Will which purports to have been executed by one Nafar Chandra Das as early as on 12th Falgun, 1334 B. S. corresponding to 25-2-1928, Nafar

died in February, 1929. The application for letters of administration was at first filed in the Court of the District Delegate on 22-12-1952 by the present appellant Tapesb Kumar Majhi. The respondent entered caveat and the proceeding having become contentious the application was subsequently refiled in the Court of the learned District Judge on 23-4-1953.

2. The respondent challenged the genuineness and validity of the Will on several grounds. It was urged by him in the first place that the alleged Will was never executed by Nafar Chandra Das and it was not also attested by attesting witnesses in accordance with the provisions of Section 63(c) of the Indian Succession Act. It was further the case of the respondent opposite party that the alleged testator had no requisite testamentary capacity at the date of the Will.

3. Both parties adduced evidence before the learned District Judge in support of their respective cases and upon a consideration of the evidence adduced by the parties and also on a consideration of the circumstances of the case the learned District Judge held that the execution of the Will by Nafar is highly suspicious and he had no testamentary capacity at the date of the alleged Will because he was suffering from ulcerous leprosy of a virulent type at the date of the alleged Will and it is not likely that he could have given such thumb impressions as appear on the Will. The learned District Judge further held that the Will was not attested in accordance with law. In view of these findings the application for grant of letters of administration was dismissed by the learned District Judge. So this appeal has been preferred by the propounder of the Will.

4. Mr. Laik appearing on behalf of the propounder appellant submitted three principal questions for our consideration. He urged in the first place that the learned District Judge should have held upon the evidence adduced on behalf of the propounder that the Will in question had been duly executed by Nafar Chandra Das. He urged in the next place that the District Judge should have held upon the evidence adduced before him that the Will was attested according to law by more than two witnesses. His third contention was that the conclusion of the learned District Judge that the testator had no requisite mental capacity for execution of the Will at the material time is wrong and is not supported by evidence. We shall

take up all these three questions one after another.

5. The first and the primary point which arises for our consideration in this appeal is whether the propounder appellant has been able to satisfy the conscience of the probate Court that the Will in question was really executed by Nafar Chandra Das when he was in full possession of testamentary powers. The alleged Will purports to have been written by one Manohar Das. On the face of the document the Will purports to bear the names of six attesting witnesses out of whom witness Golak Behari Das appears to have subscribed his own name himself. The names of the remaining five witnesses appear to have been signed in the Will by other persons, namely, Golak Behari Das, Gobinda Lal Mahara and Manohar Das. It transpires from evidence that excepting two of the so-called attesting witnesses, namely, Lagan Mahara and Rasik Mahara all the other attesting witnesses and also the scribe were dead before the matter came up for hearing before the learned District Judge. Lagan Mahara and Rasik Mahara were examined in the Court below on behalf of the propounder. Lagan is witness No. 2 for the petitioner appellant and Rasik is witness No. 3 for him. The learned District Judge appears to have given due consideration to the evidence of these two witnesses, but he is of opinion that due execution of the Will has not been proved by these two witnesses. The learned Court below has given reasons for discarding the testimony of these two witnesses. Lagan Mahara stated that the Will was written by one Gobinda. The document, however, shows that it was written by one Manohar Das. Appellants' witness No. 3 Rasik Mahara stated in his evidence that among several persons Golam Das and Gobinda Mahara attested the Will. The Will, however, shows that these two persons do not figure as attesting witnesses to the Will. The learned Court below also referred to the cross-examination of the propounder's own witness Lagan Mahara wherein he stated that the fingers of both 'the hands of the alleged testator were shrunk' and except one or two fingers in the leg all other fingers of the leg fell down. This witness further deposed to the effect that the testator had ulcers all over his face and body and his entire body was swollen and he became blind and since the disease had turned virulent he could not understand like a normal man or could he express himself like a normal man. From this testimony of the propounder's own witness which was elicited in cross-examination, the learned Judge thought that the Will was a highly suspicious

document and it was not physically or mentally possible for the alleged testator to execute a Will of this nature with full comprehension of its terms and import. We are not prepared to say that the learned District Judge has taken an unreasonable view of the testimony of propounder's witness Lagan Mahara, P. W. 2. So there practically remains the evidence of Rasik Mahara, P. W. 3 on the question of the execution of the Will. In his cross-examination this witness no doubt minimises the extent of the disease from which the testator was suffering, but in view of a portion of his statement that Gobinda Mahara and Golam Das attested the Will although they do not figure as such in the Will itself, the District Judge was not inclined to accept his evidence as reliable. The trial Court saw the demeanour of these two witnesses who are the only witnesses on the point of execution and as he was not prepared to accept their testimony as reliable, we do not think we should be justified in taking a contrary view in this appeal.

6. There are some other suspicious circumstances attending the Will which have not been pointed out by the Court below. We have already said that the Will purports to have been executed in February, 1928. It does not appear that this Will which is an unregistered document was ever made public from that date till 22-12-1952, when it was filed in the Court of the District Delegate for the first time. There is also no reason why an application for probate or letters of administration should not have been made during these intervening twenty-four years. The Will seems to be addressed to one Rishikesh Majhi, father of the appellant. The Will purports to make some provisions for conducting some akhras. The real beneficiary interest of the properties of the testator which consist of nine bighas of land purports to have been given under the Will to the mother of the testator during her life-time, and upon her death the reversion was given to Rishikesh. At the time of the Will Rishikesh had a brother Doman who was father of the respondent. It is an admitted fact that Rishikesh and Doman were the reversionary heirs of Nafar in equal shares at the material time. The mother of Nafar died some time in 1944 and Rishikesh died in September, 1952. It appears to us rather strange that Rishikesh to whom the document was addressed and who excluded his brother Doman from inheriting the properties of Nafar under the terms of the Will, would refrain from taking either a probate or letters of administration during all these twenty-four years. The Will was made public for the first time after Doman's son Birbal who is

the respondent of this appeal, had brought a partition suit against Tapeshe the propounder. These are suspicious circumstances and we are constrained to say that the propounder has not been able to remove these suspicions to our satisfaction.

7. On a consideration of all those facts and circumstances we are in agreement with the learned Court below that the Will in question is a suspicious document and due execution of the Will by the alleged testator was not proved by the evidence adduced on behalf of the propounder.

8. In the above connection Mr. Laik appearing on behalf of the appellant referred to a case reported in *Brahmadat Tewari v. Chaudan Bibi*, 20 Cal WN 192: (AIR 1916 Gal 374) (A). Mr. Laik drew our attention to the concluding portion of the head note of the case which is to the following effect:

'Every presumption will be made in favour of due execution and attestation in the case of a Will regular on the face of it and apparently duly executed.'

Mr. Laik submitted that in the present case the Will on the face of it was apparently duly executed because it contains a thumb-impression purporting to have been given by Nafar Chandra Das whose name was written by the pen of the scribe Manohar Das. In the submission of Mr. Laik we should make a presumption in favour of due execution of the Will in view of the above circumstances. We are not prepared to give effect to this contention of Mr. Laik. In the case cited by him the learned Judges observed at one place in the judgment as follows :

'There is no room for doubt on the evidence that the Will was executed by Ram Charan Tewari. The only substantial question in controversy is, whether it was duly attested.'

Towards the concluding portion of the judgment a quotation is given from a judgment of Foy, L. J. passed in the case of *Wright v. Sanderson*, (1884) 9 PD 149 (163) (B). That quotation is to the effect that

'the Court of Probate has long been accustomed, rightly and wisely, to give great weight to the presumption of due execution arising from the regularity *ex facie* of

the testamentary paper produced, where no suspicion of fraud has occurred.'

In the present case there is ample room for suspicion that the Will was not executed by Nafar Chandra Das at all. That being the case, the case cited by Mr. Laik does not support his contention that we should make a presumption in favour of due execution of the Will. In our opinion, the portion of the head note does not appear to be quite appropriate or accurate in view of the facts of the case.

9. We are thus of opinion that due execution of the Will by the alleged testator has not been established in the present case. It is not, therefore, necessary for us to enter into the question of attestation of the Will. On the question of attestation two points arose for the consideration of the Court below; first, whether an illiterate witness to the execution of the Will whose name is written by another person, but who does not put his mark or thumb impression on the document and only touches the pen when his signature is made by another person, can be regarded as an attesting witness who has signed the Will within the meaning of Section 63(c) of the Indian Succession Act.

10. The other question was whether the scribe of a Will who signs the name of an illiterate testator and puts his signature as a scribe but not as an attesting witness, can be said to have attested the Will. Both these questions were answered in the negative by the Court below. As we are not satisfied that the Will in question was duly executed by the alleged testator, we purposely refrain from making any pronouncement on these questions.

11. As regards the third question which arose for our consideration in this appeal, namely the possession of requisite testamentary powers by the testator at the material time, we find that the learned Court below is of opinion that the testator did not possess any such powers at the material time. This finding of the Court below is practically based upon the evidence of the propounder's own witness Lagan Mahara, P. W. 2 as elicited in his cross-examination. We have already referred to that portion of the evidence of this witness. Mr. Laik has not been able to satisfy us that Lagan Mahara gave his evidence either by being influenced by the respondent opposite party or through confusion. That evidence was apparently accepted by the learned Court below and if it is accepted, then there would be no

escape from the conclusion that the testator was not possessed of requisite mental powers necessary for executing a Will of the present description. In appeal we are not inclined to take a different view from the learned trial Court and we hold that the testator did not possess requisite testamentary powers at the material time. On this ground also the application for grant of letters of administration is liable to be dismissed.

12. In view of the observations made above we are of opinion that the appeal must fail. The appeal is accordingly dismissed with costs the hearing fee being assessed at two gold mohurs.

B.N. Banerjee, J.

13. I agree.

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