

Durga Dutt Vs. Chandanu

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Court : Himachal Pradesh

Decided On : Apr-17-1956

Reported in : AIR1956HP58

Judge : Ramabhadran, J.C.

Acts : Himachal Pradesh (Courts) Order, 1948; ;[Succession Act, 1925](#) - Sections 63, 266 and 299; ;[Evidence Act, 1872](#) - Section 5

Appeal No. : First Appeal No. 14 of 1954

Appellant : Durga Dutt

Respondent : Chandanu

Advocate for Pet/Ap. : L.D. Verma, Adv.

Disposition : Appeal dismissed

Judgement :

Ramabhadran, J.C.

1. This is an appeal by an unsuccessful caveator against the order of the Senior Sub Judge, Nahan (exercising powers of a District Judge under the Indian Succession Act) granting letters of Administration, with a copy of the will annexed, in favour of the respondent Chandanu.

2. Chandanu relied upon a registered will executed in his favour by Mst. Shankari on the 25th Baisakh 2005B. The caveator-appellant did not dispute the execution of the aforesaid will in favour of Chandanu. His case, on the other hand, was that the will in favour of Chandanu stood revoked by a subsequent will executed by Mst. Shankari in favour of appellant and his brother Zalmu on 2-3-51. Therefore, the point for determination, before the court below, was whether the will relied upon by Chandanu had or had not been revoked by the alleged subsequent will in favour of Durga Dutt and Zalmu.

The learned Senior Sub Judge came to the conclusion that the will relied upon by the appellant had not been properly attested as required by the provisions of Section 63, Succession Act. Consequently, he rejected the caveat and granted letters of administration in favour of Chandanu. Hence, this appeal.

3. When this appeal came up for hearing on the 14th instant, doubt was expressed (a) whether the learned Senior Sub Judge had jurisdiction to deal with this matter and (b) whether the appeal lay to this Court. As far as (a) is concerned, para 25, H. P. (Courts) Order, 1948, empowers this Court to authorise any Subordinate Judge to take cognizance of, and any District Judge to transfer to a Subordinate Judge any proceedings or any class of proceedings under the Indian Succession Act. Under Notification No. J-1-49/48, dated 11-11-48, issued by the Officer on Special Duty with the Judicial Commissioner, Himachal Pradesh, all Senior Sub Judges in Himachal Pradesh, were authorised to deal with all classes of cases under the Indian Succession Act.

The present case was filed in the Court of the District Judge, Mahasu and Sirmur, who transferred it subsequently to the Senior Sub-Judge, Nahan. Since a special provision of law will override its ordinary provisions, the transfer of the case to the Senior Sub-Judge must be deemed to be valid. I would, therefore, hold that the Senior Sub-Judge was competent to deal with the case.

4. As regards (b), the case was decided by the Senior Sub-Judge exercising the powers of a District Judge. I may point out that under para 25 (3), H. P. (Courts) Order, the proceedings in the Court of Senior Sub-Judge were subject to the rules applicable to like proceedings in the Court of the District Judge. This, in my

opinion, would include the rules applicable to appeals. Appeals from the decisions of the District Judge lie to this Court. Therefore, the present appeal to this Court will also be competent, I am supported in my view by two rulings.

1. 'Baroda Debya v. Sm. Phutumani', AIR 1933 Pat 276 (2) (A). There a Division Bench of that High Court, with reference to Section 23, Bengal, North Western Provinces and Assam Civil Courts Act of 1887, held that:

"Where an application before a District Judge for Probate of a will is transferred by him to a Subordinate Judge under Section 23, Act 12 of 1887, an appeal from the Order of the Subordinate Judge lies to the High Court and not to the Court of District Judge."

2. 'Mt. Laso Devi v. Mt. Jagtamabha Devi', AIR 1936 Lah 378 (B). There Bhide, J. remarked as follows :

"A preliminary objection was taken that no appeal was competent inasmuch as the order in question was passed by a Senior Subordinate Judge, and Section 299 applies only to orders passed by a District Judge; but in the present instance the Senior Subordinate Judge was invested with powers of a District Judge for the grant of letters of administration and in the circumstances it seems to me that the case would be covered by Section 299, Succession Act, of AIR 1933 Pat 276 (2) (A) and Sections 30 and 39, Punjab Courts Act."

5. Thus, both the preliminary objections fail.

6. Coming to the merits of the appeal, learned Counsel for the appellant urged that Lachhmi Singh, R. W. 4, had been won over by the other side and he deliberately concealed the truth. Therefore, it was contended that the appellant's case should not suffer on account of Lachhmi Singh's statement. In this connection, reliance was placed upon -- 'Mahomed Zia Ullah v. Rafiq Mohammad', AIR 1939 Oudh 213 (C), where, following -- 'Brahmadar Tewarj v, Chandan Bibi', AIR 1916 Cal 374 (D), a Division Bench of the former Chief Court of Oudh observed that:

"When the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Court may take into consideration the

circumstances of the case and judge from them collectively whether the requirements of the statute were complied with; in other words, the Court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are wilfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the will."

7. In the next place Mr. Verma argued that even if the statement of Lachhmi Singh is discarded, there was the testimony of two good attesting witnesses Nazir Ali, R. W. 3 and Sundar Lal, R. W. 2. In this connection, he cited -- 'Satipada Chatterjee v. Annakali Debya', AIR 1953 Cal 462 (E), where a Division Bench of that High Court indicated as follows :

"In cases of wills the presumption is that the attesting witnesses signed after the testator had signed. The presumption is based on the maxim 'Omnia praesumuntur rite esse acta'."

"Having regard to the circumstances of a case, it is open to the court to discard that part of the testimony of a witness whereby he repudiates the fact of attestation of the will."

8. Learned counsel for the respondent, on the other band, took me through the statement of Lachhmi Singh, R. W. 4, and pleaded--in my view with considerable justification--that a witness who states the truth cannot be dubbed as "hostile" just because his statement does not suit the party producing him. Let us see what Lachhmi Singh says. While admitting that he had signed the document, Ex. R. 1, he goes on to say "magar Durga Dutt ne kaha tha ke main ne apne bhai se mukhtarnama liya hai-is liye dastkhat kiye the, mujhe wasiat nahin batlai".

In spite of the fact that the court below declared Lachhmi Singh as a hostile witness and permitted the appellant's counsel to cross-examine him, no thing came out of such cross-examination as could reasonably justify the conclusion that the witness had been won over. Thus, it cannot be said that Lachhmi Singh was wilfully misleading the Court. Therefore, AIR 1939 Oudh 213 (C), relied upon by the appellant would not be applicable here, Mr. Paras Ram cited--'Chandratan

Gandhi v. Sm. Jamuna Bai', AIR 1946 Cal 168 (F), where a learned Judge of that High Court pointed out that:

"It is clear from Section 63 (c) itself that attestation implies something more than the mere putting down of a signature on a will in the presence of the testator by a person who has seen the testator sign. The legislature makes a distinction between mere signing and attesting. Attesting is more than merely signing on the will. It means signing a document for a particular purpose, the purpose being to testify to the signature of the executant."

He pointed out that the mere existence of the signature of Lachhmi Singh on Ex. R. 1 would not amount to attestation unless it is shown affirmatively that he did sign it knowing that the document was the will of Mst. Shankari. Lachhmi Singh, statement, as already shown, is that he put down his signature in the belief that it was a power of attorney executed by the appellant's brother in favour of the appellant.

9. Coming to the statement of Sundar Lal, R. W. 2, Mr. Paras Ram pointed out that he was the scribe and not the attesting witness. In AIR 1953 Cal 462 (E), cited by the appellant (referred to earlier) their Lordships of the Calcutta High Court pointed out that:

"The question whether a scribe can be regarded as an attesting witness has to be gathered from the circumstances of each case, the main test being whether the scribe signed the document with the intention of attesting the signature of the executant. The mere fact that the scribe wrote out the entire will as also the endorsement "Ishadi Lekhak" does not necessarily lead to the conclusion that he had signed before the testator."

A perusal of the statement of Sundar Lal, R. W. 2, shows that he never claimed to be more than a scribe. It is, therefore, not possible now to treat him as an attesting witness when that was not the case. Thus we are left with only one attesting witness which is insufficient to prove an unprivileged will (vide Section 63, Succession Act.)

10. The Court below has also referred to the following suspicious features about the document Ex. R. 1 : (a) While according to Sundar Lal (R. W. 2) Nazir Ali, attesting witness wrote out his name in Urdu, Ex. R. 1/A, the latter stated "Ex. R. 1/A mera tehrir karda galaban nahin." (b) While according to Sundar Lal, Exs. R. 1/A and R 1/B have been written with the same ink, Nazir Ali contradicts him and states that they were written in different ink. (c) The body of the will is in Urdu.

Similarly, the names of Mst. Shankari, Nazir Ali and Sundar Lal are also in Urdu. It is noteworthy that the name of Lachhmi Singh, his parentage, caste and residence are, however, written in Hindi. An affidavit has been filed by Sundar Lal in this Court wherein an attempt has been made to explain this discrepancy on the ground that Lachhmi Singh did not know Urdu and therefore his names etc. were written in Hindi. The proper course for Sundar Lal was to have give'n this explanation--for what it was worth--at the trial.

In that case, he could have been cross-examined on that point also. Further Mst. Shankari has signed on every page in Hindi. It does not appear that she knew Urdu: then why was not the same course adopted in her case? i.e. why was not her name written in Hindi as in the case of Lachhmi Singh?

(d) While the alleged will, Ex. R. 1, purports to revoke an earlier will in favour of Nand Ram minor, it is strange that it makes no mention of the registered will in favour of Chandanu dated the 25th Baisakh, 2005.

11. In view of all that has been said above, I concur with the view of the court below that the execution of the alleged will, Ex. R. 1, has not been proved in accordance with law. Therefore, the will, Ex. P. 1, in favour of Chandanu stands. The Court below rightly granted letters of administration in favour of Chandanu. This appeal, therefore, must fail

ORDER

12. I reject the appeal with, costs assessed at Rs. 30/-.