
(1897) 05 AHC CK 0008
In the Allahabad High Court

Chandar Mohan Benerji	Vs	APPELLANT
Brij Nath De and Another		RESPONDENT

Date of Decision : 04-05-1897

Acts Referred:

Citation : (1897) ILR (All) 458

Hon'ble Judges : John Edge, J; Blair, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

John Edge, Kt., C.J. and Blair, J.—This appeal is filed under the Letters Patent from the decree of our brother Knox granting probate of the will of Musammat Saudamani Dasi, who died on the 14th of July 1890. The application for probate was filed in the Court of the District Judge of Benares. Two persons--Birj Nath De and Hem Chandar De--appeared and opposed. They opposed, according to their written statement, on the ground that the will in question had not been executed by Musammat Saudamani Dasi and that she had no disposing power over the property, or some of it, dealt with by the will. The District Judge found that the execution of the will was not proved. On appeal to this Court our brother Knox found that execution was proved. The appellants before us are the objectors. The questions raised before us here are, first, whether the will was actually executed, and, secondly, as to whether Musammat Saudamani Dasi had power to dispose of the property mentioned in the will.

2. In our opinion the due execution of the will is clearly proved. It is true that the will is not before us, but that is not the fault of the applicant for probate. The will has been made away with by other parties for whose action the applicant for probate is not responsible. The original will was registered in the Sub-Registrar's office at Benares. A commissioner was duly appointed to obtain an acknowledgment of execution from Musammat Saudamani Dasi, and she, having been identified, admitted execution of the will, and on that the will was registered. It is not suggested here that the officer in question did not act strictly

in accordance with law. It is not suggested that on the occasion of his going to Musammat Saudamani Dasi's house that lady was personated by some one else. However, the execution of the will does not rest there. Two ladies were called, and we believe their evidence on this point, and they say that they were present when the will was executed by Musammat Saudamani Dasi. Another person was called; he witnessed the will. He apparently makes a living by letting himself out as a witness to the execution of documents. We see no reason to disbelieve him. Although the District Judge of Benares found that the execution of the will was not proved, he found that some such will had been executed. We find that the will was duly executed by Saudamani Dasi. The other witness to the will is dead. There was no issue before us of undue influence, or want of testamentary capacity or fraud or revocation.

3. As to the second point. It has been contended by Mr. Dwarka Nath Banerji for the appellants that where an application for probate of a will is contested and it is alleged that the property dealt with by the will was not the testator's or was not property over which the testator had a power of testamentary disposal, it is the duty of the Court to try an issue raising this Question. All we can say is that it would be exceedingly inconvenient if Courts in this country had to try such issues. A Court could never be quite sure that it had got the proper parties before it. It would be difficult always to be sure that there was not collusion in the case. It is much safer in the interests of the public that issues as to the title to property should be decided when the issues are raised in a regular suit, and not on an application for a grant of probate.

4. Mr. Banerji contends that, according to the practice in England and the practice in India, we should try these questions as to title. In support of his contention as to the practice in England he relies on the decision in *Tharp v. Macdonald*. In the goods of Tharp L.R. 3 P.D. 76. That was a case in which the probate of the will of a married woman was opposed by her husband; and the case turned on this, that a married woman had in England no testamentary power unless she was possessed of separate property. Accordingly it was necessary to ascertain whether the testatrix in that case was possessed of any separate property so as to give her a title to make a will. It is obvious from the judgment of Sir George Jessel that the inquiry was merely one to ascertain the testamentary capacity of the lady, that is, whether she had any property which gave her the right to make a will. It was the possession of separate property which removed the legal incapacity under which she would have been so far as the making of a will was concerned. Sir George Jessel pointed out that it was not necessary to ascertain whether all the personal property mentioned in the will was property, over which she had a power of disposal by will. It is obvious that if Mr. Banerji's proposition were well founded in law, a Court in India would have to go on and find as to the title to every bit of property dealt with by the will, the title to which was questioned by the objector.

5. Mr. Banerji has also relied for the practice in this country on *Annoda Sundari*

Dasi v. Jugutmani Dabi 6 C.L.E. 176. Where Sir Louis Jackson in that case said: "It appears to me that every consideration which ought to induce the Court to refuse probate of such a will must be taken into account,"--he had not in his mind any such question as a dispute as to the right to the property mentioned in the will. The illustration which he gives of what he means puts that beyond all doubt. The illustration was a case of undue influence.

6. That it is not the practice of the Courts in India, so far as we are aware, to try questions of title and finally decide them on applications for grant of probate or letters of administration, may be inferred from the following cases: Behary Lall Sandyal v. Juggo Mohun Gossain ILR 4 Cal. 1; Hormusji Navroji v. Bai Dhanbaiji, Jamsetji Dosabhai ILR 12 Bom. 164; Arunamoyi Dasi v. Mohendra Nath Wadadar ILR 20 Cal. 888, and Barot Parshotarn, Kallu v. Bai Muli ILR 18 Bom. 749. In our opinion the view of the law expressed in those cases is correct. In this Court our brother Burkitt in an unreported case has decided that questions of the title of the testator or intestate to property are not to be dealt with in applications for probate or letters of administration.

7. We accordingly decline to express any opinion as to whether the testatrix had a disposing power over the property, or any of it, mentioned in her will. The contention in the first Court could hardly have been seriously put forward, as the objectors called no evidence to support it. We dismiss this appeal with costs.