
(1894) 05 MAD CK 0007
In the Madras High Court

Rahamtullah Sahib

APPELLANT

Vs

Rama Rau and Another

RESPONDENT

Date of Decision : 04-05-1894

Acts Referred:

Succession Act, 1925 — Section 250

Citation : (1894) ILR (Mad) 373

Hon'ble Judges : Muttusami Ayyar, J; Best, J

Bench : Division Bench

Judgement

1. This was a testamentary suit brought to obtain probate of the last will and testament of the late Raja of Venkatagiri in the district of Nellore.

Plaintiffs alleged that the late raja made his last will on the 3rd June 1892 and died on the 6th idem, and, as executors appointed by testator, they

claimed probate. Exhibit A is the will propounded by them, and among the legacies mentioned therein, a sum of Rs. 1,000 is given to defendant

Haji Muhammad Rahamtullah Saheb. He, however, filed a caveat objecting to the grant of probate on the ground that the will is not genuine; that

its execution was procured by fraud, coercion or undue influence; that the testator did not know what he was doing, nor understand the nature and

effect of its provisions, if in fact he signed or affixed his mark to the alleged Will. Defendant set up another will, dated the 31st May 1892, whereby

it is alleged the late raja appointed Dewan Bahadur Raghunadha Row, the Honourable Mr. Humayun Jah Bahadur, C.I.E. Kummati

Krishnamachari and Dewan Bahadur T. Venkasami Rao as executors. Defendant stated that that will purports to remit, inter alia, a debt of Rs.

55,000 due from him to the testator, and further, to give defendant a legacy of Rs. 5,500. He further alleged that the will relied on by him was in

the possession or power of the testator's sons and others, including the plaintiffs, Raja T. Rama Row and Ramakrishniah.

2. Plaintiff's application for probate of the will propounded by him was made on the 12th August 1892 and the defendant's caveat was filed on the

19th idem. On the 24th January 1893 the following four issues were fixed for decision:

(i) Whether the will dated 3rd June 1892 was genuine?

(ii) Was the deceased raja at the time of executing the same of sound and disposing mind?

(iii) Is the will invalid as having been procured by fraud, coercion, undue influence or such importunity as took away his free agency in the matter?

(iv) Was it duly attested?

3. On the 7th February 1893 two more issues were framed with reference to plaintiff's averment that defendant had no interest in the estate of the

late raja entitling him to intervene in the matter of their application for probate, and to call upon them to prove the will in solemn form. The

additional issues are--""whether defendant has any interest in the estate of the deceased raja,"" and ""whether it is competent to the defendant to

prove such interest, if any, in this suit."" The final hearing was fixed on the 3rd March for the 12th April, and it was also directed that the additional,

or the fifth and sixth, issues be tried first. The suit came on for trial before Mr. Justice Shephard on the 19th April 1893, and on that day defendant

applied for an adjournment in order that he might bring in the prior will set up by him, and was not ready with his evidence. The learned Judge

declined to grant the application on the ground that it was made at the very last stage of the argument. Thereupon, he recorded a judgment, finding

the first of the additional and preliminary issues in plaintiff's favour, and decreed that the will dated 3rd June 1892 was the last will and testament of

the deceased raja, and that the probate thereof be granted to plaintiffs. Hence this appeal.

4. Two questions arise for determination in this appeal, viz., whether, apart from the prior will set up by the defendant, there is proof of

defendant's interest in the testator's estate, and whether the learned Judge ought to have granted an adjournment to enable defendant to bring in

the alleged prior will. As regards the first question, we agree with the learned

Judge that, apart from that will, defendant has no interest. It is true that under the will propounded by plaintiffs, defendant is entitled to a legacy of Rs. 1,000, but this circumstance can give him no right to denounce that will and to call for proof of it in solemn form. Another contention on appellant's behalf is that he claims to be also a creditor of the late raja. Adverting to this contention, the learned Judge has observed that in reality there is no evidence that appellant is a creditor of the testator, and even if he is, this will not help him.

5. The law is clear on this point. In *Hingeston v. Tucker* 2 Swaby and Tristram's Rep. 596 it was held by Sir C. Cresswell that before a person can be permitted to contest a will, the party propounding it has a right to call upon him to show that he has some interest. Section 250 of the Indian Succession Act is framed on the same principles. As for the nature of the interest which ought to be proved, it was held in *Kipping v. Ash* 1 Robertson's Rep. 270 that the bare possibility of an interest is sufficient. But this possibility should test on existing facts and not on mere conjecture. In *Crispin v. Doglione* 2 Swaby and Tristram's Rep. 17 it was held by Sir C. Cresswell that the possibility of filling a character which would give the party concerned an interest was not sufficient, but that there must be a possibility of having an interest in the result of setting aside the will. There are also several Indian cases in which an interest was considered necessary and made the subject of inquiry, and we may refer to *In the matter of the petition of Desputty Singh* ILR 2 Cal. 208 *Komallochun Dutt v. Nilrutton Mundle* ILR 4 Cal. 360 *In the matter of the petition of Hurro Lall Shaha* ILR 8 Cal. 570 *Nilmoni Singh Deo v. Umanath Mookerjee* ILR 10 Cal. 28 *In the matter of the petition of Desputty Singh* ILR 2 Cal. 208 and in *Menzies v. Pulbrook and Ker* 2 Curteis Rep. 845 it was decided that a creditor of the testator has no right to contest the will, for the reason that it is indifferent to him whether he shall receive his debt from an executor or an administrator.

6. There is, however, no doubt that if the defendant proved the prior will, he would have a sufficient interest to contest the will set up by the plaintiffs. The material question, therefore, is whether the defendant was justified in not producing, at the date of the final hearing, evidence to prove the prior will on which he relies. He ought to have been prepared to proceed at

once with the case if the sixth issue had been decided in his favour.

It is quite possible, however, that he expected that the second preliminary issue would be determined first and hoped to frame his procedure with

reference to such determination. Moreover, defendant will be hereafter precluded from proving the will set up by him, as it has been held that when

once probate of a will has been granted in solemn form, no one who has been cited or taken part in the proceedings or who was cognizant of those

proceedings and stood by, can afterwards seek to have it cancelled. In re Pitamber Girdhar ILR 5 Bom. 638. We are of opinion therefore that if

defendant pays into Court within one week from the date of re-opening of this Court after the recess all the costs incurred hitherto by plaintiffs both

in the Court below and on appeal, the decree of the learned Judge should be set aside and the case remanded for disposal afresh, after giving

appellant an opportunity to prove the will set up by him, and that if the appellant fails to make such payment within the time thus allowed, the

appeal shall stand dismissed with costs throughout.