

(1922) 11 MAD CK 0014
In the Madras High Court

Rosa Maria Bai and Another

APPELLANT

Vs

Jacob Souza

RESPONDENT

Date of Decision : 07-11-1922

Acts Referred:

Citation : 75 Ind. Cas. 881 : (1923) 18 LW 588

Hon'ble Judges : Venkatasubba Rao, J;Spencer, J

Bench : Division Bench

Judgement

Spencer, J.—I have come to the same conclusion as my learned brother that Letters of Administration should not have been granted on the

Will propounded by the plaintiff.

2. The delay of 20 years in presenting the Will for Probate has not been sufficiently explained. It is said to have been handed over by the testator to his brother's son the sole legatee. He died in 1902 or 1903 without taking any action.

3. It is not clear in whose custody the Will has been since, but his son, who has been granted Letters of Administration by the District Judge on the present application, says that he only came to know of the existence of the Will three or four years ago.

4. He adds that some documents were with his mother; but she has not been examined as a witness to prove proper custody since 1899, when Exhibit D purports to have been prepared.

5. I regard it as one suspicious circumstance that this Will should have first seen the light of day 20 years after Francis Padivala's death on the occasion when the persons who would be entitled to his property, if he died intestate, are suing to redeem a mortgage executed by him which the

legatee was instructed in the Will to discharge. Another suspicious circumstance is that of the only two persons who have come forward at this

juncture to vouch for the genuineness of the Will one is a witness, who, having access to the Burial Registers of the Parish, is in a position to make

the date of the Will accord with the known facts as to the deceased's death and the other is that witness's first cousin; a third is that when Letters

of Administration of the deceased's estate were applied for by a creditor 22 years ago the statement in Exhibit II that the deceased had died

intestate was allowed to go unchallenged by the executor and the legatee; and a fourth that they both allowed the testator's disinherited widow and

children to take possession of his moveable property and cattle and to discharge his debts without protest.

6. The individuality of the testator's ""shrikaza"" or mark on Exhibit A has not been established. The mark of the executant on Exhibit B looks as if it

might have been written by the writer of that document. That on Exhibit A is in the same ink and style as the signature of the witness P.W. No. 2.

7. As the plaintiff has failed to disperse the doubts that naturally arise as to the authenticity of this unregistered Will, the appeal is allowed, the grant

of Letters is revoked and the suit is dismissed with costs here and in the District Court.

Venkatasubba Rao, J.

8. The question to be decided is, has the execution of the Will by the testator been proved? The Will is dated the 7th September 1899 and the

application for Probate was made in 1920. The testator did not sign his name but made a mark. Of the three attesting witnesses two subscribed the

Will with their marks, and the other wrote his name. There is an endorsement at the foot of the Will indicating who the writer of it was. The testator

died 22 days after the date of the alleged Will, leaving a widow, two sons and one daughter. The sons were of the ages of 20 and 14 or

thereabouts, and the daughter was of the age of about nine. The Will makes no reference to the testator's wife and children and contains no

provision in their favour. Almost the whole of the property was bequeathed to the testator's brother's son Rosanio Padivala, and the latter's

brother-in-law was appointed executor. Of the three attesting witnesses, the two who subscribed on the Will their marks are said to have died

some years ago, though no evidence has been given as to when they died. The other attesting witness and the scribe have been examined in

support of the Will. The party propounding the Will is the son of the legatee, Rosario Padivala abovementioned who died about 20 years ago, or

about three years after the death of the testator. It is in evidence that the executor died in 1918 or 1919.

9. The grant of Probate is opposed by the widow and the surviving son. They contend that there are several suspicious circumstances and that the

evidence in support of the Will is not sufficient to remove the suspicion and to satisfy the Court that the Will was in fact executed by the testator.

10. The proof of execution Consists of the evidence of the writer of the Will and of the surviving attesting witness. The testator was living at

Permanki and it is admitted that both these witnesses were living at Mangalore, a place 12 miles from the village where the testator was living. Both

of them are related to the testator, but no importance can be attached to this fact as they are also related to the person who is benefited by the

Will, and to the present applicant who is the latter's son. The evidence does not indicate that they were either intimate with the testator or that they

enjoyed his confidence in any degree and there is no explanation as to why they were called from a distant place to assist the testator in the making

of his Will. The writer while stating that the testator was ill for about a year before his death adds that he visited the testator on the single occasion

when the Will was made. The other witness admits that he did not even attend the testator's funeral and that, during the testator's life time, he went

to his house only once, that is, a year after the testator's daughter was born, and that a year after his death he went there again. His evidence

leaves the impression that this witness went to the testator's house during his life time only on two occasions, one of them being the date of the

making of the Will. It is also admitted that there were persons near the testator's residence who could have been asked to be present, and it is

noteworthy that the Potail of the village was living within half a mile and that the Potail also happened to be the testator's landlord. No evidence

was forthcoming as regards the circumstances in which the Will was made or any discussion respecting the dispositions, or any draft prepared

under instructions from the testator. This is the only direct evidence to prove the execution of the Will. There is no conflict of testimony and the

case has to be decided mainly with reference to probabilities. The learned District Judge pronounced in favour of the Will and I should have been

less ready to differ from him if the question turned on whether the balance of evidence was in favour of the Will or against the Will. And I may also

add that the two witnesses who deposed in regard to the execution of the Will also spoke to ill-feeling between the testator and his wife, to which I

shall presently advert, and the learned District Judge did not consider them worthy of belief respecting the alleged misunderstanding and it is clear

that the District Judge has not based his conclusion on his estimate of the worth of the evidence of these two witnesses.

11. The circumstances being such as to excite the suspicion of the Court, can it be said that the evidence in support of the instrument removes

the suspicion and establishes affirmatively to the satisfaction of the Court that the Will put forward was the Will of the testator? It has been

repeatedly held that, circumstances of suspicion demand the vigilant care and circumspection of the Court in investigating the case and examining

the evidence in support of the Will.

12. In the first place, the guarantee afforded by the testator's signature appearing on the document does not exist. The testator is said to have

made a mark which is letter "Sree" of the Canarese Alphabet. This mark can be easily imitated and no admitted marks have been put in evidence

for the purpose of comparison. I am not to be understood to say that if any such marks had been produced they would be of material assistance to

the Court or probably affect its judgment.

13. An explanation has been offered for the fact that the testator disinherited his wife and children. Evidence was given to prove that they were not

living with him; that the wife had filed a criminal complaint against the husband for assault some years previous to his death, and that consequent

estrangement accounted for their separate living, but this evidence is vague and discrepant. These allegations have been denied by the son, the

widow and two friends of the testator. The learned District Judge remarks: "There is oral evidence on both sides as to whether the defendants

were living with Francis Padivala (testator) or not. It is slightly more weighty for the defence and probabilities are in favour of the defence." This

seems a just criticism of the evidence. The District Judge proceeds to say; "If

that version is accepted, then the Will must be false." That is to say, the learned Judge is fully alive to the fact that the provisions of the Will were unnatural and were only consistent with the hypothesis that there was a serious misunderstanding between the testator and his wife and children. The District Judge also was inclined to the view that on this point the evidence and the probabilities were in favour of the defence. The only conclusion consistent with the learned Judge's reasoning would be that the Will was not proved. I would like to say another word on this aspect of the case. Granting that the institution of a criminal complaint by the wife against the husband has been proved, this may account for there being no provision in favour of the wife. No motive has, however, been suggested in regard to the act of the testator so far as his children were concerned. Where the instrument is inofficious, i.e., not consonant to the testator's natural affections and moral duties, stringent proof is demanded (See Williams on Executors, Edition 1921, Vol. I, page 250) Jagrani Koer v. Durga Prashad 22 Ind. Cas. 103 : 36 A. 93 : 16 O.C. 386 : 15 M.L.T. 125 : (1914) M.W.N. 137 : .

14. The next circumstance of suspicion is the very long delay in applying for Probate. The testator's property was under mortgage at the date of the Will, and the legatee was directed to pay the amount due to the mortgagee and redeem the properties. The legatee, however, took no steps in this direction. The defendants filed a suit for redemption about 1918, and it is said that, at the instance of the mortgagee, the applicant put forward this Will. So far as the mortgage was concerned, if he proved a title to the properties in a third party the redemption suit was liable to be dismissed. Whether the mortgagee was responsible for the application for Probate or not, it is clear that until this suit was filed the Will was not brought to the notice of the heirs of the testator. The applicant first filed an application in 1919, withdrew it and filed the present application in 1920. There is scarcely any explanation for this extraordinary delay. A witness has deposed that the executor was short of money, and did not, therefore, obtain Probate. The reason given is incredible, because on the plaintiff's side there is also evidence to the effect that the net value of the property about the time of the testator's death, was only Rs. 60 odd, and it is common knowledge that the amount required for obtaining a Probate in respect of

an estate of so little value would be almost trifling. Even if this excuse should be considered sufficient for the non-obtaining of the Probate, it seem;

strange that those who were directly affected by it were not even informed of it or of its contents during this long period of time. The legatee and

his representatives acted just as if no such Will had been left. Some moveables and cattle belonging to the testator were disposed of by the

testator's widow and children without objection. A creditor to whom the testator owed rent applied, about a year after the testator's death, for

Letters of Administration in respect of his estate on the basis of intestacy. An order was passed directing grant to the creditor and it may be

presumed that the application was duly published before the order was made. The creditor, however, did not actually obtain the grant because the

testator's widow paid up the amount due. We thus see that such assets as existed were taken possession of by the heirs and the only subsisting

unsecured debt was also discharged by them. Not only was the conduct of the widow and the children consistent with the absence of a Will but

the conduct, though negative in its character on the part of the legatee and the executor, lends great support in the case of the defendants.

Muthuswamy Aiyar, J., observes in *Gnanamuthu v. Vanakoilpillai Nadan* 17 M. 379 : 6 Ind. Dec. 263, that it is usual to demand an explanation

when there is unreasonable delay in applying for Probate. There is no inflexible rule as regards the nature of the evidence required in any particular

circumstances, but the evidence in favour of a Will, propounded after a long lapse of time, must extend to clear proof of execution. This very case

tests the truth of the proposition. If this Will had been set up soon after the testator's death, it would have been more easy to the heirs to rebut the

evidence regarding the alleged ill-feeling between the husband and the wife. They might then show by evidence easily procurable that the writer and

the attestors could not have and did not, in fact, come to the house of the testator. The widow and her son have deposed that the writer and the

testator were on bad terms. How can an allegation like this be proved or disproved at this distance of time? It is said that the two attesting

witnesses who subscribed their marks on the Will are dead. On the point where they died there is no evidence. The opponents may well allege

that these persons were not alive even at the date of the Will. But owing to the lapse of time there are matters on which no satisfactory evidence

can be given. By his unreasonable delay, the applicant places the caveator under great disadvantage and it is but just that very stringent proof

should be demanded in support of the instrument put forward.

15. The question then arises, has the applicant removed the suspicion which naturally attaches to Will produced in these circumstances? I am

clearly of the opinion he has not. The witnesses whom he has examined in support of the Will are persons of no particular credit and the

explanation offered in regard to the various suspicious circumstances is far from convincing.

16. The learned District Judge relies on these circumstances. Firstly, that a draft petition for Probate bearing the date 1899 was produced, which,

it was alleged, was prepared at the instance of either the legatee or the executor but was not filed in Court on the ground of expense. A Pleader

who was examined for the plaintiff has deposed that the draft is in his handwriting. The Will was not shown to him in the witness-box and identified

by him. He, however, deposed that he saw "the Will" and in the circumstances he must have meant that he saw "a Will". This evidence does not

carry the matter very far. Even assuming that this particular Will was then in contemplation of the parties, no inference in favour of its genuineness

can be drawn. It is quite possible that the person or persons concerned dropped the application for valid reasons and if a spurious Will had been

intended to be put forward it is not unlikely that the attempt was abandoned because they thought better of it. It is indeed very difficult to accept

this circumstance as affirmative proof of the execution of the Will. Secondly, it is said that the applicant produced in Court the documents, which

the District Judge was satisfied belonged to the testator. The title-deeds of all the properties were with the mortgagee and the recital in Exhibit III,

one of the two deeds of mortgage executed by the testator in favour of the mortgagee, runs thus. "As I have given you the mulgeni and other

original documents already along with the mortgagedeed, I have this day further delivered the property to you. "The documents produced in Court

have not been shown to be utterly unconnected with the properties mortgaged that they could not be among the documents handed to the

mortgagee. If these documents were, as a matter of fact, in the possession of the mortgagee the probabilities are that the applicant obtained them

from the mortgagee, who, as already observed, has been charged by the defendants with having instigated the filing of the application for Probate.

In any event, the legatee and his son, the applicant, being the relations of the testator, no inference in their favour can be drawn from the mere

possession of some documents belonging to the testator. It is not suggested that these documents evidence or create any valuable rights and the

possession of them confers, from a pecuniary point of view, no advantage.

17. Thirdly, the District Judge seems to think that as the legatee did not attempt to redeem the mortgage earlier, there was no need on his part to

have applied for Probate. This reason is hardly convincing. If the Will was true, those that had a claim upon the testator were completely

disinherited, and the entire property devolved upon the legatee, and he would not have allowed a valuable document to remain unknown, and it is,

on the other hand, extremely probable that he would have taken the earliest opportunity to assert his rights under it.

18. In the result, I am of the opinion, that the applicant has failed to discharge the onus that lies heavily upon him and that the appeal must be

allowed. The suit is dismissed with costs here and in the District Court.