
(1950) 06 P&H CK 0003
In the Punjab And Haryana At Chandigarh
Case No : F. A. F. O. No. 77 of 1949

Rura Ram Ganga Ram Aggarwal

APPELLANT

Vs

L. Munshi Ram and others

RESPONDENT

Date of Decision : 01-06-1950

Acts Referred:

Succession Act, 1925 — Section 237, 276, 299, 63, 63(C)

Citation : AIR 1950 P&H 358

Hon'ble Judges : Harnam Singh, J

Bench : Single Bench

Advocate : Som Datt Bahri, for the Appellant; Mela Ram Aggarwal, for the Respondent

Final Decision : Dismissed

Judgement

Harnam Singh, J.—Lala Narain Dass, a childless and wifeless Maheshari Banya, was retired Railway Ticket Collector of Amritsar. He made the will, certified copy whereof is Ex. P. W. 3/4 on 4th October 1934, at Phillaur and got it registered on 19th October 1934. Lala Narain Dass then sent Ex. P. W. 3/1 which is another copy of that will to Sardar Sawan Singh of Dera Bawa Jaimal Singh, one of the beneficiaries under the will. Under that will Lala Narain Dass bequeathed one half of the deposits in the Punjab National Bank, Ltd., Ludhiana, and the Post Office at Phillaur, to Sardar Sawan Singh or his spiritual successors of Dera Bawa Jaimal Singh and the other half of the deposits together with his entire household effect to the Manager Hindu Yatim Khana, Ravi Road, Lahore. Lala Munshi Ram, Lala Kharaiti Ram, Amar Nath and Lala Har Narain were appointed executors under the will of Lala Narain Dass.

2. On 25th June 1949, Lala Munshi Ram, Kharaiti Ram and Lala Amar Nath made an application under S. 276, Succession Act, 1925 (hereinafter referred to as the Act) for the grant of probate of the copy of the will, Ex. P. W. 3/4. Lala Har Narain, the fourth executor under the will, it was stated in the application, had died before the application was made.

3. Now, the application under S. 276 proceeds on the grounds mentioned hereunder; (1) that, inasmuch as Lala Narain Dass has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the presumption arose that Lala Narain Dass was dead; (2) that the registered will dated 4th October 1934, was the last will and testament of the said Narain Dass, but that the original has not been found in the papers and household effect of the deceased; and (3) that the deceased had left a fixed deposit of Rs. 8,000 in the Punjab National Bank Ltd., Ludhiana, and a deposit of Rs. 328-3-6 in the Post Office at Phillaur but that the documents with respect to these deposits have not also been recovered from the papers and the household effects of the said Narain Dass.

4. Boora Ram respondent appeared in the proceeding in the Court of the District Judge, Jullundur, and resisted the grant of the probate of the copy of the will, Ex. P. W. 3/4, alleging that the registered will dated 4th October 1934, was not the last valid will of Lala Narain Dass deceased, and that he had revoked that will under another will, Ex. R-1, made on 23rd October 1940.

5. In replication the executors maintained that the will Ex. R-1 dated 23rd October 1940 was fictitious and forged document and was otherwise invalid.

6. On the pleadings of the parties the trial Court fixed the following issue: 1. Whether the will dated 4th October 1934, made by Narain Dass (who has not been heard of since over seven years) was cancelled by him? If so, when? 2. Whether the will dated 23rd October 1940, set up by the respondent was executed under undue influence? 3. Whether the will dated 4th October 1934, set up by the petitioners is the last valid will of Narain Dass?

7. Considering that due execution of the will dated 4th October 1934, had not been challenged by Roora Ram respondent in his written statement or in his statement before the issues the trial Court found that the factum and validity of the will, Ex. P. W. 3/4, was proved. The trial Court then found that it was obligatory on Roora Mal respondent to file a separate petition for the grant of the probate of the will R.1, and that being so, issues Nos. 1 and 3 were struck off. In any case, the trial Court found that the will Ex. R-1 was not a valid will. On these findings the trial Court found that Ex. P. W. 3/4 was a true copy of the last will and testament of Lala Narain Dass.

8. Then, it was said at the trial that since the original will made on 4th October 1934, was not forthcoming, it should be presumed that it has been revoked by the testator. The trial Court has, however, found that the circumstances of the case showed that the original will, dated 4th October 1934, was being withheld by the respondent. In the result the trial Court came to the conclusion that it was established that the petitioners were executors under the will, copy whereof is Ex. P. W. 3/4, and that they were entitled to the probate of that copy.

9. From the order passed by the trial Court granting probate of the copy of the will of Lala Narain Dass, Roora Ram respondent has come up in appeal under S.

299, Succession Act, 1925.

10. In these proceedings Mr. S. B. Bahri contends that the Court was in error in granting probate of the copy of the will of Narain Dass. He then contends that on the facts proved at the trial a presumption arises that Lala Narain Dass had revoked the will, copy whereof is Ex. P. W. 3/4.

11. On the first point reliance is placed upon S. 237, Succession Act, Section 237 reads:

When a will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced.

12. From a perusal of S. 237 it appears that a person who asks for a probate of a copy of the will must prove that the will has been lost or mislaid since the testator's death. Now, in the present case the factum and validity of the will made by Lala Narain Dass on 4th October 1934, was admitted by Roora Ram in his written statement and it was not disputed that the copy produced was a true copy of the will of Lala Narain Dass. That being so, the only question that arises for determination is whether this case falls within S. 237 of the Act.

13. Now, it is common ground that the will of Lala Narain Dass which he made on 4th October 1934, was in existence on 23rd October 1940, when the document Ex. R-1 is stated to have been made by the said Lala Narain Dass. Then the original will made on 24th October 1934, has not been recovered from the goods of Lala Narain Dass after his death and the circumstances under which Lala Narain Dass was found missing show that he did not die a natural death. The body of Lal Narain Dass was found from a deserted well in a neighbouring village on 31st October 1940 and the Chemical Examiner found a considerable amount of opium in the intestines of the deceased. Taking all the circumstances into consideration I think that the trial Court has rightly found that the will dated 4th October 1934, was being withheld by the respondent. On these facts the case falls within S. 237 of the Act.

14. Then, it is said that when a will is traced to the possession of the deceased and is not forthcoming on his death the presumption is that the testator has revoked the will by destroying the same. Under S. 70 of the Act there are four modes under which a will or a codicil may wholly or partially be revoked. They are: (1) by marriage; (2) by another will or codicil duly executed; (3) by writing declaring an intention to revoke and duly executed in the manner in which an unprivileged will is required to be executed under the Act; and (4) by the burning, tearing, or otherwise destroying the will or codicil by the testator, or by some other person in his presence and by his direction, with the intention of revoking the same.

15. Now, the case of Roora Ram respondent is that the will made by Lala Narain

Dass on 4th October 1934 was revoked by another will or codicil duly executed in the manner in which an unprivileged will is required to be executed. The other modes in which a will or codicil may wholly or partially be revoked are not relied upon by Roora Ram respondent. That being so, it is not open to Roora Ram respondent to say that Lala Narain Dass revoked the will by destroying that will before he died. Be that as it may, in my opinion the circumstances proved at the trial do not bring the case within the fourth mode by which a will or codicil may wholly or partially be revoked. Authority for this provision is to be found in *Padman v. Hanwanta*, 93 P. R. 1915: (A. I. R. 1915 P. C. 111). In that case it was said :

As regards the question of revocation, the Chief Court, after reviewing all the circumstances said as follows:

"We think that the more reasonable presumption in this case is that the will was mislaid and lost or else was stolen by one of the defendants after the death of Daula;"

and they held that in their opinion it was not revoked. Their Lordships think that it was perfectly within the competency of the learned Judges to come to that finding. Much stress has been laid on the view expressed by Baron Parke, in *Welch v. Philips*, 1 Moore P. C. 299 that when a will is traced to the possession of the deceased and is not forthcoming at his death the presumption is that he has destroyed it. In view of the habits and conditions of the people of India this rule of law, if it can be so called, must be applied with considerable caution.

16. Applying the test laid down in *Padman v. Hanwanta*, 93 P. R. 1915: (A. I. R. 1915 P. C. 111) to the facts of this case, I am clearly of the view that the will made by Narain Dass on 4th October 1934, was mislaid or stolen by Roora Ram respondent. For all these reasons I find that there is no force in the contention raised,

17. Indeed, the sole question that arises for determination in these proceedings is whether Lala Narain Dass has revoked the will that he made on 4th October 1934, by writing declaring an intention to revoke that will and duly executed in the manner in which an unprivileged will is required to be executed under the Act.

18. Now, Buta Ram is the scribe of Ex. R-1 and Hira Lal and Lachhman purport to have attested that document. In his evidence given at the trial Lachman Dass stated :

Narain Dass executed the will Ex. R-1, when I was passing by the shop of Hira Lal. I was called in. The will Ex. R-1 was complete. I was asked to attest it, I affixed my signature on it. The testator Narain Dass did not sign or thumb-mark the will in my presence. Hira Lal, Roora, Rupa and Boota Ram scribe were present at that time. I did not enquire from the testator whether I should sign the will or whether he had signed the will. This will was not read over at that time, Hira Lal did not sign this will in my presence.

19. Clearly Lachhman Dass P. W. 2 cannot be regarded to be an attesting witness of the will, R-1, within the meaning of S. 63 of Act XXXIX [39] of 1925. The relevant portion of S. 63 reads:

The will shall be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

20. Mr. Bahri concedes that the requirements of S. 63 (c) have not been satisfied in this case and that being so, Ex. R-1 cannot be regarded to be a writing declaring an intention to revoke the will and executed in the manner in which an unprivileged will is required to be executed under the Act. That being so, I have no hesitation in holding that Roora Ram respondent has failed to prove that the will, copy whereof is Ex. P. W. 3/4, was revoked by Narain Dass on 23rd October 1940.

21. Finding that Ex. P. W. 3/4 is a true copy of the last will and testament of Lala Narain Dass I affirm the order of the trial Court and dismiss the appeal with costs.