
(1909) 08 CAL CK 0063
In the Calcutta High Court

Sagar Chandra Mandal

APPELLANT

Vs

Dwarka Nath Mandal and Others

RESPONDENT

Date of Decision : 20-08-1909

Acts Referred:

Succession Act, 1925 — Section 3

Citation : 3 Ind. Cas. 380

Hon'ble Judges : Vincent, J; Mookerjee, J

Bench : Division Bench

Judgement

1. This appeal is directed against a decree of the District Judge of 24-Pargannahs, by which he has refused probate of a will alleged to have been executed by one Uttom Mandal on the 29th July 1901. The testator died on the 10th January 1907 and on the 23rd April following his nephew Sagar Chandra Mandal applied for probate as executor by implication. The Court below has refused probate on two grounds, namely, first, that the document propounded is not a testamentary instrument, and secondly, that although, the testator is proved to have put his mark on the first sheet and the attesting witnesses are shown to have signed the last sheet, as the intermediate sheets were not signed or initialled, there is no guarantee that the document is, as a whole, the genuine will of the testator. Both these grounds have been challenged before us in appeal and, in our opinion, successfully.

2. As to the true character of the instrument propounded by the appellant, we think there can be no reasonable doubt that it is a will. A will is defined in Section 3 of the Indian Succession Act as the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. Section 49 then provides that a will is liable to be revoked or altered by the maker of it, at any time when he is competent to dispose of his property by will. If, therefore, an instrument is on the face of it of a testamentary character, the mere circumstance that the testator calls it irrevocable, does not alter its quality, for, as Lord Coke said in Vynior's case (1610) 8 Coke 82 (a) : 77

Eng. Hep. 597. If I make my testament and last will irrevocable yet I may revoke it, for my act or my words cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable." The principal test to be applied is, whether the disposition made takes effect during the life-time of the executant of the deed or whether it takes effect after his decease. If it is really of the latter nature, it is ambulatory and revocable during his life. *Masterman v. Modery* 2 Haggard 235 In the goods of Morgan L.R. 1 P. and D. 214. Indeed the Court has sometimes admitted evidence, when the language of the paper is insufficient, with a view to ascertain whether it was the intention of the testator that the disposition should be dependent on his death *Robertson v. Smith* L.R. 2 P. and D. 43. Tested in the light of these principles, there can be no doubt that the instrument now before us is of a testamentary character. It is described as a will and states explicitly that as after the death of the testator, disputes might arise among his relations with regard to the properties left by him, he made the dispositions to be carried into effect after his demise. The terms and conditions are then; set out, paragraph by paragraph, and in each paragraph, the disposition is expressly stated to take effect after his demise. Against all this, reliance is placed on the sixth paragraph, in which the testator says that he would be at liberty to mortgage the properties and not to sell them absolutely. Such a restraint as this upon his own power of alienation during his life-time would be" obviously void. It does not indicate any intention to make the deed irrevocable. We" are satisfied that the instrument in question is a will. The view we take is supported by the decision in *Rammoni Dasi v. Ram Gopal Shaha* 12 C.W.N. 942 where, as here, the document was inoperative as an instrument of present" transfer of immovable properties. The cases; of *Musammatt Sita Koer v. Munshi Deo Natji Sahay* 8 C.W.N. 614 and *Chaitanya Gobinda Pujari Adhicari v. Dayal* 9 C.W.N. 1021 : 32 C. 1082 are clearly distinguishable, as the documents propounded in those" cases were in the nature of agreements or settlements. We must, consequently, hold that the first ground upon which probate has refused by the Court below cannot be maintained.

3. The second ground upon which the learned District Judge has refused probate is that each of the several sheets on which the will is written is not signed or initialled. It is well-settled, however, that one signature made with the intention of authenticating the whole instrument is sufficient, though the will be contained on several sheets of paper. (" *Iarmon on Wills*" 5th Edition. Vol. I p. 80 and *Redfield on Wills*, 4th Edition Vol. I p. 208). No doubt, as a precaution against possible substitution, each sheet may be initialled by the testator or the witnesses (*Ransenson Wills* page 351). Bat this is not essential, and it will generally be presumed that all the sheets were put together in the same order at the time of execution, as at the testator's death. The leading decision on this point is that of *Marsh v. Marsh* (1860) 1 Sw. & Tr. 528 : 6 Jurist N.S. 380 where Sir C. Cress well followed an elaborate judgment of Sir H. Tenner Fust in *Gregory v. Queen's Proctor* (1846) 4 Cas 620. It was ruled in these cases that when a will is found written on several sheets of paper one of which only is signed and

attested, prima, facie the presumption is that they were all in the room and formed part of the will at the time of execution. To the same effect are the decision in *Bond v. Seawell* (1765) 3 Burr 1775; *Winsor v. Pratt* (1821) 2 Br. 650 In the goods of *Gansden* (1862) 2 Sw Tr. 362 : 8 Jurist N.S. 180, *Cook v. Lambert* (1863) 3 Sw. Tr. 46 : 9 Jurist N.S. 258 32 L.J. Probate 93. Of course, the presumption is rebuttable and if there are suspicious circumstances the Court must act with great caution, In the goods of *West* (1863) 9 J N.S. 1158 : 32 L.J. Pro 182. But ordinarily the legal presumption would be applied *Rees v. Bees* (1873) L.R. 3 P. and D. 84 In the goods of *Horsford* (1874) L.R. 3 P. and D. 211.] It has further been held that in considering whether or not several sheets of paper constitute the will, declarations, made by the testator both before and after execution, are admissible to show that it was his intention to make dispositions in conformity with those found upon the several sheets of paper *Gould v. Lakes*(1880) L.R. 6 P. and D. 1. In the case before us, there is evidence to show that the testator intended to leave his whole property to his nephew *Sagar Chandra* which is precisely the effect of the will as it stands now. We farther find that the contents of the second sheet read continuously with those of the first which terminates with an unfinished sentence. Our attention was, however, invited to the circumstance that later sheets, inclusive of the last which contains the signature of the attesting witnesses, are in a different and probably written with a different pen from what had been used for the first two sheets. But this is not a ground for suspicion, because the evidence indicates that the writing of the will was begun-in the outer apartments of the residence of the testator and probably finished and certainly" attested in the shop in the neighbouring" market where the intending witnesses had gone to make their purchases. We further observe that in the Court below, no suggestion was made in the questions put to the witnesses that the will, if genuine, had been subsequently tampered with by the interpolation or substitution of sheets. The sole suggestion was that it had not been executed at all by the testator. That view has been completely negatived by the evidence. It was only in the course of argument in the Court below that the theory was started for the first time that sheets may have been interposed or substituted; for this no foundation had been laid in the evidence. The second ground upon which probate has been refused cannot consequently be supported.

4. The result, therefore, is that this appeal must be allowed, the decree of the Court below discharged, and probate directed to issue to the appellant who is entitled to his costs from the caveators, both here and. in the Court below. We assess the hearing fee in this Court at five gold mohurts.