

Moonga Devi and Others

Vs

Radha Ballabh

Civil Appeal No. 1235 of 1969

(G. K. Mitter, K. S. Hegde, A. N. Grover JJ )

18.04.1972

JUDGMENT

GROVER, J. -

1. This is an appeal by special leave from a judgment of the Allahabad High Court in a matter relating to probate of a will, dated May 10, 1960, alleged to have been executed by Chhangur Sahu, a resident of Varanasi City, who owned considerable movable and immovable properties.

2. Chhangur Sahu, who died on October 20, 1962, when he was over 87 years of age, had a wife and a daughter alive at the time when he executed a will. It appears that no previous will was executed by him. It was recited in that will that he had no son but his daughter Sumitra Devi had been married long ago. By this will Chhangur Sahu left a life interest to his wife in the properties. After death Radha Ballabh - respondent before us - who is stated to be a relation of the testator and who was appointed executor of the will was to get the properties covered by the will. It was provided that the executor was to look after the maintenance of Sundari Devi the sister of Radha Ballabh and also perform the marriage of her daughter. He made no bequests whatsoever in favour of his daughter Sumitra Devi. The will was attested by two witnesses, Ram Charan and Sankatha Prasad Singh, it was got registered and was entered in the registration book on May 12, 1960.

3. On September 30, 1965, Radha Ballabh respondent filed an application for the grant of probate of the aforesaid will in the Allahabad High Court. On January 9, 1966, a caveat was filed on behalf of the present appellants, namely, the widow of Chhangur Sahu and his daughter Sumitra Devi. An affidavit of Sumitra Devi was also filed along with the caveat. In the affidavit it was stated that Sumitra Devi along with her mother had been in possession of the properties of Chhangur Sahu since his death and that the will set up by Radha Ballabh was not a genuine document and did not confer any right or title on him. It was further claimed that Moonga Devi the widow of Chhangur Sahu was the sole heir and was entitled to claim all the properties. The caveat was filed through Shri V. P. Mishra, Advocate who had apparently been engaged by the mother and the daughter to represent their case. On January 17, 1966, an order was made by the High Court converting the probate proceedings into a suit which was fixed for January 31, 1966, for framing issues. On that date Shri V. P. Mishra made a statement that the deceased was in a sound mental condition in May, 1960, and hence the validity of the will was not being challenged on the ground that the deceased was not in a sound disposing mind. The order recorded by Mathur, J., on that date states inter alia :

".....

Considering that the deceased died about 2 1/2 years after the execution of the alleged will, there

can be no controversy in that the will, if, genuine, was executed at a time the deceased was in a sound disposing condition.

The point in controversy is whether the will was executed by the deceased, in other words, bears his signature and thumb-mark.

The following issue is framed :

Whether the will in dispute had been duly executed by the deceased Chhangur Sahu?

One month allowed to the parties to file documentary evidence with regard to admitted signatures and thumb-marks of the deceased.

If the parties desire the signatures and thumb-marks to be sent to an expert, they should make an application within the above periods."

4. On October 3, 1966, Shri V. P. Mishra made a statement that the due execution of the will in question was no longer challenged. On that very date the Statement of one of the attesting witness Sankatha Prasad Singh had been recorded. He was not cross-examined by Shri V. P. Mishra on behalf of his clients, namely, the present appellants. On October 4, 1966, a letter was sent by the clerk of Shri V. P. Mishra to one of the appellants. This was followed by another letter, dated October 8, 1966. These letters are reproduced below :

# Allahabad 4-10-66##

Shrimatiji

Yours to hand. We had intimated the date to you previously, but your letter shows that you are not yet in receipt of that letter by now : You might have got it now. The case was argued today on October 4, 1966. The Court has given an opportunity of three weeks to file certain papers. Therefore you come immediately on receipt of this letter along with the documents in respect of the property sold in Calcutta. You must reach on the 6th or the 7th.

# Allahabad 8-10-66##

Shanti Devi,

Your letter and the documents to hand. But your presence is necessary as many things are to be ascertained without which the case is likely to suffer seriously. As regards fees, you have still to pay a sum of Rupees 220 more. While coming do bring that as well. You should not delay in coming."

5. On February 22, 1967, the appellants filed a petition through another Advocate Shri Kashi Nath Gupta. It was stated therein that information had been received that their counsel (Shri V. P. Mishra) had admitted the execution of the will. No instructions had, however, been sent to him to do so and his action was highly prejudicial and damaging to the interest of the appellants. It was pointed out that from the very beginning the genuineness of the will had been challenged by the appellants on the ground that it was a forgery and at no time any instructions had been sent to Shri Mishra to admit the execution of the will or its validity or its genuineness. It was requested that 10 days might be granted for taking all necessary steps and further proceedings might be stayed. This was followed by another application, dated March 6, 1967, in which it was stated that no instructions had been

given to Shri Mishra to make any such statement or submission of the nature he had made and that his engagement should be deemed to have been determined. This petition was number as 58-A. Another petition was filed which was numbered as 59-A on the same date in which it was reiterated that the will had been challenged on the ground that it was not genuine and did not confer any right, title and interest on Radha Ballabh. It was also pointed out that Shri Mishra did not even cross-examine Sankatha Prasad Singh one of the attesting witnesses when he was examined on October 3, 1966. It was further mentioned that on inquiry from Shri Mishra it was found that some time in the month of September, 1966, a person who gave his name as Radhey Shyam had represented that he was a nephew of appellant Moonga Devi and had instructed him not to challenge the execution of the will as the thumb-impression appeared to be genuine. According to Smt. Moonga Devi she had not sent any nephew or asked any other person to meet Shri V. P. Mishra and to give him instructions authorising him not to contest the matter at all. It was emphasised that the two ladies were illiterate and it would be in the interest of justice to afford them an opportunity to substantiate the defence and challenge the genuineness of the will by adducing evidence and by cross-examining the attesting witness whose statement had been recorded on October 3, 1966. Mathur, J., on March 8, 1967 recorded an order to the following effect :

"A party can be permitted to resile from an admission made by him or by his advocate only if the Court is satisfied that the admission was made under some misapprehension or on being unaware of full facts. Further, the probate Court has to be satisfied as to the genuineness of the will before a probate can be granted. Consequently from whatever aspect the matter is looked into, it shall be necessary to see the original documents and registers containing the admitted signature and thumb-marks of the testator. If it appears that the signatures or thumb-marks on the will are different to the admitted signatures and thumb-marks of the testator, it would be necessary to sent the papers to an expert for opinions but if the signatures and thumb-marks appear to be similar, the present applications can be dismissed.

In other words, not only for the disposal of the applications 58-A and 59-A but also for the final disposal of the petition for probate, it is necessary to grant an opportunity to the parties to produce before the Court or to take steps for the production of original documents bearing undisputed signatures and thumb-marks of the testator.

April 10, 1967 is fixed for the disposal of the application and also of the main case. Parties should produce in Court, at least a week earlier, all documents in their possession or power which they would like the Court to see before taking a final decision; but if the documents are not in their possession or power, steps must be taken beforehand to ensure that the originals are before the Court on the date fixed. No further time shall be granted unless it appears that the party was not guilty of negligence and the delay was beyond their control. The case may be treated as tied unto me."

6. On April 11, 1967, the case was adjourned to July 10, 1967. It was specifically mentioned that the adjournment was being made on the request of the advocate for Moonga Devi on payment of Rupees 100 as costs. On July 10, 1967, the learned Judge made the following order :

"The signatures of Chhangur Sahu on the disputed will tally with the signatures on the partition deed and the gift deed. There can, therefore, be no doubt in that the will had been signed and executed by Chhangur Sahu. In the circumstances Smt. Moonga Devi and Smt. Sumitra Devi cannot be permitted to resile from the statement made by the Advocate. The applications 58-A and 59-A are hereby dismissed."

7. By an order, dated July 10, 1967, the application of Radha Ballabh for grant of probate was allowed. It was directed that the other application which had been moved should be consigned. This order was a brief order in which after stating what has already been reproduced earlier it was observed that the statement of the Advocate was not based upon incorrect facts. As it had been made on instructions received by him the parties were bound by it. In addition there was the uncontradicted statement on oath of Sankatha Prasad Singh regarding due execution of the deed of will. The learned Judge proceeded to say that he had examined the will and had satisfied himself as to its genuineness. The appellants filed an appeal to the Division Bench of the High Court which was dismissed summarily.

8. Mr. M. C. Chagla who appears for the appellants has characterised the proceedings in this case as most unusual and illegal. It has been pointed out by him that before Shri V. P. Mishra who had been appointed as Advocate right from the beginning when the caveat had been filed on January 9, 1966 made a statement that the execution of the will was no longer being challenged, he had neither been sent nor had he received any instructions from the appellants to make any such admission. He did not even cross-examine the attesting witness although an issue had been framed on the point. The letters which were written by his clerk immediately after the proceedings of October 3, 1966 did not contain one word about any such concession having been made in accordance with any alleged instructions sent either by post or through some special messenger by the appellants. In none of the two letters was there the suggestion or indication that any such instructions had been obtained by Shri V. P. Mishra from the appellants before he decided not to contest the grant of the probate. Even after this matter had been brought to the notice of the Court no attempt was made by the learned Judge of the High Court whatsoever as should normally have been done to enquire from Shri Mishra and put it on record of proceedings as to how and in what manner he had received the instructions to concede the question of the execution of the will which had been contested right from the time caveat was filed on January 9, 1966. Indeed, according to Mr. Chagla, Shri Mishra had made two admissions. The first was on January 31, 1966, when he stated that the validity of the will was not being challenged on the ground that the deceased was not in a sound disposing mind. Thereupon the issue was framed whether the will had been duly executed. The second admission or concession was made on October 3, 1966 when Shri Mishra did not even cross-examine the only attesting witness who had been produced. Mr. Chagla maintains that it was the bounden duty of the Court, particularly, when the appellants were illiterate ladies and it had been so pointed out in their petition made to the Court, to have taken good deal of care in the matter and not to have treated to whole case causally by disposing of it by merely making a comparison of the signatures himself which again was a course which was not legally permissible particularly in view of the circumstances of the present case.

9. We find a lot of substance in the submissions of Mr. Chagla. We are wholly unable to comprehend how a matter of granting of probate could be disposed of in the manner in which it was done by the High Court. A narration of facts given in the earlier part of the judgment which has not been disputed on behalf of respondent Radha Ballabh fully establishes that this case has some very abnormal features. Here was an Advocate who had himself filed a caveat on behalf of the appellants in which the question of execution and genuineness of the will had been seriously challenged. In his presence an issue had been framed with regard to that matter. The execution of the will had to be proved in accordance with the provisions of Section 63 of the Indian Succession Act, 1925. The letters which had been written by Shri Mishra's clerk contained no mention whatsoever of any instructions having been received from the appellants or of any statement having been made on the previous day conceding the execution of the will in accordance with those instructions. In these circumstances the only and the proper course which the High Court ought to have followed was

either to ascertain from Shri Mishra about the exact circumstances in which he made that statement on October 3, 1966, and also refrained from cross-examining the attesting witness. In the absence of any satisfactory explanation by him the appellants should have been given a full opportunity to contest the grant of the probate and to cross-examine the sole attesting witness after recalling him. We are completely at a loss to understand how the learned Judge by mere comparison of the signatures on the will of the testator with his admitted signatures could decide the matter.

10. It appears that according to the learned Judge the appellants could not be permitted to resile from the statement made by the Advocate because he was satisfied that the disputed signatures tallied with the admitted signatures. The first question to be determined was whether the admission had been made by the Advocate on any instructions given by the appellants. No attempt, however, was made to ascertain the true position in that direction which was indeed very unfortunate and regrettable. It is not merely the genuineness of signatures on which the proof of the execution of the will under Section 63 of the Indian Succession Act depends. It has to be proved that the will was attested in accordance with clause (c) of that section. That could not be done unless the statement of the attesting witness could be taken into consideration. In our judgment it could not be treated as evidence in the circumstances of the present case. It is abundantly clear that the manner in which the proceedings were conducted resulting in the grant of probate was such that there has been a gross miscarriage of justice. Learned counsel for the respondent Radha Ballabh has invited our attention to certain observations made in order of the High Court, dated November 12, 1968, by which the petition for grant of certificate to appeal to this court was rejected. It has been observed in that order and that matter was mentioned in the order of Mathur, J., dated July 10, 1967, that the caveat was signed only Sumitra Devi who had also filed her affidavit in respect thereof on January 9, 1966. Even if the signatures were of Sumitra Devi the application for the caveat was on behalf of the mother and the daughter and it was wholly immaterial if Moonga Devi had not signed it. It was clearly stated in the affidavit of Sumitra Devi in Para 5 that Moonga Devi was entitled to all the properties of Chhangur Sahu as his sole heir. It has also been emphasised in the above order that the application filed on behalf of the present appellants on February 22, 1957, was belated and that counsel Shri Kashi Nath Gupta through whom that application had been filed had made a statement that the said application had become infructuous, in view of the order passed by Mathur, J., on March 8, 1967. Reference was made to the statement of the attesting witness and the comparison made by Mathur, J., of the signatures. We find it very difficult to comprehend how these matters stated in the order disposing of the application for grant of a certificate can be of any avail or assistance. It was not the function of the court at that stage to re-examine the question on merits. At any rate, these facts were of no material consequence so far as the case of the appellants on the points considered by us was concerned.

11. The appeal is hereby allowed and the order of the High Court is set aside. The proceedings for grant of probate shall start afresh from the stage when the issue was framed and the application for probate shall be disposed of in accordance with law. The appellants shall be entitled to costs in this court as also in the High Court. In the interest of judicial propriety it will be highly desirable if this matter is not heard and disposed of by any learned judge who has already expressed his opinion in the case.

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