PATNA HIGH COURT

Ram Nath Das

Vs

Ram Nagina Choubey

A.F.O.D. No. 630 of 1956

(Kanhaiya Singh and Ramratna Singh, JJ.)

18.08.1961

JUDGMENT

Kanhaiya Singh, J.

1. This is an appeal from the judgment and order of the Additional District Judge, Arrah, dated 25th July, 1956, refusing to grant a probate of the Will of Mahanth Banwari Das. The propounder of the Will is Ram Nath Das, who claims to be the Chela of the testator. The Will is a registered instrument and was executed on 3rd July, 1940. Mahanth Banwari Das, the testator, died six years after the execution of the Will on 17th July, 1946. The present application for probate was filed on 30th November, 1953. The case of the propounder is that the Will in question was the last Will and testament of Mahanth Banwari Das, that it was duly executed by him and attested by other witnesses, that he had been appointed executor under the Will and that by this Will Mahanth Banwari Das appointed him his successor and also directed that on his death he would enter into possession of the entire properties and assets of the Kutias.

2. Ram Nagina Choubey, Ram Bhawan Das and Raj Kumar Das preferred objections to the grant of the probate. Ram Nagina Choubey claimed to be the successor of the late Mahanth. The other two objectors, Ram Bhawan Das and Raj Kumar Das, claimed to be the Mahanths, respectively, of Sikrahata Math and Dhangawan Math. Their common objection is that the Will propounded by the applicant was a forged and fabricated document and was not executed by the late Mahanth Banwari Das. They further pleaded that at the time of the execution of the Will Mahanth Banawari Das was not in full possession of his mental faculties and was not in sound disposing mind and, therefore, it cannot be said to be a voluntary act of the testator. Their another objection was that the properties demised by the Will are the properties belonging to the deities and did not constitute personal properties of the late Mahanth, and, therefore, he had no power to dispose of the properties of the deities by Will or otherwise. The special plea entered by Ram Bhawan Das and Raj Kumar Das is that the Maths of which they are the Mahanths are separate, and the properties attaching to those Maths did not belong to the late Mahanth and did not appertain to the Mathia of which he was the Mahanth.

3. The learned Additional District Judge held that the Will was not genuine and was not executed

by the late Mahanth Banwari Das and that the entire transaction was pregnant with grave suspicion. He further held that the Will propounded by the applicant was not the last Will of the late Mahanth. He also expressed the view that the properties covered by the Will belonged to the deities and Banwari Das was merely the manager or shebait and, therefore, was not competent to transfer those properties by Will. He further held that the alleged Will, even if it be genuine, was, in the eye of law, not a Will and could not be admitted to probate, because by this; Will the properties were in fact not disposed of but only a successor was appointed. He accordingly dismissed the application and refused to grant probate of the Will. Now, the applicant has come up in appeal.

4. Learned counsel for the appellant contended that the finding of the learned Additional District Judge that the Will was not genuine was against the weight of evidence on the record and showed lack of appreciation of the evidence by him. He took us through the evidence, and having heard the learned Advocates and considered the evidence carefully, I think, this contention is substantial and must be accepted as correct.

5. Four witnesses were called by the applicant to prove the execution and attestation of the Will (exhibit 5), namely, Tilak Dhari Rai (P.W.1). Rafique Khan (P.W.3), Pradumna Upadhya (P.W.4) and the applicant, Mahanth Ram Nath Das (P.W.6). P.W.3 is the scribe of the Will and P.Ws.1 and 4 are two of the attesting witnesses. Their evidence establishes beyond doubt that P.W.3 scribed the Will, and after it was written out, the contents were read over and explained to Mahanth Banwari Das, who put his pen-mark in token of his having executed the document, and thereafter the other witnesses attested the execution. There is absolutely nothing in the evidence to discredit their testimony. As a matter of fact, the objectors failed to elicit anything from the cross-examination which may be said to disprove the voluntary execution of the Will by Mahanth Banwari Das. In other words, there is nothing in the cross-examination to show that the Will was not scribed by P.W.3 and was not executed by Banwari Das and was not attested by the witnesses who purport to have attested it.
There is no reason why all these persons will combine to tell falsely against the objectors. As against this, there is total lack of evidence on behalf of the objectors to establish that the Will was not executed by the late Mahanth or that it was a forged and fabricated document. The only thing urged on their behalf is that at the time of the execution of the Will Mahanth Banwari Das was 90 years old. The inference sought to be drawn from his age is that he was of fickle mind and incapable of understanding the implication of his own act. Mere old age does not lead to such an inference. There is no medical evidence to show that in fact Banwari Das had no capacity to understand the effect of his own action at the time when the Will was executed by him. Therefore, the general statement of these witnesses about the late Mahanth's lack of proper mental capacity cannot be accepted. It is fruitless to examine in detail the evidence in this case, because the evidence absolutely falls short of establishing fraud in execution of the Will. Another suspicious circumstance that was pointed out by the learned counsel for the respondents is that Mahanth Banwari Das did not append his thumb-mark to the Will. This is true; but by itself this circumstance is not sufficient to out-weigh the evidence of the other witnesses, whose testimony, as discussed above, is aboveboard. Further, the affixing of thumb-mark to the document is not a necessary legal requirement of execution. A document may be executed also by putting penmark thereon, and, therefore, the law about the execution of the document has been fully satisfied. Learned counsel for the appellant, however, drew my attention to the fact that the thumb-mark of Mahanth Banwari Das occurs on the back of the first page of the document called Will. This

thumb-mark was given by Mahanth Banwari Das before the registering officer. A sale deed (exhibit 6) has been filed to establish the identity of the thumb-mark on the Will. The Finger Print Expert (P.W.2) has given his opinion that these two thumb-marks tally. The existence of thumb-mark on the back of the Will is not an evidence of execution of the Will, but this, however, supports the evidence of execution adduced by the applicant. The learned Additional District Judge has not given any cogent reason for discarding this evidence. In face of this evidence, which I find it difficult to discard, I do not agree with the conclusion of the learned Judge that the Will is suspicious and spurious. Having considered the evidence carefully, I hold that the document (exhibit 5) said to be a Will was duly executed by Mahanth Banwari Das and is a genuine document.

6. Learned counsel for the objectors, however, contended that even assuming that it was a genuine document, it did not operate as a Will. Before I examine this important argument, I would dispose of another contention, namely, that the Will propounded by the applicant was not the last Will and testament of Mahanth Banwari Das. This contention is based upon the evidence of P.W.6. He has deposed that on the day the Will (exhibit 5) was executed, Mahanth Banwari Das had executed another Will in favour of Deonarain Das, his full brother. It is, however, not certain which Will was executed first. This statement, by itself, is not sufficient to show that the disputed Will was not the last will of Mahanth Banwari Das. The evidence of P.W.6 read as a whole leaves no room for doubt that this was his last Will and testament. He has stated in examination-in-chief and it was not challenged in cross-examination, that the disputed Will was the last will and testament executed by Mahanth Banwari Das. Therefore, this contention is wholly without any merit.

7. Adverting to the main contention that the document in question was not strictly a Will, but an instrument purporting to appoint only a successor, it will be necessary to examine the contents of the Will. Its relevant portion is as under:

> "Therefore, I, the executant, in a sound state of mind, in enjoyment of my proper senses, on fully understanding all the matters in good faith and for the benefit of the Kutias on taking advice from my well-wishers and legal advisers, independently, without pressure and coercion, without any inducement and persuasion on the part of others, execute this Will as per stipulations given below. So long as I, the executant, am alive, I shall remain in possession and appropriation of all the articles and property and the Kutias as usual. After the death of me, the executant, Ram Nath Das, the disciple of me, the executant, will be the Mahanth of the aforesaid Kutias in my place. He will enter into possession of the entire property and assets of the Kutias in place of me, the executant. He will manage the affairs in the same manner as they are done during the time of me, the executant, and he will improve the property and the Kutias so that Puja Path, Rag Bhog of Shri Ramjee and all other gods, and the Sadhus and Mahatmas may continue nicely. Whatever rights I, the executant, have, will pass on to Ram Nath Das. He will get his name registered wherever necessary, in place of the name of me, the executant. I, the executant, appoint Ram Nath Das aforesaid as executor."

The language of the Will is quite explicit and unambiguous. The operative portion of the Will

reproduced above manifestly shows that there is no disposition of the properties of the Math by this document. All that Mahanth Banwari Das purports to do by this document is to provide for his successor and thus he has laid down therein that after his death, Ram Nath Das, his disciple (the applicant), would be the Mahanth of the Kutias mentioned therein in his place. It is further evident, and it is not disputed by learned counsel for the appellant, that the properties of the Kutias are not dealt with by this document. There is no disposition of the properties of the Math. It is true that there is a direction that Ram Nath Das will enter into possession of the properties and the assets of the Kutias in his place and will manage the affairs in the same manner as were done in the lifetime of Mahanth Banwari Das. He has further laid down that whatever rights he had would pass on to Ram Nath Das. This is not, strictly speaking, a disposition of the properties. It is nothing but an adumbration of what would legally follow on the applicant's assuming the Mahanthship of the Kutias. As a Mahanth he will have to manage the properties, and for this he will have to obtain possession thereof. The direction about possession and management of the properties, therefore, is not a disposition, but a statement of the necessary consequence of his appointment as a Mahanth. It is plain, therefore, that there was no disposition of the properties of the Math, and what Mahanth Banwari Das purported to do by the execution of this document was to appoint his successor. The important question, therefore, is whether a document, by' which properties are not disposed of but only a successor to a certain office is appointed, can be regarded as a Will. There are two Bench decisions of the Calcutta High Court directly bearing upon this question. In *Chaitanya Gobinda v. Dayal Gobinda*[1], their Lordships observed as follows:-

> "The word 'will' has been defined in the Probate and Administration Act. It means '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'. Now, upon the statement of the declarant himself, the alleged testator in the document in question, it is not his property, but the property of the thakurs. But, however that may be, it is quite clear that all that he does or purports to do by the document in question is to appoint the petitioner as a shebait or manager for the purpose of carrying out the sheba, puja and other rites and ceremonies appertaining to the akhra, of which he was the head. There was no testamentary disposition of the properties belonging to the akhra, and indeed he could not make any such disposition. If it was simply an appointment of a manager made by the late Mohunt, it is obvious that there was no disposition of any property. We think that the Court below is right in the view that it has expressed, and that probate of a document like this cannot be applied for under the Probate and Administration Act."

This decision was followed in a later case in *Jagadindra v. Madhusudan*[2],
It has been laid down in this case that where a Mahanth by a document purported to appoint his successor on the gaddi, and to make over to him as Mahanth all the properties of the Asthal and the right of performing the Debsheba and did not purport to deal with any property of his own, the document was not a Will and could not be admitted to probate. There are two decisions of the Privy Council, which though not strictly in point, lend sufficient assistance in determining this question. In J*agannath v. Kunja Behari*[3], a Hindu executed an unregistered document calling it a Will in favour of his wife to the effect:

> "I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner." On an interpretation of this document, their Lordships have held that the document is not a Will, but only a power to adopt, and as such ought to have been registered under section 17 of the Indian Registration Act, 1877. Their Lordships observed that standing by itself the document is nothing more than a present authority to the wife to make an adoption, and there is nothing else of substance in the document. It failed as a Will because it did not deal with any property.

In the other case, namely, *Vijayaratnam v. Sudarsana Rao*[4], their Lordships of the Judicial Committee were considering a document which purported to be a disposition of the property of the executant and at the same time conferred a power of adoption on his widow. The executant was a minor, and, therefore, it was plain that the document which purported to be a Will could have no legal effect as such. The question arose whether the document could operate as an authority to adopt. Their Lordships held that a document which purported to be a Will but was inoperative as such might nevertheless constitute a valid authority to adopt. This case is an authority for the proposition that where a document does not purport to be a disposition of property cannot operate as a Will. A similar view has been expressed in the cases of *Umacharan Bose v. Rakhal Das Ray*[5], and *Puran Lalji v. Ras Behari Lal*[6], As against this, learned counsel for the appellant referred to the decisions in *Mancharam v. Pranshankar*[7], *Chandranath Chakrabarti v. Jadabendra Chakrabarti*[8], *Ram Charan Ramanuj Das v. Gobinda Ramanuj Das*[9], and *Iswardeo Narain Singh v. Kamta Devi*[10], In none of these cases the question we are confronted with was pointedly raised and answered. Learned counsel laid great stress upon the observations of their Lordships of the Supreme Court in the case of Ishwardeo Narain Singh, AIR 1954 SC 280 referred to above that the Court of Probate is only concerned with the question as to whether the document put forward as the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind and that the question whether a particular bequest is good or bad is not within the purview of the Probate Court. These observations do not support the proposition of law enunciated by the learned counsel namely, that a document purporting to appoint a successor, though not purporting to dispose of a property, may constitute a Will. Where there is a Will on the face of the document, the Probate Court certainly will not proceed to consider whether or not the disposition of the property was good or bad. But the Probate Court cannot act like an automaton and grant probate in respect of any document whether the document constituted a Will or not. The primary duty of the Probate Court is to see first whether prima facie the document constituted a Will. "Will", as defined by section 2 (h) of the Indian Succession Act, 1925, means the legal declaration of the intention of a testator 'with respect to his property' which he desires to be carried into effect after his death. (Underlined (here in single quotation marks' -Ed) by me). "Codicil", as defined by section 2 (b), means an instrument made in relation to a Will, and explaining, altering or adding to its disposition and shall be deemed to form part of the Will. It is manifest, therefore, that unless a document satisfies this definition it cannot constitute a Will in the eye of law. The condition which must be satisfied before a document can be called a Will is that there must be some disposition of property. The document must contain a declaration of the intention of the testator not with respect to anything, but with respect to his property. If there is a declaration of intention with respect to his successor, it cannot constitute a Will, as defined by the Indian Succession Act. When, therefore, a document though called a Will, does not deal with any property, it will not be given effect to as a Will, although it may operate to effectuate any other

purpose provided therein. In the instant case, the document did not contain any legal declaration of the intention of Mahanth Banwari Das with respect to any property, and there was no disposition of any of the assets of the deceased testator or the deities. Therefore, having regard to the authorities quoted above, and more particularly to the definition of the Will, it cannot constitute a Will, strictly speaking. The learned Additional District Judge, therefore, was right in his conclusion that the document was not a Will, and, therefore, it could not be admitted to probate. On this ground, his decision must be upheld.

8. In the result, this appeal is dismissed with costs.

Ramratna Singh, J.

9. I agree,

Appeal dismissed.

Cases Referred.

[1] ILR 32 Cal 1082
[2] 20 Cal LJ 307
[3] AIR 1922 PC 162
[4] AIR 1925 PC 196
[5] AIR 1927 Cal 756
[6] AIR 1922 All 285
[7] ILR 6 Bom 298
[8] ILR 28 All 689
[9] 56 Ind App 104
[10] AIR 1954 SC 280