(1949) 09 AHC CK 0010

Allahabad High Court (Lucknow Bench)

Case No: Misc. Appeal No. 21 of 1947

Mt. Raj Rani		APPELLANT
	Vs	
Rajaram		RESPONDENT

Date of Decision: Sept. 8, 1949

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100, 101
- Oudh Courts Act, 1925 - Section 38, 39
- Succession Act, 1925 - Section 295, 59

Citation: AIR 1950 All 202

Hon'ble Judges: Chandiramani, J

Bench: Single Bench

Advocate: S.C. Das, for the Appellant; Sri Ram and Tirbhawan Nath, for the Respondent

Final Decision: Dismissed

Judgement

Chandiramani, J.
This is the plaintiff''s appeal against the appellate decree of Mr. Akbar Husain, District Judge, Lucknow, dated 27th November 1946.

2. The plaintiff, Mst. Raj Rani applied on 22nd August 1946, before the District Judge, Luck now, for the grant of letters of administration on the basis of a will dated 7th March 1945, executed by Jamna Prasad deceased. She alleged that the will had been executed on 7th March 1945, that the testator, Jamna Prasad died the same day, that she was the sole legatee under the will and that the deceased testator had a fixed abode at Sarojni Devi Lane Katra, Maqboolganj in the city of Lucknow. The proceedings were transferred to the Court of Civil Judge, Lucknow, for disposal, on 25th August 1945. On notices being issued, the present defendant respondent objected to the grant of the letters of administration and claimed that there was no will, that in any case the will was not duly executed as the testator was not of sound disposing mind and that he himself was the sole heir of the deceased being his

daughter''s son. The following issues were accordingly framed:

(1) Is the will dated 7th March 1945, genuine and valid as alleged by the plaintiff ?

(2) Had Jamna Prasad a sound disposing mind at the time of making the will ?

(3) Is the defendant a daughter''s son of the deceased Jamna Prasad ?

(4) To what relief is the plaintiff entitled ?

3. Before the trial Court the original, will Ex. 2 was produced and the scribe of the will Kunwar Bahadur and the attesting witnesses, Ram Gopal and Mata Din were examined. On the aide of the defendant evidence was led to prove that the defendant was the daughter''s son of the deceased Jamna prasad and also that on 7th March 1945, when the will is alleged to have been executed, the testator was actually unconscious and therefore incapable of making the will. A medical practitioner was also examined who stated that a person lying ill for over one year and dying within 5 hours of making the will would not be having sound mind if at the time of the execution of the will 5 hours before his death, the pupils of his eyes were contracted. The same witness also stated:

"If anyone has his pupils of the eyes drawn up the white part extended it shows that his mind has become useless; such a contraction comes before death. His mind is not correct or sound."

The learned trial Court after considering the evidence held that the will Ex. 2 was executed by the testator after fully understanding the contents thereof, that although he was ill, he wag not incapable of making a will, and that the will was duly executed. Letters of administration were accordingly ordered to be granted.

4. The defendant went up in appeal and the only point seriously urged was that from the evidence on the record it is clear that the testator was not possessed of sound disposing mind at the time of the execution of the will. The appeal was filed before the learned District Judge. He observed:

"It is admitted that the will was executed within about 5 hours of the alleged testator''s death. It is also admitted by Mata Din one of the petitioner''s witnesses that at the time when Jamna Prasad the testator signed the will his pupils were dilated and the white of his eyes was In the middle, which means that he was unconscious. Nanhey D. W. 2 stated that Jamna Prasad wag unconscious when he went to see him the day before."

On these grounds and also on the ground that in the will it has been wrongly stated by the testator that he had no child or grandchild, when in fact the defendant wag his own daughter''s son, he held that Jamna Prasad, the testator, could not have been of sound disposing mind when his signature on the will was alleged to have been made, and that he was at that time incapable of making any disposition of his property by a will. The application for letters of administration was accordingly

dismissed.

5. The plaintiff has now come up in appeal and the appeal purports to have been made u/s 299, Succession Act. A preliminary objection has been taken by the defendant respondent that no appeal lies. It is correct to say that no appeal lies under the provisions of the Succession Act, but as a matter of fact, an appeal lies under the provisions of the Oudh Courts Act. u/s 299, Succession Act, every order made by a District Judge by virtue of the powers conferred by that Act shall be subject to appeal to the High Court in accordance with the provisions of the CPC applicable to appeals. Under the Succession Acts no power of hearing appeals has been conferred on the District Judge so that obviously the present appeal is not covered by the provisions of Section 299, Succession Act. Now it appears that u/s 31, Oudh Courts Act, 1925, the Chief Court was empowered to authorise any Civil Judge by a general or special order to take cognizance of; or any District Judge to transfer to a Civil Judge under his control, proceedings under the Succession Act, 1865, and the Probate and Administration Act, 1881, which cannot be disposed of by District Delegates. The proceedings in the present case were of a contentious nature and could not under the provisions of the Indian Succession Act be disposed of by the District Delegates but could be disposed of by the District Judge. Sub-section (4) of Section 31 also provides that proceedings transferred to a Civil Judge shall be disposed of by him subject to the rules applicable to like proceedings when disposed of by the District Judge. u/s 295, Succession Act, it is directed that in any case before the District Judge in which there is contention, the proceedings shall take as nearly as may be the form of a regular suit, according to the provisions of the CPC 1908, in which the petitioner for probate, or letters of administration, as the case may be, shall be the plaintiff and the person who has appeared to oppose the grant shall be the defendant. Thus it is clear that the contentious proceedings before the Civil Judge, Lucknow, became a suit. The order passed by the Civil Judge in the present case therefore amounted to a decree. u/s 39, Oudh Courts Act, it is laid down that save as otherwise provided by any enactment for the time being in force an appeal from a decree of the Civil Judge shall lie to the District Judge where the value of the original suit in which or in any proceedings arising out of which, the decree or order was made did not exceed Rs. 6,000/-. According to the plaint itself the value of the assets likely to come to the plaintiff was Rs. 1,000/-. It has also not been shown that there is any enactment which prevents an appeal in such a case being filed in the Court of the District Judge. Clearly, therefore, an appeal lay to the District Judge from the decree of the Civil Judge. Section 38, Oudh Courts Act, also provides that save as otherwise provided by any enactment for the time being in force an appeal from a decree or order of a District Judge shall lie to the Chief Court. The order passed by the District Judge was clearly a decree in this case and therefore under s. 38, Oudh Courts Act, a second appeal did lie to the Chief Court in the absence of any enactment to the contrary. No such enactment has been shown. An appeal, therefore, does He. The preliminary objection of the defendant is

therefore rejected.

6. Upon merits it has been urged that the learned lower Court was influenced by an irrelevant consideration, namely, that the pupils of the eyes of the deceased were dilated and the white of the eyes was in the middle and that the inference of unconsciousness drawn from the dilation of the pupils is not admissible according to law, that the lower appellate Court misconceived the issue to be decided in the case, that the evidence in the case did not justify the Court below to infer that the deceased was unconsious and that the Court below failed to consider the evidence of the attesting witnesses and the scribe of the will and failed to give any reason why their evidence, which was believed by the trial Court should be disbelieved. Now it is clear that the question whether at the time of the execution of the will the deceased was of sound disposing mind is purely a question of fact. The learned counsel for the appellant has sought to show that the finding of the lower Court was vitiated by its not taking into consideration the evidence on the record and that it has also misread some of the evidence. This contention appears to be correct. While giving his reasons for coming to the conclusion that the testator was not of sound disposing mind, the learned Judge has not made any mention whatever as to the nature of the evidence given by the scribe and the attesting witnesses. The learned Judge has also wrongly stated that Nanhey, D. W. 2, saw the testator one day before his death and found him unconscious, Nanhey''s testimony in fact was that he had found the testator unconscious on the very day of his death. In the circumstances it has been necessary for this Court to hear the parties on the question of fact, and having heard them I have not the least hesitation in agreeing with the learned lower appellate Court that the testator at the time of the execution of the will was not of sound disposing mind. To prove the will the plaintiff examined Kunwar Bahadur, the scribe of the will and also the attesting witnesses, Rails Gopal and Mata Din. The scribe says that her was called to the house of the testator on 7th? March 1945 in the morning, that the testator himself asked him to write out a will and gave him instructions and he prepared a draft. He read out this draft to the testator and after it had been approved, he (the scribe) faired it out and then it was signed by Jamna Prasad, the testator, in his presence and in the presence of the attesting witnesses and the attesting witnesses also-signed in his presence. In cross-examinations he stated:

"First Jamna Prasad signed under "Alabad" and he was writing parentage etc. his band shook and it was not legible so I asked him to sign him again and he did so. His band shook and so I asked him to make another signature and he signed a third time. I was satisfied but for further precaution I asked him to put down his thumb mark. Thumb mark is also taken apart from the signature and I did it."

He also stated that the signature was taken while the testator was sitting. Ram Gopal, P. W. 2, one of the attesting witnesses also stated that the will was read out to the testator and then the testator signed it in his presence and that the testator

signed twice because the first signature was not legible as the testator''s hand shook. He also states that a thumb impression was taken. He states that Kunwar Bahadur, the scribe asked the testator whether there was any one else entitled to the property as heir and Jamna Prasad said that there was none. This witness admits that he is indebted to Gobind Prasad husband of the plaintiff, to the extent of Rs. 200/-. This witness also stated that the testator at the time when the will was written was ill but not so ill as to be incapable of action or speech and that he did not think that the testator would die the same day. Mata Din the remaining attesting witness also stated that the will was read over to the testator and then he signed twice, that he, the witness signed in the presence of the testator. He stated in cross-examination that the testator was very ill on that day and could not sit up and Jamna Prasad was so ill that his hand was shaking when he signed the deed and so all the people said that his thumb mark be taken and this was done. He stated that the testator died the same day about 6 hours after the execution of the will and

"he could see with his eyes, pupils of his eyes were distended and the white of the eye was in the middle. People used to talk to him louder When he was questioned he answered by "Han Hun" and did not speak words as we do. I asked him if he had given his property to Raj Rani by the deed and he said "han". He lay on the bed but his eyes were open; he signed it in a sitting position. He was lifted with the help of Gobind Prasad and seated."

He also stated that Jamna Prasad had been ill since one or one and a half years and he had piles and other diseases. Now from the evidence of tee plaintiff''s witnesses it is established that he had been suffering from piles and other diseases, that at the time of the execution of the will be had to be lifted and seated on the bed and that he could not speak and the only answers he could give were "han hun". From the evidence of Ram Gopal it is also clear that the testator, Jama Prasad had been sent to hospital but be had returned from there without being cared and he died of the same illness but he says that he does not know what the illness was.

7. NOW if we look at the signatures on the original will Ex. 2, it appears that the testator had made his signatures three times. The first time the name ''Jamna Prasad'' in not written clearly and completely, the second time the name Jamna Prasad is written more legibly but the third time the signature is very illegible. The scribe himself says that the hand of the testator was shaking and each signature was worse than the previous one. The last signature was such that the words ''Jamna'' and ''Prasad'' have been combined together indicating as though he was not able to see and his strength was sinking very fast. This clearly indicates that the condition of the testator was very bad and he was sinking rapidly. We have the plaintiff''s own witnesses saying that the testator died within 5 hours. In the will it was stated that the deceased had no issue of his own nor there was any issue of his children. This statement has been falsified by the evidence produced by the defendant. The defendant''s evidence shows that the defendant is the son of the

daughter of the testator. It is true that the testator at the time of his death was living with his own brother Gobind Prasad, whose wife Mt. Raj Rani, the plaintiff, is the legatee under the will but this fact cannot prove that the will is genuine. Even the fact that the testator''s two brothers have not objected to the will, will not prove that the will is genuine. The learned lower appellate Court has stated that according to Mata Din, plaintiff''s witness, the pupils of the eyes of the testator were dilated and the white of his eyes was in the middle. The inference which the lower Court draws from this is this that the testator was unconscious. Dr. Asad Ali, D. W. 3, has stated:

"A man who is ill from a year and 5 hours before his death his pupils get contracted, then I conclude that his mind is not in a sound condition,"

This evidence on behalf of the defendant does not therefore support the conclusion drawn by the learned Judge. On behalf of the defendant, one Nanhey, D. W. 2, was produced. He stated that he was a neighbour and was sent for to attest the will but when he found the testator unconscious, he refused and that the testator died the same day. The learned trial Court did not believe this witness because he did not question Jamna Prasad and merely by seeing him concluded that the testator was not in his senses. What the witness said was that he did not ask Jamna Prasad any question because he saw that he was not capable of speaking and so be did not question him. I do not see how all this evidence of Nanhey could be disbelieved. The will itself shows that a place was reserved for attestation by a third witness. Nanhey says that be was that witness. The scribe, Kunwar Bahadur, says that he does not remember if Nanhey was the third witness or actually the person who refused to sign. In the circumstances I see no reason why Nanhey''s version should not be believed.

8. The protracted illness of the testator, his being very ill on the day of the alleged execution of the will, the progressive deterioration in his signatures on the will itself, his great weakness as evidenced by the fact that he had to be lifted up by others and seated on his bed, his inability to speak and the fact that he died within 5 hours of the alleged execution of the will and the statement of Nanhey, D. W. 2 that he refused to attest the will as the testator was unconscious, leave no room for doubt in my mind that at the time of the alleged execution of the will the testator was in fact incapable of understanding the nature of his act and was not in a sound disposing mind The will could not in the circumstances be held to have been duly executed.

9. The appeal fails and is hereby dismissed with costs.