Baisnav Charan Dass Bairagi Vs Kishore Dass Mohanta

Court: Calcutta High Court

Date of Decision: June 14, 1911

Final Decision: Dismissed

Judgement

1. These are two appeals arising out of cross-applications for probate of the alleged Wills of one Gopi Das Bairagi who died on the 23rd Falgoon,

that is, 7th March 1907. The Will propounded by Kishore Das Mohunt is said to have been prepared between 7 and 8 in the morning of the 6th

March and has been proved to the satisfaction of the learned Judge in the Court below by several witnesses. The objector, Baisnav Charan Das

Bairagi, puts forward a second Will said to have been made in the evening of the same day by which the first Will was revoked. Apparently this

latter document follows the lines of a disposition of the trust to the Mohuntship of the Bara Akhra which had been made by a previous Mohunt,

Gobinda Das. It contains no testamentary disposition properly so-called. It is purely a deed transferring a trust and it therefore falls within the rule

laid down in the case of Chaitanya Gobinda Pujari Adhikari v. Dayal Gobinda Adhikati 9 C. W. N. 1021 (1905). It could not therefore be

admitted to probate in any case. But we have to consider its genuineness, because if it is a genuine act of the testator then the act of revocation of

the previous Will would hold good as against that.

2. We will first consider the question of the genuineness of these two documents. There appears to be overwhelming evidence in favour of the first

document. As the learned Judge points out the signature is that of a very weak man in extremis: whereas the signature of the other document is firm

and apparently made by a person in the enjoyment of ordinary strength.

3. The evidence of the doctor who attended the deceased, Babu Arun Chandra Chatterjee, is in our opinion against the second Will. It is sought to

be argued from his evidence that the deceased could not have been in a fit state to sign this Will at about 8 o''clock in the morning. The doctor''s

evidence seems to show the contrary. He says, he went at a very early hour probably about 6 A.M. and found the deceased asleep owing to the

effects of a sleeping draught. The last dose of that sleeping draught had been given at 4 A.M., and the doctor says that the effect of the dose would

in his opinion have lasted for three or four hours. It is therefore clear that the testator must have awaked refreshed from the sleep between 7 and 8

in the morning. There seems therefore to be no possible reason why he should not then have executed the Will. Then during the day the doctor

learnt from Gopi Das Mohunt or Baisnav Das Bairagi of the Will executed in the morning and it is not denied that such a Will was executed. On

that day he heard of no other Will, but on the 7th or 8th Baisnav Das told him of another Will made on the afternoon of the 6th. Then again the

pleader, Babu Nara Hari Mookerjee, who says he is on very friendly terms with all the Nadia Mohunts, has clearly deposed that Baisnav Das

came to his house at about 10-30 in the night of the 6th and said,-"" Gopi Das Mohunt had in the morning made a Will in favour of Kishore Das

and thereby ruined him and unless you interfere in my behalf he does not agree to make a Will in my favour."" He requested him to go to the akhra

at that late hour and induce Gopi Das to make a Will in his favour. The witness refused to go, and on the next morning Baisnav Das, the objector,

came again and said that the Mohunt agreed to make a Will in his favour if only he would intercede for him. He accordingly went and saw the

testator and asked him if he had made a Will in favour of Kishore Das. He said "" yes"". He then asked if he changed his mind since, and he said

no "". He did not tell him of any Will executed by him in favour of Baisnav Das. Now the learned Judge has placed reliance upon this gentleman''s

evidence. He is a respectable pleader and the learned Judge had the advantage of seeing him in the witness-box and we cannot find any reason for

disbelieving his evidence. That evidence supported as it is by the evidence of Pulin Behari Bose, Police Sub Inspector, who was one of the

witnesses, Bejoy Gobinda Goswami, who is the scribe of the Will, Brindaban Das Mohunt, the Mohunt of the contiguous akhra, who was another

witness, Rai-Charan Das, who is the Mohunt of Baladev akhra another witness, Krishna Chaitanya Mohunt of another akhra also a witness, -

seems to us to establish beyond all reasonable doubt the genuineness of the first Will. The last witness we have referred to is also relied upon by

the learned Judge. He says that the objector, Baisnav Das, himself told him next day shortly after Gopi Das''s death in answer to his enquiry that

Gopi Das had made no separate provision for him except what was contained in the Will in favour of Kishore Das. The learned Judge has believed

this witness, and we can find no reason nor has any reason been put before us for disbelieving him. That being so, the only evidence in favour of

the second Will is that of two persons, one of whom was the scribe and the other was a witness of both the Wills and who admits and excuses his

own moral delinquency in deliberately witnessing a Will which he says he knew was contrary to the intention of the testator. Such a witness cannot

be believed. The learned Judge has pointed out the deficiencies and discrepancies in the evidence of these two witnesses and we cannot differ from

him in the opinion that their evidence is not to be accepted.

4. We therefore find that the second Will was not genuine and that there was no revocation of the first Will.

5. That being so, we have to consider whether the first Will is a testamentary document at all and if any portion is testamentary, what effect that will

have upon the grant of probate in respect of the whole of the Will. As regards the main body of the Will it is in the same form as the previous Will

of Mohunts and would fall within the rule laid down in the case to which we referred, that is to say, would be merely a deed evidencing the

devolution of a trust and as such would not be a testamentary instrument. But in the third paragraph of the Will the executor Kishore Das is clearly

given the residuary estate of which the testator might die personally possessed. It is in very general form, which form has been held to be valid in all

Wills, that whatever he dies possessed of that shall pass to the legatee. It is not necessary that he should have been possessed of anything, and the

wording of it is that the said Kishore Das Mohunt shall get and shall be entitled of his own accord to make a gift or sale of any other property that I

may earn during my life-time and also the properties which I may earn in my own name or in benami within this or other districts."" He then

proceeds to appoint Kishore Das to be the shebait and executor of this Will.

6. Now it appears to us clear on all authorities that this Will must be admitted to probate as a whole. If there are any declaration of trust which

cannot take effect as a Will, that is a matter which is not for us to deal with. The parties will decide their civil rights in another tribunal. But it might

very well be that the trust which is imposed on Kishore Das may operate as an obligation upon him to look after the trust property until such time

as the lawful trustee is invested with the shebaitship. But this is an obligation which is consequent upon his taking the residuary estate of the testator.

7. As regards the partial admission of Wills to probate, the law is very clearly set out with the cases which govern it in Williams'' Law of Executors

and Administrators, Roth Edition, Vol. I, p. 291. It states that a Will may be in part admitted to probate and in part may be refused,-""if the Court

shall be satisfied that a particular clause has been inserted in the Will by fraud without the knowledge of the testator in his life-time, or by forgery

after his death, or if he has been induced by fraud to make it a part of his Will, probate will be granted of the instrument with the reservation of that

clause; or where a clause has been introduced per incuriam and the deceased executes the paper not having given any instruction for such clause

and it not having been read over to him, probate would be granted of the remainders of the paper omitting such clause; but the Court cannot even

by consent order a passage of the Will to be expunged which the testator being of sound mind intended to form part of it.

8. This is in our view the correct view of the law in this country, and we therefore think that this Will should be admitted to probate as a whole

leaving all questions as to the disposition of the trust to be decided between the parties in a future litigation. We therefore dismiss both the appeals

with costs. We assess the hearing fee at two gold mohurs for the two appeals together.