(1929) 11 BOM CK 0019

Bombay High Court

Case No: None

Vellasawmy Servai	APPELLANT
Vs	
L. Sivaraman Servai	RESPONDENT

Date of Decision: Nov. 22, 1929

Citation: (1930) 32 BOMLR 511

Hon'ble Judges: Viscount Dunedin, J; Tomlin, J; George Lowndes, J; Darling, J; Binod Mitter, J

Bench: Full Bench

Judgement

Binod Mitter, J.

The appellants alleged that E. Muniandy Servai (hereinafter referred to as the testator) executed a will dated January 22, 1906, by which he appointed the appellant Vellasawmy Servai and one S. Muniandi Servai as executors to the will. The testator died on February 16, 1924. He deposited this will personally in the Registration Office in Rangoon on the very day that it was executed, and it remained there until it was produced by the Registrar in this case. The District Judge held this will to have been duly proved, and although the High Court in its judgment threw doubts on its genuineness, the respondent before the Board did not seriously dispute its validity. Their Lordships agree with the District Judge and hold that this will was duly executed.

2. The respondent alleged that the testator duly executed another will dated January 23, 1924. The main question involved in this appeal is whether this will was duly executed by the testator. The respondent on August 7, 1924, made an application for probate of this last-mentioned will. To prove this will the respondent gave evidence himself and called several other witnesses, amongst whom the important ones were one Maung Po Nyun (hereinafter referred to as the registration clerk) and Kurpaya, Aiyer and Tangasawmy.

3. Shortly put, the respondent''s evidence is that the testator, an old man of 75, started from Kyungyaung, his home, for Rangoon on January 21, 1924. The respondent accompanied him only to Kungyangon, where the testator got on the steamer to go to

Rangoon, and at his request the respondent went to fetch Kurpaya and Tangasawmy to Rangoon to help the testator to make the will. The respondent went to Rangoon and requested one Aiyer to see the testator to take instructions from him about the will, which-Aiyer did. Aiyer drafted the will and took it to the testator and he approved of it. Before the will was signed an application was made to the Registrar for the issue of a commission, and a commission was duly issued. Thereafter the registration clerk attended at No. 67, Twenty-Seventh Street, Rangoon, where the testator was staying, and the will was executed by the testator and attested by Kurpaya and Tangasawmy in the presence of Aiyer and the registration clerk,

4. Certain of the witnesses called by the respondent contradicted this story in material particulars. For instance, according to the respondent and his witnesses, Kurpaya and Tangasawmy, Aiyer took the instructions personally from the testator. Aiyer denied this and said that he went to take instructions from the testator, but the latter was in a drowsy condition and could not give him any instructions, which were subsequently obtained from the respondent and Kurpaya. The registration clerk stated that the signature of the testator was on the will when the application for registration of the will was made, and that the testator did not sign the will in his presence. Similarly, Aiyer also denied that he was present when the will was executed, and stated that he did not see the testator after his ineffectual attempt to obtain instructions from him.

5. The District Judge, who had the opportunity of seeing the respondent and his witnesses, Kurpaya and Tangasawmy, wholly disbelieved them. He accepted the evidence of the registration clerk, and if his evidence is accepted there is no reliable evidence that the testator understood the terms of the will.

6. The learned Judges of the High Court were of opinion that the evidence of the respondent and of Kurpaya were not at al satisfactory, but they accepted the evidence of Tangasawmy whom the learned District Judge had wholly disbelieved, and they pronounced in favour of the will.

7. Counsel for the respondent before the Board suggested, and the High Court was also of the opinion, that the evidence of the registration clerk and Aiyer was not reliable and that they had been won over by appellants. The High Court laid stress on Exhibits 3 and 6, but these documents are hardly any evidence that the will had been duly executed. They merely show that one N. N. Burjorjee had heard of the execution of the will, and that K. Mooniandy Moonoosawmy Servai had also heard of the execution and registration of the will. Having regard to the fact that the registration clerk attended on the testator, this is not surprising, but their Lordships are of opinion that this evidence is of very little value on the question of the due execution of the will.

8. The learned District Judge pointed out in his judgment that the signatures looked like mere scrawls, as if they were made by a person unable to hold a pen properly. Their Lordships had B. 65. an opportunity of looking at the original signatures, and they are

inclined to agree with the learned District Judge on this point.

9. The respondent, the profounder of the will, is the principal beneficiary under it, Even according to the evidence of Tauga-sawmy, which the High Court accepted, but which the trial Judge wholly disbelieved, the respondent took a leading part in giving instructions for the will and in procuring its execution and registration. Circumstances exist in this case that would excite the suspicion of any Probate Court and require it to examine the evidence in support of the will with great vigilance and scrutiny, and the respondent is not entitled to probate unless the evidence removes such suspicion and clearly proves that the testator approved of the will. In their Lordships'' opinion, the respondent has wholly failed to do so.

10. This would be sufficient to dispose of the appeal, but in fact the District Judge, who saw the witnesses, wholly disbelieved the evidence of the preparation and execution of the will, and their Lordships are not prepared to dissent from him in his estimate of the evidence of the witnesses on these points. They accordingly hold that the decree of the High Court should be reversed and that of the District Judge restored. The respondent should pay the costs of the appellants of this litigation, except that the appellants should pay the costs of their application before the Board to adduce additional evidence. The respondent would be entitled to set off these last-mentioned costs against the costs which he has to pay to the appellants. Their Lordships will humbly advise His Majesty accordingly.