Privy Council Appeal No. 34 *of* 1947

Mst. Gomtibai - - - - - - - - - - *Appellant*

v.

Kanchhedilal and Others - - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT NAGPUR

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH JUNE, 1949

Present at the Hearing:

LORD OAKSEY
SIR MADHAVAN NAIR
SIR MALCOLM MACNAGHTEN

[*Delivered by* SIR MADHAVAN NAIR]

This is an appeal from the judgment and order of the High Court of Judicature at Nagpur dated 29th September, 1941, which set aside an order of the Additional District Judge of Jubbulpore, dated 20th September, 1939.

The appeal arises out of an application made by respondent No. 1 for the grant of probate of a will (dated 31st July, 1938) executed by one Ganesh Prasad—hereinafter referred to as the testator—on 1st August, 1938, in which he had been appointed as the executor.

The testator died on 4th August, 1938, and respondent No. 1, as the executor, applied for probate of the will on 29th August, 1939.

The appellant Gomtibai is the widow of the testator. She filed a Caveat under section 284, clause 4, of the Indian Succession Act, 1925, on 15th September, 1938. In her written statement she denied the testamentary capacity of the testator, alleged that he was "mentally and physically imbecile and infirm", and that the will had been executed under the undue influence of Maheshwarilal, the natural father of the testator, with the help of respondent No. 1. She added that the testator had no independent advice and even she was in the dark about it. Execution and attestation of the will, which she denied in the statement, are not now in contest.

The legatees of the will who are the other respondents (respondents Nos. 3 to 6) supported the validity and execution of the will.

Two questions arising for determination in the appeal are:

(1) Whether the testator executed the will "in his right mind, and with disposing mental capacity" (Issue 2);

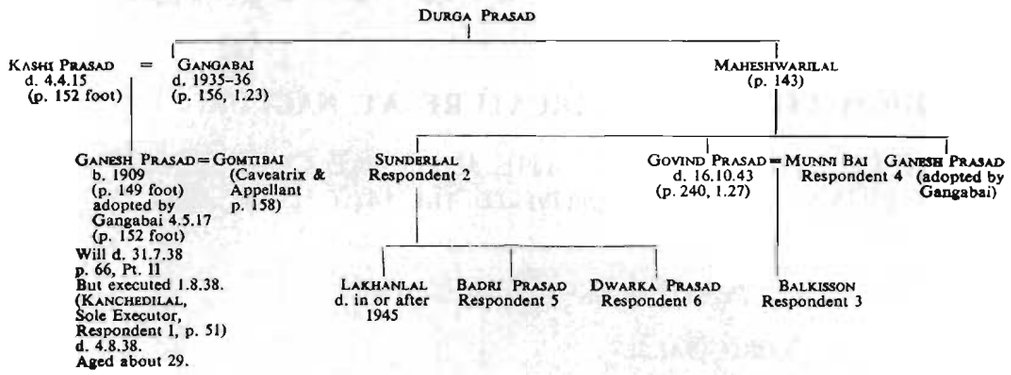
(2) "Was Maheshwarilal in a position to dominate his will, and did he use his position to induce him to execute this will?" (Issue 3) i.e., whether or not the will was executed under the undue influence of Maheshwarilal.

The Additional District Judge found both issues in favour of the appellant. He held that the testator did not possess the disposing mental capacity, and that undue influence was exercised in the preparation of the will. He accordingly refused probate.

The High Court on appeal set aside that order of the Additional District Judge and admitted the will to probate.

The principles of law applicable to the case not being in dispute, the decision of the case depends entirely on a consideration of the evidence which is mainly oral.

The relationship of the testator and the legatees appears from the following genealogical table. (This table was prepared by the respondents and is more detailed than the one on the record.)



The testator was the natural son of one, Maheshwarilal; he was adopted in 1917 by Gangabai under the authority of her husband Kashiprasad, who died in 1915. The testator was then about 8 years old. After adoption he ceased to be a member of his natural family. Maheshwarilal was the brother of Gangabai, the adoptive mother. His other sons, grandsons and the widow (appellant) of the testator were the legatees under the will.

The will was prepared by B. V. Shukla, pleader (applicant's witness No. 4). He also attested it. The other attestors are V. R. Sen, M.B., B.S. (applicant's witness No. 3), and S. Golchha, Advocate (applicant's witness No. 6).

In the recital to the will it is stated that the testator is not keeping good health, his health does not improve, and the trouble is increasing day by day and his health is becoming weaker. It is also stated that the will is executed for the protection and management of the property.

The terms of the will are thus conveniently summarised in the respondents' case :

> " Under the terms of the will Mst. Gomti Bai (the appellant) was to receive Rs. 50/- per month for her maintenance, and the back portion of the parlour was to be given to her for residential purposes. Out of the remaining properties four annas (one-fourth) share was to be given to Sundarlal (respondent No. 2), one anna and four pie (one twelfth) share to Lakhanlal (since deceased), Badriprasad (respondent No. 5), Dwarkaprasad (respondent No. 6) each, and eight anna share (one-half) to Govind Prasad (since deceased and now represented by respondents 3 and 4)."

It was also mentioned in the will that after the death of the testator's wife the property set apart for her maintenance and residence should be distributed amongst his two brothers and nephews, in proportion of their shares. The properties belonging to the deceased, including moveable and immoveable, after deducting the liabilities were estimated as amounting to Rs.74,442-2-7.

A few features of the will specially emphasised by Mr. Rewcastle, the learned counsel for the appellant, in support of his arguments may here be noticed. These are, (1) the extremely small provision made for the appellant, who always lived on affectionate terms with the deceased, justifiably termed by the learned judges of the High Court as " shabby ". They refer to it in these terms : " The feature about the case which is disquieting is that the wife was not told anything about the will and that it deals with her very shabbily " ; (2) The fact that the *entire* property was

disposed of by the testator amongst the members of his natural family; (3) The absence of a provision in the will for having an adoption made by the appellant as the testator was childless at the time of his death. Their Lordships will deal with these aspects later in considering the evidence in the case. Before discussing the evidence, it will be convenient to refer briefly to the principles of law applicable to the case, which are really not disputed, so that the evidence may be examined from the proper standpoint.

The law is well settled that the *onus probandi* lies on the person who propounds the will, and this onus is in general discharged by proof of capacity, and the fact of execution, from which the knowledge and the assent to its contents by the testator will be assumed (*Barry* v. *Butlin*, 2 Moore's Privy Council Cases, p. 480). But where a will is prepared and executed under circumstances which excite the suspicion of the court " it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document " (*Tyrrell* v. *Painton*, 1894, L.R. Probate 151). See also *Charles Harwood* v. *Baker*, 13 E.R., p. 117. " Where once it has been proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent "—that is, when the propounder of the will has discharged the onus—" the burden of proving that it was executed under undue influence is on the party who alleges it " (*Boyse* v. *Rossborough*, 6 H.L.C., p. 49). In the case just cited, it is also stated that " influence in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud ". To the same effect is the statement in the earlier case, *Barry* v. *Butlin* (supra), " The undue influence and the importunity which if they are to defeat a will must be of the nature of fraud or duress . . . " As observed in *Craig* v. *Lamoureux* (1920 A.C. 349) the burden of proving undue influence is not discharged by merely establishing " that a person has the power unduly to overbear the will of the testator. It must be shown that in the particular case the power was exercised, and that it was by means of the exercise of that power that the will was obtained ".

It follows from what has been said that respondent No. 1, in order to discharge the burden lying on him, should show that the testator executed the will in his right mind and with disposing mental capacity, and *then*, in order to succeed, the appellant will have to establish that the will was executed under undue influence—as explained above.

The first question for consideration is, had the testator the right mental capacity at the time when he executed the will? The evidence bearing on this question overlaps the evidence regarding the alleged undue influence and its exercise. Certain facts appearing in the evidence serve both purposes. However, their Lordships will try to deal with each question separately. The testator was 29 years old when he died. He was an unusually fat man with an abnormally bulky body. He is said to have weighed $3\frac{3}{4}$ maunds some days before his death. He was called in derision " Gobar Ganesh ", which means dull headed. He was not educated. He was weak minded, as both courts have found. Possibly he suffered from dropsy. This became more and more intensified towards July, 1938, and ultimately caused his death. He was not able to manage his estate or to understand accounts. He had no friends and was always lonely. Relying on these, the increasing deterioration of his health in 1938, which is conceded, the evidence mainly of Dr. D'Silva amongst the witnesses, and inferences drawn from certain general circumstances, Mr. Rewcastle argued that the intelligence of the testator was very much below the usual standard and that he was almost an " imbecile " and signed the will at the command of his father without understanding its contents. The learned counsel stated that at any rate the circumstances connected with the preparation and execution of the will are so full of suspicion that the court must scrutinise the circumstances and unless it is shown affirmatively that the testator knew the full significance of what he was doing when he executed the will, the probate should not be granted.

What their Lordships have to see is whether or not, on the day he executed the will, the testator was a free agent possessed of sufficient mental capacity to grasp the full significance of the document to which he was putting his signature. Their Lordships will first consider the evidence given by the respondents on this point before dealing with the grounds urged by the appellant; and as they agree with the views of the High Court they will deal with the matter only very briefly.

The evidence of Kanchhedilal the executor and of two attesting witnesses shows clearly that the testator was in full possession of understanding when he executed the will. Kanchhedilal knew the testator from his birth and was his family lawyer for a long time. He is a senior lawyer of standing at the Jubbulpore Bar. He says he saw him on 31st July, the night before the will was executed, when the testator asked him whether he would consent to be his executor. Kanchhedilal says that on that day he had " a sound mind and clear understanding ". There was no cross-examination of the witness on this point. Dr. Sen, one of the attesting witnesses, treated the testator for some time. He was also the family physician. He says the testator signed and executed the will in the presence of all the attesting witnesses and that on that day he " was possessed of clear understanding when he executed the will. I could not call Ganesh Prasad imbecile from what I knew of him ". There is very little cross-examination with reference to the statement of the witness that Ganesh Prasad was possessed of clear understanding on the day when he executed the will. The witness asked the testator whether the will was all right and he replied in the affirmative. Mr. Shukla, another attesting witness, who also prepared the will, says that the testator " was mentally sound and had a proper power of understanding when he gave me the instructions to prepare the draft of the will and when the will was scribed out and when the will was actually executed. I used to see him at least once a week till his death. He could not be called imbecile but he was not an intelligent person. His sickness did not impair his intelligence or powers of understanding ". The High Court does not reject the evidence of this witness though the learned judges say that he would have been more weighty if the draft of the will which he had prepared had been produced, saying at the same time that " It is however only fair to him to say that according to him he handed it over to Ganesh Prasad who placed it in a box along with the will ". The respectability of this witness cannot be challenged. He is a pleader of some standing. Reading his evidence as a whole their Lordships cannot see why it should not be accepted. The evidence of the other attesting witness Sunderlal Golchha, an advocate, is also to the effect that the testator was possessed of sufficient mental capacity at the time when he executed the will. He knew the testator from his boyhood. He says he was not imbecile but he was not very intelligent. He looked at the will " . . . Ganesh Prasad had glanced over both sides of the will and then he signed it. He was in his senses and he recognised the attesting witnesses when he signed the will."

To a certain extent some of the appellant's witnesses may be said to corroborate the evidence noticed above. Ramjas, a doctor practising the Indian system of medicine, used to treat the testator. He says he treated him for 12 or 13 days before his death also. He visited him on the morning of the day when the will was executed. Though he says that the condition of the testator was not good, that he replied in low tone that he was not well when he asked him how he was, that his tongue was fluttering when he was talking, he said he was " in his ordinary senses then. I asked him to show his pulse and he extended his hand and I felt it." More or less to the same effect is the evidence of Gomtibai, the appellant. She says " He did talk on that Monday morning but he used to falter and he could not talk after that." Towards the evening of that day his condition steadily grew worse till he died on the 4th. Considering the evidence as a whole their Lordships are satisfied that at the time when the will was executed the testator possessed sufficient mental capacity to realise the significance of what he was doing and he executed it knowing full well that he was executing his last will.

The testator was not a man of high intelligence but the evidence shows that he was not incompetent to understand the contents of the will which he was executing. Neither the evidence of Dr. D'Silva, the chief medical witness of the opposing party on this point, nor the general circumstances relied on by Mr. Rewcastle, is helpful in deciding the question. Dr. D'Silva is, no doubt, a highly qualified doctor but he was not the testator's family doctor. He is said to have visited him some three years before his death. He does not seem to have treated him though he says he prescribed for him. His evidence was rightly disregarded by the High Court.

The general circumstances relied on to show that the testator had not sufficient mental capacity and that he executed his will under undue influence may be now referred to. These are the features of the will to which their Lordships drew attention at the beginning of the judgment, these being the fact that the testator made only the paltry provision of Rs.50 per mensem for his wife's maintenance though he had a rich and valuable estate, that he left all his property to his natural family sacrificing the interests of the family which became his after his adoption, and that there was no provision made in the will for having an adoption made by his wife as he was childless at the time of his death. On close examination it will be found that none of these circumstances would support the inference sought to be drawn from them. Their Lordships would agree that the provision made in the will for the maintenance of the appellant is " shabby " in view of the fact that the estate left behind by the testator was very valuable ; but the question which their Lordships have to consider is, did the testator and the people who advised him think that the provision was inadequate? If this disposition contained in the will " was apparently just what everybody expected " then no inference can be drawn from it, assuming that the testator possessed testamentary capacity and that his will was not procured by undue influence. (See the observation of Lord Macnaghten at page 177 in *Baudains* v. *Richardson* 1906 A.C. 169.) There is nothing in the evidence to show that anyone thought that the provision was inadequate. Mr. Shukla, with whom the testator discussed the terms of the will before it was scribed says :

> " It did not strike to me that he had made shabby provision for his wife. In my opinion the provision made by him for his wife was an adequate one. I believed that the provision made for his wife was quite proper for her ordinary comforts. The family to which his wife belonged had no high standard of life so far as living was concerned. The charitable and religious ideas of the females for doing good for the souls of their husbands did not strike me when I drafted the will in which provision was made for the wife of Ganesh Prasad."

Their Lordships have already stated that they see no reason why this witness should not be believed. It is said that this provision in the will may be traced to the undue influence exercised on him by his father and that it also shows that he was unable to think for himself (because he was mentally so weak) what would be an adequate provision for the maintenance of his wife. In this connection it may be noted that evidence makes it clear that the appellant's father and brother had free access to the testator during the time when the will was made, and after. The appellant in her evidence says that " Sheodinlal my father had been attending Ganesh Prasad practically every day during his last illness. . . . He used to come usually in the evenings. He used to talk to Ganesh Prasad about his health. My brothers also used to come to see Ganesh Prasad." To the same effect is the evidence of the appellant's witness Narbada Prasad, who says " Sheodinlal used to sit with Ganesh Prasad every day for a fortnight till the death of the latter. There was no fixed time for him to come but he used to come and sit with him for at least half an hour every time." Neither the father nor the brother has been called on the appellant's side as a witness. In the circumstances their Lordships agree with the view

of the High Court that "Sheodinlal's absence from the witness box can only be due to the fact that he knew that the will represented Ganesh Prasad's wishes and that he would not be able to stand up to cross-examination on the point." If it was the testator's wish that his wife should be given a maintenance of Rs.50 only and he gave effect to it in his will, it cannot be said that it was brought about by the undue influence of the father, however much one may feel that the wife was left in the cold as a result of the arrangement.

The other feature of the will, namely the distribution of the estate amongst the natural relations of the testator, is also not helpful in supporting the appellant's case. The learned judges of the High Court have sufficiently dealt with this question, and their Lordships accept their view that this arrangement was quite natural and what one would expect in the circumstances of the case. The following extract from the judgment of the High Court may be quoted to show that the provision relating to the distribution of the estate cannot in the circumstances be considered unnatural.

> ". . . There is evidence to show that there are no other reversioners that the witnesses know of, but the line is so long under the Hindu law before those claiming through a female can inherit that one can well understand Ganesh Prasad's desire to provide for his own natural brothers and nephews rather than run the risk of having the property fall into the hands of persons so remote from him as to be complete strangers. The fact that this desire happened to coincide with Maheshwarilal's wishes and even that it was what he fully intended to extort if not given naturally, is neither here nor there, because if that was in fact the testator's wish and he gave effect to it, there is no case of undue influence."

The absence of a provision in the will relating to adoption, which was very much emphasised in the course of argument, also does not support the appellant's case. Some days after the arguments were closed their Lordships were informed that the testator was a Hindu of the Agarwala Caste. It is true that the Hindus believe that a son either by birth or adoption confers spiritual benefit on the father; but it would not necessarily follow that the will does not truly represent the wishes of the testator because, being childless, he did not make a provision for adoption. In their Lordships' view the absence of a provision relating to adoption in the will cannot be attributed either to infirmity of mind of the testator, or to undue influence said to be exercised by Maheshwarilal.

On a consideration of the evidence, their Lordships hold that the testator executed the will in his right mind and with disposing mental capacity.

The next question for consideration is whether the will came to be executed by the undue influence of Maheshwarilal. Evidence does not disclose any specific act showing the exercise of undue influence. It was said that at the time of the execution of the will the testator "looked" at his father and then executed the will. Their Lordships are unable to draw any inference in favour of undue influence or the exercise of it from the fact that both father and son "looked at each other" when the latter signed the will. In one portion of his judgment the learned District Judge refers to the behaviour of the testator in the presence of his father to show that he must have exercised undue influence on the testator. He says:

> "The evidence shows that Ganesh Prasad behaved like a cat in the presence of Maheshwarilal; that he was very dutiful and obedient to him, and that he never knew to say 'no', as expressed by Dr. Barat, and therefore there was no alternative for him other than signing the will, as desired by the presence of Maheshwarilal on the occasion. Maheshwarilal had supreme control over Ganesh Prasad, and he certainly exercised it in securing the present will from him."

The above facts do not necessarily show either that the testator did not possess mental powers sufficient enough to grasp the significance of what he was doing when he executed the will, or that the will was brought about by the exercise of undue influence on the father's part. Facts have to be interpreted in relation to the surrounding circumstances and the nature of the people concerned. The testator may have behaved very submissively, or may not have spoken in the presence of Maheshwarilal. There is force in the learned judges' observation that this is not an uncommon phenomenon in India. It may be conceded that Mareshwarilal was a dominant personality and that his influence was very much felt in the management of the household and the affairs of the estate. He and his other sons, i.e., the brothers of the testator and their children, all lived with the testator, and the property which belonged to the testator exclusively came to be looked upon—at any rate Maheshwarilal may be said to have looked upon it—as if it belonged to the entire family. This may no doubt generate a suspicion that Maheshwarilal wielded considerable influence over the testator, but it must be remembered that there is evidence that the testator wanted to make provision for his brothers, and there is no evidence that there were any immediate reversioners or others with a claim on the estate whose interests had to be safeguarded. Assuming that his father influenced the testator in disposing of his property in the manner he had done in the will, there is nothing to show that the disposition was not agreeable to his own wishes in the matter. No doubt the term of the will relating to the maintenance of his wife—the really disquieting feature of the will—looked at from the modern standpoint is not satisfactory ; their Lordships have already dealt with it. It is said that the will was executed in great secrecy, but it cannot be said to have been executed in a " hole and corner fashion ". It may be accepted as true that the testator's wife did not know anything about the will ; if this is unnatural, her father and brothers must have known all about it, and their Lordships are unable to draw any sinister inference from the circumstance that the wife did not know anything about it.

Maheshwarilal had no ancestral property when Kashiprasad asked him to join him at Jabbulpore. Kashiprasad educated him, set him up in business and got him married. It is admitted that after the adoption of his son (the testator) Maheshwarilal began to manage the estate. The gravamen of the charge against Maheshwarilal under this head (undue influence) is that he joined his brother-in-law as a very poor man ; by the time of the testator's death he not only became rich, but accounts showed that the estate became indebted to him—apart from the fact that under the will all the property was distributed amongst his sons and grandsons. This charge cannot be put more forcibly than has been done by the learned judges. They state as follows :—

> " Put shortly the argument was this. We start with two estates, a rich one and a poor one. The owner of the rich estate adopts the poor man's son, and the poor man thereupon manages the rich man's estate. The rich man dies, and in a short time we find the rich estate poor and the poor estate rich. We find that in the course of his management the poor man has taken loans from the rich man's estate and then written them off in the rich man's books. We also find the poor man supposedly lending large sums of money to the rich man without any explanation as to how the money was come by. In the circumstances, it is argued, that that is enough to swing the balance against Maheshwarilal, the poor man in the picture drawn above."

The learned judges have examined the accounts carefully and shown that, as a matter of fact no adverse inference against Maheshwarilal in support of the charge of undue influence can be drawn from the facts disclosed by them. It would serve little purpose to go through the evidence which has been dealt with in detail by the learned judges. After going through the items of accounts to which their Lordships' attention was drawn by learned counsel, their Lordships agree with the opinion of the learned

judges that "Maheshwarilal did well out of the estate in the sense that they all lived together and that he has been able to accumulate something for himself, but we see nothing inherently wrong in what he has done considering the relationship and considering the fact that he served without pay all these years . . ." Undue influence, in order to invalidate a will, must amount to coercion or fraud. Its existence must be established as a fact and it must also appear that it was actually exercised on the testator.

Considering the evidence as a whole their Lordships are satisfied that the charge of undue influence has not been made out.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

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In the Privy Council

MST. GOMTIBAI

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