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CHANGAIYA NAIDU

v.

KAVERI AND ANOTHER

B

[SUPREME COURT, 1967 (Knox-Mawer J.), 14th, 15th, 22nd November, 6th, 15th December]

Probate Jurisdiction

C

Probate and administration—probate in solemn form—whether testator of sound mind memory and understanding—circumstances raising suspicion—onus on persons propounding will.

Evidence and proof—probate—whether testator of sound mind memory and understanding—circumstances raising suspicion—onus on those propounding will.

Whenever a will is prepared under circumstances which raise a well grounded suspicion that it does not express the mind of the testator it is for those who propound the will to remove such suspicion.

D

Cases referred to: *Barry v. Butlin* (1838) 2 Moo. P.C. 480; 12 E.R. 1089; *Fulton v. Andrew* (1875) L.R. 7 H.L. 448; 32 L.T. 209; *Brown v. Fisher* (1890) 63 L.T. 465; *Tyrell v. Paynton* (1894) P.151; 70 L.T. 453; *Finny v. Govett* (1908) 25 T.L.R. 186; *In re Begley*; *Begley v. McHugh* [1939] I.R. 479.

E

Action for probate in solemn form.

Z. K. Dean for the plaintiff.

K. A. Stuart for the defendants.

The facts sufficiently appear from the judgment.

KNOX-MAWER J.: [15th December, 1967]—

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The Plaintiff is claiming probate in solemn form of a document alleged to be the last Will and Testament of one Manikam s/o Papaiya who died in the early morning of the 1st November 1965. This document (Exhibit 1) dated 31st October 1965 purports to revoke all former Wills, to appoint the Plaintiff the sole Executor and to devise the whole of the deceased's property to the Plaintiff. The Defendants are Kaveri d/o Nadi Gounder the wife of the deceased Manikam and one China s/o Munni Kutti. The Defendants allege, inter alia, that at the time when Exhibit 1 purports to have been executed, Manikam was not of sound mind, memory and understanding. By way of counter claim the Defendants seek probate of a Will dated 26th April 1965 in which Manikam appoints Defendant 2 the sole Executor and Defendant 1 the sole beneficiary. This document has been exhibited (Exhibit 6).

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In respect of Exhibit 1 Learned Counsel for the Plaintiff called a number of witnesses. The person who drew up Exhibit 1, Mr. Pillai, a Law Clerk of Nadi, was one of them. Mr. Pillai was brought to the house of the Plaintiff on the evening of Sunday, October 31st 1965, where Manikam was lying on a bed. Mr. Pillai said he was of the opinion that Manikam

was capable of making a will although even he admitted that the old man was gasping for breath. It is significant that the Plaintiff had absented himself from the house at this time, and quite deliberately in my view. Be that as it may Mr. Pillai wrote out Exhibit 1 and obtained Manikam's thumb impression upon Exhibit 1 which contains the usual attestation clause. Mr. Pillai and one Krishna Murti, a taxi driver, purported to sign as attesting witnesses. In my view Mr. Pillai was entirely mistaken in his assessment of Manikam's mental condition at this time. Similarly with the other witnesses called to support the Plaintiff's case, their claim that Manikam was in a condition to understand and appreciate the contents of Exhibit 1 is, I find, quite untenable. It is to be noted that the witness Krishna Murti, while endeavouring otherwise to support the Plaintiff's contention, agreed that all that the old man said in his presence was one word "yes". The Plaintiff himself made a very poor showing in the witness box; although one point did emerge from his evidence namely that Manikam, despite his age and very poor physical condition, was given to drinking bouts in the company of the Plaintiff. This I consider was the real reason why he came to be at the Plaintiff's house at the time in question.

Whenever a will is prepared under circumstances which raise a well grounded suspicion that it does not express the mind of the testator, it is for those who propound the will to remove such suspicion. *Barry v. Butlin* (1838), 2 Moo. P.C. 480; *Fulton v. Andrew* (1875) L.R. 7 H.L. 448; *Brown v. Fisher* (1890) 63 L.T. 465; *Tyrell v. Paynton* (1894) P. 151; *Finny v. Govett* (1908) 25 T.L.R. 186; *In re Begley*, [1939] I.R. 479. Far from removing such suspicion the general effect of the evidence of the Plaintiff's witnesses was to increase it.

On the other hand Dr. Dass, who was called by the Defendants, was a witness upon whom a Court is able to place the utmost reliance. He said that Manikam had been brought to Lautoka Hospital between 5.30 and 6 p.m. that evening, Sunday, October 31st. The Doctor said that Manikam was then in a serious condition, suffering from chronic heart failure. Dr. Dass gave him a morphia injection which he said would affect his brain. The Doctor advised the old man to go into hospital but he refused. Doctor Dass said that from what he saw of Manikam and the treatment he gave him, Manikam was not in a fit condition to make a will. The Court is in no doubt that when, later that evening, Manikam purported to make the testamentary disposition Exhibit 1 he was not of sound mind, memory and understanding. Indeed I am quite sure that had Manikam been in his right senses he would not have sought to revoke his will in favour of his wife and bequeath all his property to the Plaintiff. The Plaintiff's claim to probate of Exhibit 1 therefore fails.

I turn now to the Defendants' counter claim. Here the Court is able to rely, with confidence, upon the evidence of Mr. Shankaran, Clerk to Messrs. Stuart and Company, in respect of the document Exhibit 6. The Court has no reason to doubt that here all the regulations for a valid will were duly complied with. As to the omission to make disclosure to the sugar company of the true consideration for the transfer to Ram Reddy of Manikam's farm, this may have relevance in some other context, but it does not in any way lead me to doubt the validity of Exhibit 6. The Court therefore declares in favour of this will and admits it to probate.

Judgment for defendants on claim and counterclaim.