PRIVY COUNCIL.

P.C.*
1909.
May 14, 17.
July 20.

SHUNMUGAROYA MUDALIAR (DEFENDANT),
v.
MANIKKA MUDALIAR (PLAINTIFF).

[On Appeal from the High Court of Judicature at Madras.]

Will—Execution of will—Evidence on the question of whether the testator was of sound disposing mind at time of execution—Reversal by Appellate Court of decision of Judge who heard evidence and entirely disbelieved their testimony—Onus of proof.

On a contested application for probate in which the question was whether a testator was of sound disposing mind on two separate occasions when he was alleged to have executed a will and a codicil, the Judge who saw and heard the witnesses decided that the only reliable evidence was that of the doctor who attended the testator and attested the two documents, and that if the doctor's evidence was true, then that of the principal witnesses in support of the will could not be; and he therefore disbelieved their story as to the execution of the documents, and dismissed the application for probate. The Appellate Court being of opinion that he had not given adequate consideration to the possibility that, in spite of the testator's physical infirmity his mental capacity was sufficient, reversed the decisions and granted probate of the will and codicil: *Held*, by the Judicial Committee (reversing the judgment of the Appellate Court) that the medical evidence entirely justified the view of the Judge who heard the evidence, namely, that it left the onus on the plaintiff who propounded the will quite undischarged, so that in the absence of other reliable evidence he had no alternative but to dismiss the application.

It is always difficult for Judges who have not seen or heard the witnesses to refuse to adopt the conclusions of fact of those who have, but that difficulty is greatly aggravated when the Judge who heard them has formed the opinion not only that their inferences are unsound on the balance of probability against their story, but that they are not witnesses of the truth.

Coghlan v. *Cumberland*, [(1898) L R., 1 Ch., 705], referred to.

APPEAL from an appellate decree (17th January 1906) of the High Court at Madras, which reversed a decree (8th February 1905) of the same Court in its original jurisdiction.

The only question raised on this appeal was as to the validity of a will executed on 11th October 1903 by Thiruvengada Mudaliar, and of a codicil thereto executed on 18th October 1903.

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* *Present* :—Lord MACNAGHTEN, Lord ATKINSON, Lord COLLINS and Sir ANDREW SCOBLE.

Prior to September 1901 the testator was a member of an undivided Hindu family possessing considerable immoveable property. In that month the members of the family, consisting of the testator, his brother Shunmugaroya, the present appellant, and their cousins agreed to partition the property, the cousins taking a one-half share of the property, and the testator and his brother one-quarter share each. The value of the share which came to the testator was about Rs. 50,000. He was about seventy years of age and had no wife or children or grand-children. The appellant was the person who would be his heir if he died intestate.

The testator had a house in the village of Irumbiliceri and also a house at Madras. In September 1903 he went to Madras. On 3rd October 1903 he had a stroke of paralysis from which he never recovered and eventually died on 10th February 1904. At the time he was taken ill he was living in a house which had fallen to the share of Ramakrishna, the eldest of his cousins, and he remained there until his death. The respondent Manikka, who was the husband of Ramakrishna's sister, was at the same house. The will was executed on 11th October 1903 : the testator by it bequeathed all his property to the respondent, gave an annuity of Rs. 10 per mensem to the respondent's wife's sister ; and directed that the marriage expenses of her daughter Rajammal should be paid. The will recited that the testator was not expected to survive. It was written by Srinivasa Aiyangar : the attesting witnesses were K. C. Ramiah and M. Vijaya Raghavulu. On 13th October 1903 the respondent wrote an application to the Registrar to come and register the will, and on 14th October it was registered at Ramakrishna's house by Alwar Aiyangar, who was temporarily acting as Sub-Registrar. On 17th October the respondent again applied to the Registrar to come and register the codicil ; but it was not ready and was not executed until 18th October. The codicil explained why the respondent was made legatee, fixed Rs. 2,000 as the marriage portion of Rajammal, and gave her mother Rs. 500 in addition to the annuity. Six witnesses attested the codicil, namely, N. Ramakrishna, M. Iyathumby Mudaliar, Srinivasa Chari, P. Loganatha, Veeraragava Mudaliar, and M. Vijaya Raghavulu. On the 20th October 1903 the Sub-Registrar Ananta Chari refused to register the codicil as the testator was unconscious, but it was registered on 26th October 1903 by Alwar Aiyangar who was again acting temporarily. A

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power-of-attorney was later drawn up by Ramakrishna, executed on 26th November 1903 by the testator in favour of the respondent, and registered by Alwar Aiyangar on the next day.

The respondent, on 25th April 1904, applied to the High Court at Madras for probate of the will and codicil. The application was opposed by the appellant, and the suit was tried by Mr. Justice BODDAM; who, after referring to the case of *Hardwood* v. *Paker*(1) as to what were the tests of "a sound disposing mind," came to the conclusion that he was unable to believe the evidence of the plaintiff, of Ramakrishna, and of Srinivasa Chari, the principal witnesses for the will, and that he could only rely on the evidence of the native doctor Vijaya Raghavulu on which he found that the testator was not at the time of the execution of the will and codicil of sound disposing mind. The material portion of his judgment was as follows :—

"Upon the question of the exact state of mind of the deceased and of what occurred when the will was executed, practically, I do not find that I have any evidence beyond that of the doctor that I can rely upon. I do not hesitate to say that, from their evidence and the way in which it was given, I do not believe Ramakrishna Mudali or Manika Mudali. I believe that they have come here deliberately with the intention of trying to make out a story which is not true. I cannot rely upon the evidence of Srinivasa Chari, for I do not believe him In these circumstances I have to be satisfied that the state of mind of the deceased man at the time the will was executed was such that he was capable of making the will propounded. For this I am dependent upon the evidence of the persons called before me in this case as the persons who were present at the time and of those called I am unable to believe the evidence of any of them excepting the doctor. With the exception of his evidence there has been no evidence given except that of Jaganatha Mudali, Dr. Browning and Alwar Ayangar. As regards the former I don't for a moment believe him. His evidence is worthless.

"The *onus probandi* lies in every case upon the party propounding the will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. This must be done by proof of capacity and the fact of execution from which the knowledge of and assent to the contents of the instrument are, in ordinary cases, assumed.

(1) (1839) 3 Moore's P.C., 282 at p. (290).

"The facts are these:—On 3rd October 1903, eight days before the first will was executed, the deceased had a fit of apoplexy, and was paralysed on one side. The doctor who attended on him, says that his tongue and throat were also partially paralysed. He tells us that he attended on him till the end of November and during that time his physical condition remained unchanged, though his mental condition improved. He tells us that, at first, he was only semi-conscious, but that he gradually improved. And he tells us that on the day when the Sub-Registrar went there for the purpose of registering the second will, he was invited to give an opinion as to the mental capacity of the deceased man, and that he declined to do so and dictated to the (Sub.) Registrar what he would say and in doing so went as far as he could go. This is what he says in exhibit F; 'I have known Tiruvengada Mudaliar for the last six weeks or so. He came under my care about the beginning of this month. I have been present to-day at the enquiry into the execution of a will presented by him and have heard his answers thereto. They have been given by him in a conscious state of the mind.' That, he says, is as far as he could go with a view to giving an opinion as to his mental capacity. He says 'when I was asked by the Registrar, suggestions were made that he was of testamentary capacity. They wanted me to certify to his mental state. I declined and said I would only say he was conscious. I declined to make any further statement. I did so because of my observation of the patient. I only mean that he was conscious as distinct from unconscious. The questions I had put to him showed only that he was conscious. No one suggested that a will was going to be executed before I was asked to attest it. Deceased never told me a word about it. He never opened his mouth to me. His tongue and throat were partly paralysed. His articulation was faint and slow. He could do nothing. He was quite bed-ridden. Unless some one helped him he could do nothing. My attestation means only that I saw it signed, and nothing more.' . . . By saying he was conscious on the third day I mean he ceased to be unconscious. I don't remember attesting any power-of-attorney or other document. To his own Counsel in re-examination he says 'I dictated to the Sub-Registrar. I went as far as I could and put in my own words. I could not form any opinion as to the state of his mind at the time the second will was executed. So far as I questioned him and the Sub-Registrar his replies were monosyllabic and rational because he was not insane.' That is the evidence with regard to the state of mind of the deceased man at the time, *i.e.*, eight days later than the latest will which has to be propounded. He had an apoplectic stroke on the 3rd. The first will was executed on the 11th and the second

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will is supposed to have been executed on the 18th and the date of its registration is the 26th October. The testator's mental condition had improved daily and yet the best the doctor can say with regard to his state of mind then is that he was conscious. Curiously enough, on the 17th, the day before the second will is executed and some days after the first will had been registered, there is received in the Sub-Registrar's office an application to register the second will. It cannot be suggested that there may be some mistake about the date it bears for it also bears the stamp of the Sub-Registrar's office of the 17th October. This application has been signed and dated the 17th October in ink by some body, who apparently received it, and marked 2-20 P.M. It bears the stamp of the Sub-Registrar's office of the same date. And upon that application some body appears to have attended and there is this writing at the bottom. 'Attended at 5 P.M. on the 20th October 1903. The party (executant) was found unconscious and so no document was registered. 21—10—03.'

"Here the party propounding the will is the party benefited by the will. He is not the person who, in ordinary circumstances, would be a person to be provided for by the deceased. He is a sister's son, but the deceased has brothers and nephews and other closer relations. The only persons benefited are the plaintiff, who propounds the will and the plaintiff's relations: his wife's sister and here daughter."

After going through the evidence of the plaintiff and Srinivasa Chari which was to the effect that the testator had no difficulty in giving his own instructions for the will and in executing it with little or no assistance from any one. The judgment concluded.

"There were several other people then present, who could have been called; but they have not been called and it may be for a very good reason, I do not know. All I can say is that, with the exception of the evidence of Vijiaraghavalu, the doctor, there is absolutely no evidence at all that one can say 'I believe this witness is telling me the truth with regard to the state of mind and what it was at the time the will was executed.' As regards the evidence of Dr. Browning he was not there at the time and he declines to say anything as to his state of mind when he was not there. Moreover the utmost he can say is that when he saw him he might have made a simple will but Dr. Browning in saying that did not know the legal requirements of a person's mind when he makes his will. In these circumstances I am utterly unable to say that the plaintiff has satisfied me that this man was of a sound and disposing mind when he executed the will either of the 11th or of the 18th. If the facts were satisfactorily proved it would be a matter then to discuss as to

the extent of the capacity of the deceased's mind. The facts are not to my mind satisfactorily proved at all. The only thing I am perfectly clear about is that the story as told by Srinivasachari and the plaintiff is not true, and that the deceased man, if the evidence of the Sub-Registrar and the doctor is true, was not in a state of mind, or possessed the physical capacity, to give the instructions in the way they say he gave them or to execute the documents which they say he executed then."

Mr. Justice Boddam accordingly made a decree dismissing the application for probate with costs.

The Appellate Court (Mr. Justice SUBRAHMANIA AYYAR and Mr. Justice BENSON) after admitting further documentary evidence, and on a consideration of that and of the evidence already given decided that the testator was of sound disposing mind when he executed the will and codicil. They summed up their conclusions as follows:—

"The conclusion that we draw from the medical evidence as a whole is that the disability of the testator was mainly physical, not mental. We have already stated that the dispositions of the will were such that they could have been communicated by very few and simple words, and we are of opinion that the persons who made the draft could have had no difficulty in following the instructions of the testator and embodying them, as they did in the will and codicil, and that the testator was in a condition to fully understand the documents when read over to him, and to signify his approval or disapproval of them. Though, no doubt, both the plaintiff and the vakil in their evidence seem to give an exaggerated account of the capacity of the testator to express himself by words, and though the evidence of the plaintiff, as an interested party, must be accepted with caution, yet we see no reason to treat the vakil as an untruthful witness when he states that the will was prepared by him from instructions given to him directly by the testator himself. That the vakil had previously been doing legal work for the testator is beyond question That he enjoyed his confidence is clear from the fact that he was employed to represent his interest in the friendly arbitration which effected the partition. He was therefore the natural person to be called in to make the will, and he would be unlikely to be guilty of a fraud in connection with it. The fact that another person was employed to prepare the draft of the codicil, goes far to negative the idea of any conspiracy between the vakil and the plaintiff. Moreover the case does not rest altogether on this testimony, for both the will and the codicil were duly registered on the 14th and the 26th October,

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respectively. We do not see the slightest ground for regarding the Sub-Registrar as other than a perfectly unbiassed witness, and it was his duty before registering the document to satisfy himself as to the mental competency of the executant both at the time of execution and at the time of registration.

"As to the man who was in temporary charge of the Registration office for a few days in the interval between the 14th and 26th October, and who made a remark in one of his registers that on the 20th October he went to register the will but found the testator unconscious, we do not attach any importance to that statement. Being dead at the time of the trial, he was not examined as a witness in the case. It is nowhere shown that he actually saw the testator on the 20th and as both the medical men visited the testator on that day and did not find him unconscious, it is clear that the statement referred to does not affect the case.

"Intrinsic confirmation of the Sub-Registrar's evidence is afforded by several signatures made by the testator in the course of the registration proceedings, and these signatures we have no hesitations in saying were made by the same hand that signed the will and the codicil.

"It remains to add that at the end of November the testator registered a power-of-attorney in favour of the plaintiff empowering him to manage the property, and to alienate part of it to enable the testator's debts to be discharged, and in pursuance of this the plaintiff did actually sell certain villages for the sum of Rs. 18,000 to Ramakrishna, the cousin of the testator, already mentioned.

"It is admitted that the defendant used to visit the testator who was his own brother from the time he fell ill in October 1903 until his death on 10th February 1904, the last visit being paid on 9th February. It is in evidence that the defendant tried to remove the testator from Madras to the defendant's own residence in the country. It is also in evidence that the defendant's son used to attend on the testator. In these circumstances and looking to the fact that the documents were registered, it is difficult to believe that the defendant was not aware of the existence of the documents or that, if any deception were practised on the testator in connexion with them, the defendant would not have brought it to the notice of the testator, and got the documents cancelled.

"In conclusion we may notice that the documents which we admitted in evidence at the hearing of the appeal, show that in November 1903 the defendant's vakil called upon the testator by a registered notice to intimate his disclaimer of interest in certain arrears of rent for which the defendant was suing and used a reply

sent the day before the testator's death as evidence of such disclaimer. This implies that the defendant knew that the testator was then capable of attending to business and was not unconscious as the defendant in his evidence pretended.

"In these circumstances we feel that we are unable to arrive at the same conclusion as the learned Judge with regard to the competency of the testator. We find that he was fully aware of the extent of his property, of the objects of his disposition, and the nature of the disposition."

The Appellate Court consequently reversed the decision of the Court below and made a decree directing that the will and codicil be admitted to probate.

On this appeal—

Sir *R. Finlay*, *K.C.*, and *De Gruyther*, *K.C.*, for the appellant contended that the evidence on the record was not sufficient to establish that the testator was of sound disposing mind at the times of the alleged execution of the will and codicil. To satisfy the Court that he was so, the onus was on the respondent who propounded the will and codicil, and he had not discharged it. Reference was made to *Barry* v. *Butlin*(1); and the Registration Act (III of 1877), section 63.

Cohen, *K.C.*, and *Kenworthy Brown* for the respondent contended that the will and codicil were on the evidence proved to have been duly executed by the testator having at the time a sound disposing mind. Though physically infirm the testator might have had sufficient mental capacity to understand what he was doing and to carry out his intentions. *Sajid Ali* v. *Ibad Ali*(2); and the Registration Act (III of 1877), sections 63 and 71 were referred to; and it was submitted that the High Court decree was right.

Sir *R Finlay*, *K.C.*, replied.

1909, *July 20th.*—The judgment of their Lordships was delivered by

LORD COLLINS.—This is an appeal from an Appellate decree of the High Court of Madras reversing a decree of Boddam, J., sitting on the Original Side of the High Court, who dismissed an application by the plaintiff (the present respondent) for probate of a will purporting to have been executed by one Thiruvengada Mudaliar on the 11th October, 1903, and a codicil thereto of the 18th October, 1903.

(1) (1838) 2 Moore, P.C., 480.
(2) (1895) I.L.R., 23 Calc., 1; L.R., 22 I.A., 171.

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The only issues were :—

(1) Was the testator, when he executed the will of the 11th October 1903, of sound disposing mind ?

(2) Was the testator, when he executed the codicil of the 18th October 1903, of sound disposing mind ?

The onus was admittedly on the plaintiff, who propounded the will and codicil, to make good the affirmative in each case.

The learned Judge, who heard and saw the witnesses, held that he had entirely failed to do so.

The Court of Appeal who suffered under the disadvantage of neither seeing nor hearing the witnesses, nevertheless held that the onus on the plaintiff had been discharged, and admitted the will and codicil to probate.

It is not disputed that the learned Judge correctly laid down for his own guidance the essentials of "a sound and disposing mind." For reasons which he gives, he was unable to place any reliance on the persons called who were present on the 11th October at the signing of the will, except the native doctor, who was one of the attesting witnesses. This gentleman's evidence, a great part of which is set out in the judgment, entirely justifies, in their Lordships' opinion the view taken by the learned Judge, that it left the onus on the plaintiff quite undischarged, with the necessary consequence that, in the absence of other reliable evidence, the learned Judge had no alternative but to dismiss the application. Certainly no other medical evidence was forthcoming sufficient to turn the scale. Dr. Browning, the only other medical witness, had declined to see the testator with a view to witnessing his will, and says in evidence :—

"If what they say is true, that he had an attack of apoplexy on the 3rd, I should think it doubtful if he could have dictated a will like that [*i.e.*, of the 11th October]. I am not prepared to say he could."

As to the attack of apoplexy, there can be no possible doubt, for it was not disputed at the trial. As the result therefore, of the medical evidence the onus is very far from shifted. The chief point made by the Court of Appeal against the decision of the Trial Judge is that he confounded physical with mental incapacity. But, in their Lordships' opinion, there is no sufficient foundation for this imputation. It really arises from the fact that the learned Judge dwelt upon the proved physical infirmities of the testator in limb and speech as entirely discrediting the account

given by the plaintiff and the witness Srinivasa Chariar of what took place on the 11th and 18th October, a conclusion which, in their Lordships' opinion, was entirely just. No doubt it is always difficult for judges who have not seen and heard the witnesses to refuse to adopt the conclusions of fact of those who have (see the observations of Lindley, M.R., in *Coghlan* v. *Cumberlan* (1); but that difficulty is greatly aggravated where the Judge who heard them has formed the opinion, not only that their inferences are unsound on the balance of probability against their story, but that they are not witnesses of truth, and that was the inference which Boddam, J., drew with regard to some of the material witnesses for the plaintiff in this case.

The Court of Appeal seem to have attached some weight to a suggestion that the testator was on bad terms with his brother, his nearest male relative and heir. But this suggestion is displaced by the letters which were produced, showing the affectionate terms on which they corresponded.

The Court of Appeal also seem to attach too much weight to the fact that the defendant's vakil advised that formal notice should be sent to the testator shortly before his death, demanding a disclaimer of interest in certain arrears of rent in respect of property which had fallen to the defendant's share on a family division. Even if the defendant appreciated its significance, it was no more than an attempt under the advice of his lawyer to cure a technical blot as a measure of precaution in a legal process.

Their Lordships are of opinion that Boddam, J., was right in holding that the plaintiff had failed to discharge the burden of proof.

They will, therefore, humbly advise His Majesty that the appeal should be allowed, the Appellate decree of the High Court set aside with costs, and the decree of Boddam, J, restored.

The respondent will pay the costs of the appeal.

Appeal allowed.

Solicitor for the appellant *Douglas Grant.*

Solicitors for the respondent *Chapman, Walker and Shephard.*

J.V.W.

(1) (1898) L.R., Ch., 705.