

Privy Council Appeal No. 76 of 1929.

Venkat Rao and another - - - - - *Appellants*

v.

Namdeo, since deceased, and others - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE CENTRAL
PROVINCES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 29TH JUNE, 1931.

Present at the Hearing :

LORD BLANESBURGH.

LORD TOMLIN.

SIR JOHN WALLIS.

[*Delivered by* SIR JOHN WALLIS.]

The only question in this case is as to the genuineness of a nuncupative will or oral disposition of his property alleged to have been made by Vishram Patil, a *malguzari* or landowner of Lonsaoli in the Wardha District of the Central Provinces, who died on the morning of Tuesday, the 23rd December, 1919, aged 70, leaving two widows, but no children. The will is alleged to have been made on the evening before he died, and again, by way of confirmation, on the following morning shortly before his death. No probate was necessary, but Namdeo, the principal beneficiary, having obtained mutation of names in his favour as regards the deceased's lands, with the consent of the widows, who took widow's estate in the absence of a will, two of the next reversioners or presumptive heirs of the deceased, who would have been entitled to succeed on the determination of the widows'

estate, deeming that the order for mutation cast a cloud upon their title, instituted the present suit, under Section 42 of the Specific Relief Act, for a declaration that the deceased had died intestate, against Namdeo, the principal beneficiary under the alleged will, joining as the second and third defendants the two widows, who supported him, and as fourth defendant, his father, Govind Rao, the remaining reversioner, who was unwilling to be joined as a plaintiff.

The suit came by transfer before the Additional District Judge of Wardha, and the case made in the plaint was that Vishram died of typhoid fever, and was unconscious, and had lost all control of his functions for several days before his death. The written statement of Namdeo, the first defendant, after setting out at some length that he had been brought up by the deceased and his wives as their own child and treated as heir, set out the defendants' case as to the alleged will in the following terms :—

“ 11. Vishram got fever on 16th December, 1919. It was an ordinary fever and Vishram Patil could not in any sense then be said to be bed-ridden. When the fever did not subside for a week he feared that the illness might take a more serious turn, and in view of his old age, Vishram Patil orally declared on 22nd December, 1919, at 8 p.m. (in the night) that, if he were to expire in that illness, the defendant No. 1 would be the owner of all his moveable and immoveable property after his death. The testator declared his last will in words to the following effect in the presence of several persons including his relations and his two wives : ‘ I brought up Namdeo from his childhood as my son. He will be the owner of my estate after my death. He will, according to my wishes, gift to the *Deosthan* the Dorli fields that I intended to gift, and he will provide for my ladies. I am sure of this.’ Vishram Patil was quite conscious and in his senses when he made this testamentary disposition of his property. He was in full possession of his mental powers and quite in his senses the whole night. He ordered a feast to the Brahmins and relatives to be arranged on the 24th and caused letters of invitation to be written partly by this defendant and partly by plaintiff No. 2. Some of the letters intended for persons living at a distance were despatched on 22nd December, 1919, at night, and others were kept over for being sent the next day.

“ 12. Early in the morning of the 23rd (Tuesday) he sent for the father of this defendant, and asked him to look to arrangements for the contemplated feast. In the meantime he felt inclination to answer the call of nature, and insisted on being taken down the cot for that purpose. While he was answering the call he felt giddy and extremely exhausted. He felt that his end was drawing near and he expressed his fears that he would not survive to see the feast during which he thought of executing some writing embodying his last wishes in regard to the disposition of his property, but he enjoined on all those present to help in giving effect to the wishes already expressed by him orally on the previous night. He was at this time fully conscious. His strength then began to fail him, and he lapsed into a languid state. He died at 8 a.m. on the 23rd December, 1919. Under these circumstances a formal writing and the contemplated feast could not be held.”

The widows' written statement alleged that on the night preceding his death Vishram :—

“ unequivocally declared that his estate should devolve on defendant No. 1, Namdeo, and he said that he felt no doubt that the defendant No. 1

would gift the fields at Mauza Dorli to the *Murlidhar Deosthan* founded by him [as a religious endowment] and that defendant No. 1 would look after defendants Nos. 2 and 3. The same wish was repeated about the early morning of the day on which he died."

The sole issue, "Did Vishram make an oral bequest to the defendant No. 1, as alleged by the latter?" threw the onus on the first defendant, and put him in the same position as if he had been propounding the will for probate.

The defence examined fifty witnesses in support of their case. The trial began in March, 1924, and during that month thirty witnesses were examined, but nearly all their evidence was directed to mere probabilities, and none of them spoke to the actual making of the alleged oral wills. The evidence of the remaining twenty witnesses was taken after the long vacation before another Judge, but the only witnesses who spoke to the making of the will were Namdeo himself, his father Govind Rao, the surviving widow and six other witnesses, only four of whom spoke to the alleged will on Tuesday morning.

The plaintiffs gave evidence themselves and called eleven other witnesses, but the impression formed by the Additional District Judge about all of them was that they were not a reliable batch, and it must be taken that they have failed to prove that the deceased was unconscious for some days before his death.

The Additional District Judge devoted two-thirds of his lengthy judgment to recording what were really unnecessary findings on all the points as to which the parties were at issue with reference to the exact relations which had existed between Vishram and his wives and the first defendant, Namdeo, from childhood onwards, and only then approached what he rightly said was the real question in the case, the making of the oral wills. After examining the evidence of the defence on this question he observed that the thirty-fourth and thirty-eighth witnesses for the defence were the two witnesses who were not connected with either party, and that it would be difficult to say that they were enough to prove the defence unless the surrounding circumstances corroborated them materially.

He then proceeded to deal with this question, and arrived at the conclusion that it was improbable the deceased would have made the wills set up by the defendants. He accordingly found the issue against them and decreed the plaintiffs' suit.

The learned Judicial Commissioners, before whom the case came on appeal, were dissatisfied with the way in which the Additional District Judge had dealt with the case. They rightly criticized the theory—it was nothing more—that in 1917, after Vishram had constructed a temple at great cost in front of his house, his feelings towards Namdeo, the first defendant, whom he had hitherto regarded as his heir, underwent a complete change, and he ceased to care about him, and thought only of the temple, and that consequently it was very improbable that he would have made a will in Namdeo's favour. They also criticized his

examination of the evidence on the ground that he had made no reference to the corroborative effect of the proof of Vishram's previous conduct, though it was found that up to 1917 at least he had manifested an intention of making Namdeo "his general trustee to whom some property should be given."

This was really to fall into the opposite error. The will was, no doubt, one which Vishram might well have made, and would have been a very proper will to make. That this was also the opinion of the neighbourhood may be gathered from the fact that fifty witnesses came forward in support of the defendants' case, as against the "unreliable batch" of thirteen who gave evidence for the plaintiffs. Still, the only question is, is the will proved to have been made, and the very propriety of the contents does not make it any the less necessary for the Court to be on its guard, and to scrutinize closely the evidence of execution, because experience shows that witnesses are sometimes tempted to come forward and depose that the will which ought to have been made actually was made.

There is, unfortunately, no satisfactory medical evidence as to the nature or course of Vishram's illness. What is common ground is that on the evening of Monday, the 22nd December, the day before he died, invitations some of them written by one of the plaintiffs and some by the first defendant, were prepared and sent out to certain Brahmins and caste-men to a repast (the translation calls it dinner) at 10 a.m. on Wednesday morning. It is proved by the plaintiffs and by the surviving widow that Vishram had great faith in the religious efficacy of feeding Brahmins, and the widow says that it was usual to have resort to this practice in cases of illness in the family. The fact that Vishram was ill was therefore very naturally mentioned in most of the invitations to indicate the object of the gathering. There was no mention of any will, and the invitations in themselves had no more to do with a will than if the recipients had been asked to come and join in prayers for Vishram's recovery. The story that Vishram intended to make a written will on that occasion rests, therefore, wholly on the oral evidence of the defendants, and is not corroborated by the fact that the invitations were prepared and partly sent out. If on Monday evening Vishram decided to make a will there is no reason why he should not then and there have made a written will, and it was further open to him to send for the Sub-registrar, admit execution, and get it registered so as to put the will beyond all question. It is not part of the defendants' case that he was afraid of obstruction from the reversioners, which might have made him put off making his will until the gathering on Wednesday. It cannot therefore be said that the defendants' explanation of the fact that no written will is forthcoming is at all convincing.

In the absence of a written will the defendants are constrained to rely on an alleged oral will, and their case is that the declaration of the deceased's testamentary wishes on

the Monday evening when he announced his intention of making a written will on the following Wednesday was itself a valid oral will, and that, in any case, the repetition of these wishes by the deceased on the Tuesday morning when he knew that he would not live till Wednesday, constituted such a will. The question, therefore, is, have the defendants shown that this is a true story and not an attempt to set up a false case of a will which the deceased very possibly would have made if he had not become unconscious and died before realizing the seriousness of his condition? The onus of establishing an oral will is always a very heavy one, and in this connection their Lordships may refer to the ruling of this Board for the guidance of Courts in India in dealing with oral wills in *Baboo Beer Pertab Sahee v. Maharajah Rajinder Pertab Sahee*, 12 Moo., I.A. 1 at p. 28, that they must be proved with the utmost precision, and with every circumstance of time and place.

As regards the alleged oral will of the Monday evening, it is in their Lordships' opinion, quite clear that the defendants have failed to prove that such a will was made. A declaration such as is alleged to have been made by the deceased on that occasion of testamentary intentions to which effect was to be given by a written will cannot be regarded as an oral will. It cannot, in such a case be inferred that there was the necessary *animus testandi*, or intention that the oral declaration should itself operate as a testamentary disposition of the declarant's property.

The defendants must, therefore, rely on their alternative case, that on Tuesday morning, shortly before he died, Vishram, feeling that he would not survive to make a written will on the Wednesday, made a fresh declaration of his testamentary wishes with the intention of making an oral will. That case again rests entirely on the oral evidence of the defence witnesses who speak to it.

Before dealing with this evidence it is necessary to refer to what is said by the defendants to have happened in the interval between the making of the two alleged wills. The writing of the invitations, it is said, took till 10 o'clock on Monday night, when Govind Rao retired to rest in his own house in the same compound, leaving the two wives and Namdeo in charge of Vishram. At 11 o'clock a party of six persons from other villages is said to have arrived to inquire about his health. They found him lying in his cot, but he sat up and spoke to them, and told them that he was going to make a will at the gathering on Wednesday, and they remained with him and kept him awake till 1 a.m. on Tuesday. Their Lordships cannot but regard with grave suspicion the evidence as to this visit which was, no doubt, intended to corroborate the evidence as to what had already taken place and to rebut the plaintiffs' evidence that at this time Vishram was unconscious. The witnesses all say that when they started on Monday they did not know that Vishram was seriously ill, and their whole story is so unsatisfactory as to

suggest that they are not witnesses of truth. It is said that Gopal Rao, who had married Vishram's niece and lived 10 miles away, had heard on Saturday that Vishram was ill, but not that the illness was serious. He decided on Monday to go and see Vishram and left his village for that purpose with another friend, at 3 p.m. They stopped at Mhasala at 5.30 p.m., and met there Gopal Wogh, who invited them to share his evening meal, and said he would go with them. The meal was over at 8.30 p.m., but they did not leave till 10, by which time the party had come to include three more persons, Gopal Wogh's manager, one Ithoba, who has not been called, and another witness who had no connection with the deceased, and whose only reason for going was that Ithoba had asked him. The Additional District Judge was struck by the disconnected manner in which the evidence as to this part of the case was presented, and viewing it as a whole their Lordships do not think it can be regarded as corroborating the defendants' case.

To come now to the crucial part of the case, the alleged oral will on Tuesday morning, the allegation in paragraph 11 of the first defendant's written statement, which has been set out above, states that early on Tuesday morning Vishram sent for Govind Rao, and asked him to see to arrangements for the contemplated feast. "In the meantime (*sic*) he felt an inclination to answer the call of nature, and insisted on being taken off the cot for that purpose. While he was answering the call he felt giddy and extremely exhausted. He felt that his end was drawing near, and expressed his fears that he would not live" to execute the will on Wednesday, but he enjoined all present to give effect to the wishes already expressed by him orally on the previous night. His strength began to fail him, and he lapsed into a languid state. He died at 8 a.m.

The evidence of the three defendants and four other witnesses is to the same effect, and the only question is, can it be accepted as proving the alleged oral will? The allegations in the written statement fail to specify the precise time at which the will was made, which turns out to be a point of some importance. Govind Rao says he was sent for an hour before sunrise to discuss the arrangements for Wednesday, which seems a strangely early hour for such a purpose. Namdeo, on the other hand, says they slept till red of dawn, and the widow says that Govind Rao was not sent for until after the sun was up, which, so far north of the Equator, on one of the shortest days in the year, must have been well after 6 o'clock. There is also evidence that before the oral declaration was made witnesses were sent for, which of course would take some time.

Now the defendants had put into the box at an early stage of the case as their seventeenth witness, one Chintaman Joshi, the Brahmin family priest, who was called to speak of Namdeo's relations with Vishram, and particularly to the prominent part taken by Namdeo in Vishram's ceremonies. He was cross-

examined as to this evidence, but was not shaken. It was then elicited from him that he had been away from the village, and returned on the Monday evening. He stated that he was called on Tuesday at daybreak, as Vishram's condition was very bad, to come and administer the last rites to him. He found Vishram unconscious and administered the last rites to him whilst in that condition, and then left. Vishram, he stated, died between 6.30 and 7 a.m. No questions were asked the witness in re-examination about this part of his evidence, and it would seem to have been thought best to ignore it, as no reference to him is found in the evidence as to the oral wills which was all taken subsequently. There is no suggestion against this witness, and their Lordships feel no doubt that he was speaking the truth to the best of his recollection. Making every allowance for unintentional errors due to the lapse of time, their Lordships are of opinion that this evidence throws grave doubt on the testamentary capacity of Vishram at the time the will is alleged to have been made, and on the whole story of what happened on Tuesday morning, which, indeed, appears to be none too probable in itself.

Further, in the case of disputed wills, it is always material to see when the alleged will was first put forward, and their Lordships therefore attach considerable importance to the omission of any mention of a will in favour of Namdeo in the report of the *Patwari* or village officer to the revenue authorities as to the mutation of names with reference to Vishram's lands which was made on the 31st December, eight days after his death.

“ To

“ The Revenue Inspector, Circle Salod.

“ 10. (The undersigned *Patwari*) begs to report as follows :—

“ Vishramji, son of Shiwaji Patil, of Lonsaoli, a five annas four pies co-sharer of *malguzari* share, Khel (A), eight annas, of *mauza* Lonsaoli, died on 23rd December, 1919. His heirs are his wives Sayatrabai, eight annas and Baijabai eight annas of Lonsaoli. Report submitted for information for mutation of the above share in the names of the heirs in place of the deceased. Dated 31st December, 1919.

“ Signature of Manik Rao Vithoba, *Patwari*,

Circle No. 48, Lonsaoli, tahsil Wardha.”

It can scarcely be questioned that if the *Patwari* knew of a will under which Namdeo became Vishram's heir it was his duty in the ordinary course to mention it in his report as to the persons in whose favour mutation of names should be made. The defendants' case is that the *Patwari* knew about it from the first, but was directed by the Assistant Inspector not to mention the oral will in his report. The defendants have not called the *Patwari*, not, as mistakenly stated by the Appellate Court, because he died before the trial, but because the defendants allege he had been won over by the other side. Instead they called as their fortieth witness the Assistant Land Record Superintendent, who did not say that he had told the *Patwari* not to mention

the will in his report. He professed to recollect a conversation in which the *Patwari* consulted him as to the mutation, and having told him preferably to mutate in the name of the widows, as there was no writing. This seems rather a lame story, because it was his own duty to take action on the report, and it does not account for the fact that the will was not mentioned in the report. There is, in fact, no satisfactory evidence that the oral will was publicly put forward until Namdeo applied for registration in his own name on some unspecified date in January, that is to say, very late in the day.

Their Lordships have not failed to give full consideration to the fact that the widows have been supporting a case which involves the loss of their own widows' estate, but they cannot agree with the Appellate Court that the attitude of the widows would almost prove the will by itself. It may well be that the deceased and his wives who had brought Namdeo up as their own child desired him to succeed, and that the surviving widow, as stated by the Appellate Court, is anxious even now to give effect to her husband's wishes if she can, by adopting the first defendant, but the duty of the Court is to see whether the oral will set up is proved to have been made. The Additional District Judge was not satisfied with the oral evidence in support of it. For the reasons already given their Lordships, after a careful consideration of the case, have reached the same conclusion. In their Lordships' opinion the appeal must be allowed, the decree of the Appellate Court reversed, and the decree of the Additional District Court restored, and they will humbly advise His Majesty accordingly. The defendants must pay the appellants' costs here and in the Appellate Court.

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