*Privy Council Appeal No. 97 of 1945*

**Duvvuri Suryanarayanamurthi, now Jabdatul Yakaran Sri Duvvuri Suryanarayanamurthi Baphyat Bashand, Zamindar** - - - - - *Appellant*

*v.*

**Duvvuri Suramma and others** - - - - - *Respondents*

FROM

## THE HIGH COURT OF JUDICATURE AT MADRAS

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## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH MAY 1947

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*Present at the Hearing:*

LORD THANKERTON
LORD DU PARCQ
SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

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This is an appeal from a judgment and decree of the High Court of Judicature at Madras, dated 26th August, 1943, which reversed a judgment and decree of the Court of the Subordinate Judge at Amalapuram, dated 27th September, 1940.

On the 9th March, 1938, the respondent No. 5 as plaintiff brought a suit for partition against his father, defendant No. 1, his mother, defendant No. 3, who is respondent No. 1, and his elder brother, the appellant, defendant No. 2. On the 19th February 1940, whilst the suit was pending, the father died, leaving him surviving, his widow, respondent No. 1, his two sons, the appellant and respondent No. 5, and four daughters, respondents 2, 3, 4 and 6. The daughters were brought on record as the legal representatives along with the widow of the deceased.

Four days before his death, namely, on the 15th February, 1940, defendant No. 1 (who will hereinafter be referred to as " the testator ") made a will which, if valid, affects the shares in which the interest of the testator in the joint family property will be divisible between surviving members of the family. The appellant challenged the fact of the execution of the will and alleged, in the alternative, that the testator was not of testamentary capacity when he made his will. The Subordinate Judge raised an issue: " Whether the will set up by defendants Nos. 3 to 7 is true, valid and binding ". In answer to the issue he held that the execution of the will was proved, but that it was not proved that the testator was in a sound disposing state of mind, and that the will was not valid and binding. In appeal the High Court agreed with the finding that the will was duly executed, but disagreed with the view of the Lower Court as to the testamentary capacity of the testator, and made a declaration that the testator was in a sound disposing state of mind and that the will was valid and binding.

The will was in the following terms:—

" Will executed and given on the 15th February 1940, by Venkatapati Somayajulu Garu's son Jabdatul Yakaran Sree Duvvuri Suryanarayana Somayajulu, Baphyat, Bashand Zamindar Garu, Brahmin, Zamindar, resident of Gangalakurru.

I am now about 65 years old. From the past about four years shivering and palpitation have set in in my body. Now, on account of a little paralysis, shivering of the hand has also set in. Apprehending as to what the future might be, I have made the following arrangements regarding the provisions to be given effect to after my lifetime in respect of all my movable and immovable properties.

I have two sons named Suryanarayanamurti and Venkatapati Somayajulu, four daughters named Garimella Seethamma, Akella Seshamma, Challa Kameswaramma and Garimella Annapurnamma and a wife named Suramma.

My son, Venkatapati Somayajulu filed the suit, O.S. No. 9 of 1938 on the file of the Sub-Court, Amalapur, against me and against my son, Suryanarayana, for partition of the family properties. In the said suit, my elder son and I filed (written) statement and are contesting the suit. Without prejudice to my contentions in the said suit, some lands have been put in my possession. For partition of the remaining lands and the movable properties, the suit is being adjourned for trial. While so, as the disease has been gradually growing in my body, I have thought that, in any event, it would be good to make arrangements as hereunder and have executed this will making provisions as described hereunder.

That, out of my share of the immovable properties, my eldest daughter, Garimella Seethamma, shall get land of the extent of 4 acres, with life interest, the second daughter, Akella Seshamma, shall get land of the extent of 4 acres, the third daughter, Challa Kameswaramma, 2 acres of land and the fourth daughter, Garimella Annapurnamma, 6 acres of land; that after my lifetime, my wife, Suramma, shall give the lands of her choice as aforesaid that, out of the said lands, the land that may be given to Garimella Seethamma, shall after Seethamma's lifetime, pass to my elder son, Suryanarayanamurti with full rights; that as regards the lands that are going to be given to the other three daughters, the same shall be enjoyed by them during their lifetime and that after their lifetime, the same shall pass to their male descendants with full rights; that as regards all the remaining immovable properties pertaining to my share, my wife shall enjoy the same during her lifetime and that, after my wife's lifetime, my second son, Venkatapati Somayajulu, shall enjoy the same with full rights, and that, out of the entire movable properties that might fall to my share in the suit, my wife shall, after discharging the debts due to outsiders for my share, deal with the entire remaining movable properties according to her pleasure. I have executed this will wholeheartedly and with sound consciousness agreeing that this will shall take effect after my lifetime, in the manner mentioned above. Nothing has been written previous to this will. It has been arranged that, as regards the house that has fallen to my share, my wife, Suramma, and my daughter, Garimella Seethamma, shall reside in the same during their lifetime and that, after their lifetime, the same shall pass to my second son, Venkatapati Somayajulu. I reserve to myself the right to cancel this will."

The will was expressed to have been written by Akella Subbarayudu and to have been witnessed by three witnesses. It was registered on the 17th February, 1940, in the circumstances hereinafter mentioned, and the testator died as already mentioned on the 19th February, 1940.

The will, it will be seen, makes provision for all the members of the testator's family but gives only a very small share to the elder son, the appellant. The elder daughter was a widow, and the provisions of the will are natural enough if the testator was on bad terms with his elder son. Upon this question, and also upon the question as to the state of

the testator's health, the following passage in paragraph 3 of the written statement, filed by the testator as defendant No. 1 on the 8th August, 1938, is relevant.

" About two years ago, the 1st defendant fell down from the cart, broke his hand and foot, and suffered much without being able to get up from the cot for some time. Subsequently also, a kind of tremor due to biliousness began and he is not in a condition to move out of the house. Ever since that time, because of old age, because of bodily illness and because of lack of steady mind, he was unable to manage the family property. As the 2nd defendant was the eldest son, ever since that time he assumed management of the family business, caused some lands to be cultivated, collected the cists, failed to give the said moneys to the family property and spent the same for bad purposes for himself. Moreover, having learnt about the filing of this suit, having learnt about the absence of this defendant from home, he beat his mother and sister in the family house on 10th March, 1938, forced open the iron safe and carried away the documents, promissory notes, silver, brass, etc., articles belonging to the family. Not being able to bear the violent behaviour of the 2nd defendant and his friends, this defendant and his wife went to Irusumanda village where they have been residing at the house of their son-in-law. The 2nd defendant has accordingly suppressed all the movable property belonging to the family."

Those allegations against the elder son may or may not be true; they have not been proved; but their importance is that they show the feelings which the testator entertained towards his elder son during the pendency of this suit.

The finding of the Lower Courts as to the factum of the will has not been challenged. There is no allegation of undue influence or fraud, and the only question debated on this appeal is as to the testamentary capacity of the testator. The contentions of the appellant are that the burden of proving testamentary capacity lies on those who propound the will; that the admittedly bad state of health of the testator, and the fact that he died four days after executing the will make the burden peculiarly heavy; and that the Subordinate Judge, having found as a fact that testamentary capacity was not proved, the High Court was not justified in interfering. Upon this latter point a consideration of the evidence and of the judgments of the Lower Court, makes it clear that the High Court did not differ from the Subordinate Judge in his appreciation of the witnesses whom he had seen; the difference between the Courts lay in the weight which they respectively attached to different classes of evidence.

Apart from the members of the family, whose evidence is not of much relevance and is not disinterested, the evidence that the testator was of testamentary capacity rested on the testimony of the writer of the will, of two of the attesting witnesses, and the sub-Registrar. The third attesting witness was not available.

The writer of the will, who was defence witness No. 2, deposed that he wrote the will and that the testator had no fever on that day. His evidence is that on the morning of the 15th February he was called by one of the testator's daughters (the 4th respondent) to the testator's house, and the testator asked him to write a will. The witness suggested that somebody else should be procured for the purpose, but the testator said that the witness could easily do it. The witness says that he asked the testator why he was giving to his second and not to his elder son, and the testator said his elder son had beaten his wife and was contracting many debts. The testator told him the dispositions he wanted to make and the witness made notes of them and then wrote the draft at his own house, and took it to the testator later in the day. On the suggestion of the wife and the 4th respondent the last sentence of the will as to the house was added to the draft. The fair copy of the will was executed by the testator

in the presence of the witness and the attesting witnesses. The testator then said that the will must be registered and, accordingly, the witness went to the sub-Registrar on the next day, the 16th, and arranged that the Registrar should come to the testator's house on the morning of the 17th. This was done and the will was then registered. The witness says that the testator was not sick during those days, but he got sick again on the 18th.

The evidence of the two attesting witnesses who were called is that the testator executed the will in their presence on the 15th February, and that he was then in a sound state of mind.

The evidence of the sub-Registrar, who was defence witness No. 1 is of great importance. He says that he went to the testator's house having been called by Subbarayudu, and that he there registered the will on the 17th February. Before doing so he took the deposition of the testator which was Exhibit IX (*e*) Original exhibit IX (*b*). That deposition is in these terms:—

" On 15th February, 1940, I executed a will. I have four daughters named (1) Garimella Seethamma, (2) Akella Seshamma, (3) Challa Kameswaramma and (4) Garimella Annapurnamma, and two sons named (1) Suryanarayanamurti and (2) Venkatapati Somayajulu. I have a wife also named Suramma. In the will I have provided 4 acres to my first daughter, 4 acres to my second daughter, 2 acres to my third daughter, 6 acres to my fourth daughter and the rest of the properties to be enjoyed by my wife during her lifetime. The first daughter has life interest. Thereafter, that property should pass to the first son. The other daughters should enjoy the properties with absolute rights. As regards the properties given to my wife, the same should, after her lifetime pass to my second son. I executed this will with consciousness. Now, I am suffering from rheumatism. Therefore, on account of the shivering of my hand, I am unable to sign properly. I have answered all these questions you have put. I request for the registration of the will."

" Now I am in full consciousness."

According to the witness this deposition was taken down in answer to questions addressed by him to the testator as to how many children he had, what will he had executed, and why his hand was shaking. The witness says that after taking the deposition he read out the will, and it was admitted by the testator, and that the testator was in a sound disposing state of mind and he could understand what was being said and done.

If the writer of the will and the sub-Registrar are honest witnesses, their testimony establishes that the testator himself dictated his wishes which were embodied in the will on the 15th February, and on the 17th he remembered its contents and desired that it should be registered. In the face of such evidence it is difficult to challenge testamentary capacity. The Subordinate Judge did not say that he disbelieved either of these witnesses, nor did he suggest that they were not disinterested. Indeed, he accepted their evidence, and that of the attesting witnesses, as to the factum of the will. He considered that the sub-Registrar was somewhat inexperienced, and regarded the words added to Exhibit IX(*c*): " Now I am in full consciousness " as indicating a doubt in the mind of the sub-Registrar as to whether that was really the fact. The only criticism the learned Judge made about the writer of the will was that he had never written any document previously for the testator, and that it was strange that the testator did not consult his lawyers about the will. Their Lordships agree with the High Court in thinking that these criticisms afford no ground for disbelieving the witnesses. The Subordinate Judge also thought that the signature of the testator on the will was a mere scrawl, but the High Court thought that many of the letters were identifiable. As the original of the will has not been produced before the Board, their Lordships must accept the view of the High Court upon this matter. In any case, the testator's thumb impression was taken upon the will as well as

his signature. The evidence on which the learned Subordinate Judge mainly relied for holding that testamentary capacity had not been proved was that of a country doctor, Rayavarapu Akkiraju, who was defence witness No. 10. He admittedly visited the testator on the 18th and 19th February, when he found him in a state of stupor and sometimes delirious, and he considered that on those days the testator was not in a fit condition to execute any will. He says that he was told, though he does not remember by whom, that the testator had been ill for the past week and that the testator was in the condition of stupor and delirium for two or three days previously, and he thought that condition might have been in existence at least for a couple of days previously. The evidence of the doctor as to the condition of the testator on the 18th and 19th February may be accepted, but he admitted in cross-examination that his opinion as to the condition of the testator before his visit was based on inference derived from the information which somebody had given him. Their Lordships agree with the High Court in thinking that it is quite impossible to accept the opinion of the doctor as to the testator's condition before the 18th February when the doctor saw him, against the positive testimony of disinterested witnesses who saw the testator on the 15th and 17th February and considered that his mind was then in a normal state.

The appellant called in aid the well-known rules formulated by Baron Parke in *Barry* v. *Butlin*, 2 Moore's Privy Council Cases 480., that it is for the party propounding a will to satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator and, secondly, that if a party writes or prepares a will under which he takes a benefit that is a circumstance that ought generally to excite the suspicion of the Court. The first of those conditions has been fulfilled in this case; the second does not arise. There is no evidence that the 5th respondent, who derived the principal benefit under the will, had anything to do with the writing or preparation of it. Indeed, the evidence is that he took no part in the proceedings. Their Lordships can see no ground for suspicion in this case. The fact that the testator was admittedly in a state of health which had affected his memory and rendered him incapable of managing his estates falls far short of establishing that he was incapable of considering what dispositions of his property he should make in favour of members of his family, or that he did not understand the dispositions which in fact he did make.

For these reasons Their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs of the respondents.

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In the Privy Council

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**DUVVURI SURYANARAYANAMURTHI, NOW JABDATUL YAKARAN SRI DUVVURI SURYANARAYANAMURTHI BAPHYAT BASHAND, ZAMINDAR**

*v.*

**DUVVURI SURAMMA AND OTHERS**

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DELIVERED BY SIR JOHN BEAUMONT

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