

Privy Council Appeal No. 45 of 1935

Oudh Appeal No. 24 of 1933

Dwarka Nath Singh and others - - - - - *Appellants*

v.

Musammat Raj Rani and others - - - - - *Respondents*

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 7TH MAY 1937.

Present at the Hearing :

LORD MACMILLAN.

LORD MAUGHAM.

SIR SHADI LAL.

SIR GEORGE RANKIN.

[*Delivered by* LORD MAUGHAM.]

The point for decision in this case is whether a Will executed by one Thakur Shankar Bakhsh Singh (whom it will be convenient to call Shankar Bakhsh) bearing date the 28th July, 1904, was a disposition of his property made with the consent of the Court of Wards at Sitapur in the terms of section 34 of the North Western Provinces and Oudh Court of Wards Act (III of 1899).

The appellants propounded the Will in question and petitioned the Chief Court of Oudh at Lucknow for letters of administration of the estate of the ward with a copy of the Will of the 28th July, 1904, annexed. A number of objections were raised to the alleged Will; but they have all failed except on the point as to the lack of consent of the Court of Wards. As to this the Chief Court in its original jurisdiction has held that the consent of the Court of Wards was obtained. The Chief Court in its appellate jurisdiction has held the contrary.

The relevant facts are as follows:—

On the 1st August, 1901, the estate of Shankar Bakhsh was taken under the management of the Court of Wards under section 8 (d) (i) of Act III of 1899 above-mentioned. By section 4 thereof the Board of Revenue is the Court of Wards.

The testamentary capacity of a ward of the Court is governed by section 34 of the Act which is as follows:—

“ A ward shall not be competent

“ (a) to transfer or create any charge on, or interest in, any part of his property which is under the superintendence of the Court

of Wards, or to enter into any contract which may involve him in pecuniary liability:

" but nothing in this clause shall be deemed to affect the capacity of a ward to enter into a contract of marriage: provided that he shall not incur, in connection therewith, any pecuniary liability, except such as, having regard to the personal law to which he is subject, and to his rank and circumstances, the Court of Wards may, in writing, declare to be reasonable;

" (b) to adopt, or to give a written or verbal permission to adopt, without the consent of the Court of Wards;

" (c) to dispose of his property by will without the consent of the Court of Wards:

" Provided, first, that the Court of Wards shall not withhold its consent under clause (b) or clause (c) if the adoption or testamentary disposition is not contrary to the personal or special law applicable to the ward, and does not appear likely to cause pecuniary embarrassment to the property, or to lower the influence or respectability of the family in public estimation:

" Provided, secondly, that the provisions of clauses (b) and (c) shall not apply to any proprietor in regard to whose property a declaration has been made under section 9."

No declaration under section 9 was made in respect of the estate of Thakur Shankar Bakhsh Singh and therefore the second proviso has no application to this case.

Previously to his becoming a ward Shankar Bakhsh had made a Will, which did not require the consent of the Court of Wards. It was dated the 19th of June, 1901, and by it he bequeathed his property absolutely to his wife Musammatt Raj Rani. On the 30th of November, 1901, he purported to make another Will which was registered on the 3rd December, 1901. By this Will he revoked the Will dated the 19th June, 1901, and bequeathed his entire property to his wife for life without power of alienation and after her death to Ganga Bakhsh Singh, his cousin, and his sons, the appellants. The Will was sent through official channels to the Board of Revenue which refused to sanction it; and this refusal was communicated to Shankar Bakhsh by the Deputy Commissioner on the 6th August, 1902. Shankar Bakhsh presented two petitions to the Board of Revenue, dated the 7th October, 1902, for permission to adopt a son and asking for the reason why sanction was refused to his Will, dated the 30th November, 1901, and registered on the 3rd December, 1901. He requested the Board to reconsider its decision.

As the result of consideration the Board of Revenue authorised Mr. Dunne, the special manager of the Court of Wards at Sitapur, to inform Shankar Bakhsh that the Board were prepared to sanction a new Will being executed by him provided it fulfilled all the conditions laid down in the Court of Wards Act. This information was duly conveyed to him by a letter of the 4th July, 1903. He was reminded later of the matter and asked to give an early reply on the 6th August, 1903.

On the 18th January, 1904, Shankar Bakhsh forwarded to Mr. W. R. Partridge, the Deputy Commissioner at Sitapur, a draft of a new Will and asked for the consent of the Court of Wards to it.

On the 16th March, 1904, the Board of Revenue wrote to the Commissioner, Lucknow Division, requesting that the attention of Shankar Bakhsh should be drawn to the fact that the net revenue of three villages mentioned in the draft Will might not be sufficient to cover the amount of certain maintenance legacies charged by the proposed Will upon the said villages; and they also called for a medical certificate as to his mental condition.

The certificate was obtained and was satisfactory. On the 27th April, 1904, Shankar Bakhsh wrote to the Court of Wards stating his willingness to add another village to the villages the income of which was to provide for the allowances and stating also that he desired to strike out of the draft Will which he had submitted a certain provision on which nothing now turns.

The facts were communicated to the Board of Revenue who after consideration came to the conclusion that the Court could not any longer refuse its consent. On the 25th May, 1904, the Board wrote to the Commissioner of Lucknow that "in the circumstances now stated the Court of Wards will not withhold its consent to a Will drawn up by Thakur Shankar Bakhsh Singh similar to that submitted [i.e., the draft Will of the 18th January, 1904], but altered in the light of the proposal contained in his letter of the 27th April, 1904" [viz., the proposal to charge a fourth village for the annuities].

A singular circumstance must now be mentioned. This letter was doubtless an authority to the Commissioner to communicate either by letter to Shankar Bakhsh or verbally to him through Mr. Dunne, the special manager for the Court of Wards in Sitapur, the determination of the Court of Wards in the matter. Mr. Dunne was called at the trial on behalf of the defendants, who were objecting to the grant of letters of administration with the Will annexed; but he was not asked to state the precise nature of the communication he made to Shankar Bakhsh. That he made a statement on the faith of which Shankar Bakhsh executed a Will is however not in doubt. Without submitting any further draft Will for the approval of the Court of Wards, on the 28th July, 1904, he executed the Will now in question, and got it registered on the 2nd August, 1904, reciting therein that "the Hon'ble members of the Board of Revenue have granted me power to execute the Will so I hereby execute this my last Will cancelling all the previous Wills executed by me."

Nor is the view of Mr. Dunne in any real doubt, for on the 13th December, 1905, he sent the following note to the Deputy Commissioner (Mr. Partridge) at Sitapur:—

"On the 25th May, 1904, the Board sanctioned the execution of a Will of Thakur Shankar Bakhsh Singh, draft of which has been submitted with this office letter No. 1344/X-2 6-4, dated 19th February, 1904. I am now informed that a Will has been executed and registered but I find there is no copy of it on file. I am not sure that the original might not be on record or kept under lock and key. The Board should also be informed of the Will having been executed."

To their Lordships it seems clear that Mr. Dunne had not suggested to Shankar Bakhsh that in order to obtain a definite consent he must submit a fresh draft to the Board. On the contrary the letter is only consistent with the view that he had informed Shankar Bakhsh (with whom he was in frequent communication) that the Board had definitely sanctioned the execution of a Will provided it was in accordance with the draft Will of the 18th January altered to the extent mentioned in Shankar Bakhsh's letter of the 27th April, 1904. Their Lordships will consider in a moment whether Mr. Dunne was authorised by the Board to make such a statement to the ward.

It should be added that the wife of Shankar Bakhsh came to know of the consent to the Will having been given, and at once wrote to the Board of Revenue in protest. On the 8th June, 1904, the Board of Revenue instructed the Commissioner, Lucknow Division, to "inform the lady through the Deputy Commissioner of the orders conveyed in my No. 691 N/X-214B dated the 25th May, 1904, which are final in this matter." The letter referred to is that above set forth.

The following correspondence ensued:—

On the 15th December, 1905, Mr. Partridge sent the following note to Mr. Dunne:—

"I did not know that he had executed a Will since receipt of the B.O. (Board's Order) dated 25th May, 1904, and have all along been under the impression that he had changed his mind or put off the idea for the present. Please find out from him now whether he has executed a Will since that date and if so, call on him to produce it.

"After inspecting it if it has been registered, send me a copy and return the original to him."

On the 19th December, 1905, Mr. Dunne, the special manager, sent the following note to Mr. Partridge, the Deputy Commissioner:—

"I have the original Will which Chaudhari Ganga Bakhsh gave me to read two days ago. I send it to you for perusal. It was registered . . . but we were not informed of it. I heard by chance that a Will had been executed."

On the 20th December, 1905, the Deputy Commissioner, Mr. Partridge, sent the following note to Mr. Dunne, special manager:—

"I return the Will in original with a copy which I have had made. The copy should be kept in one file and another copy should be made and sent to Commissioner for Board's information."

On the 20th December, 1905, on receipt of the note Mr. Dunne, the special manager, passed the following order:—

"I have kept the original to return to Chaudhari Ganga Bakhsh. Comply with Deputy Commissioner's orders."

On the 16th January, 1906, Mr. Partridge sent a copy and a translation of the Will to the Commissioner, Lucknow Division, and suggested that some provisions in the Will were of doubtful validity on the ground of perpetuity. No answer seems to have been received at this time from the Court of Wards; but they seem to have taken advice on the question.

On the 27th March, 1906, Shankar Bakhsh wrote to the Board of Revenue stating that he had quarrelled with his wife and with Ganga Bakhsh (his residuary legatee). He was desirous of marrying again and of making a new Will. On the 30th May, 1906, he was informed that the Will already executed by him was, to use his own phrase, "somewhat illegal." A number of letters followed. On the 8th June, 1906, he submitted for approval a fresh draft Will of quite a different tenor. However, on the 13th July, 1906, the Board of Revenue wrote objecting to the proposed new Will on the ground that it tended "to lower the influence or respectability of the family in public estimation," and on other grounds, and adding the following statement:— "I am to say that the Court of Wards withholds its consent to the Will as at present drafted by the ward as well as to the Will already executed by Thakur Shankar Bakhsh Singh." This statement may not unfairly be contrasted with the letter written on the 8th June, 1904, in reference to the protest by the wife of Shankar Bakhsh.

The subsequent events may be shortly stated.

On the 21st November, 1906, Shankar Bakhsh wished to make a Will in favour of Christian missionaries and presented a draft thereof together with two petitions, but on the 10th January, 1907, the draft was rejected and Shankar Bakhsh was informed of such rejection. He did nothing afterwards and appears to have regarded his Will, dated the 28th July, 1904, as his valid last Will and testament.

He died on the 29th of July, 1922, at Sitapur, and the appellants as legatees under the Will, dated the 28th July, 1904, or as legal representatives of Chaudhari Ganga Bakhsh Singh (who died intestate on the 19th October, 1929), applied on the 27th October, 1930, to the Chief Court for letters of administration with a copy of the Will annexed, of the estate of Shankar Bakhsh, deceased.

On the 5th January, 1931, Musammatt Raj Rani, the widow of Shankar Bakhsh, who had entered a caveat on the 23rd December, 1930, and her daughter, Must. Bindeshuri, filed their written objections. They claimed the entire property by virtue of the Will dated the 19th June, 1901, and challenged the said Will dated the 28th July, 1904, on various grounds, as above stated. After an elaborate trial before Kisch J. the various issues were determined in favour of the appellants, including that as regards consent which alone their Lordships have been dealing with. A decree was passed granting letters of administration to the appellants with the Will annexed.

Their Lordships are of opinion that the question in effect to be decided can now be stated in a narrow and precise form. Was Mr. Dunne, the special manager, authorised by the letter of the 25th May, 1904, to convey to Shankar Bakhsh the consent of the Court of Wards to his disposal of his property by Will in accordance with the draft Will already submitted by him, but altered in the way proposed by his letter of the 27th April, 1904? The alternative view

is that he was authorised only to convey the information that the Court of Wards would in the future consent to such a disposition, presumably if a further draft were submitted. In answering this question it is desirable to bear in mind certain considerations:—First, section 34 relates to the *competence* of the ward to dispose of his property. It is a section in derogation of the ward's ordinary rights, and the power of the Court of Wards to withhold their consent is clearly defined in the first proviso. Secondly, the normal course contemplated by the terms of the section is that the consent will be given before the Will is executed and may be given either to a draft submitted or in more general terms to a specific disposition of the ward's property. This is not to say that a subsequent consent would not be effective (as is now provided by the United Provinces Court of Wards Act (IV of 1912) section 37), but that the words of the section point more appropriately to an antecedent consent being given to a disposition not yet effected. It may be observed that a prior consent is clearly intended when the consent is being given to make an adoption under subclause (b). Thirdly, competence being taken away from the ward to the extent mentioned in the section, it is restored by a consent subject to any qualifications mentioned in the consent. It is therefore impossible for the Court of Wards having given its consent and the consent having been acted upon according to its terms, to withdraw its consent at a subsequent date so as to invalidate *ex post facto* the competency of the ward. Fourthly, under the section no formality is requisite to a consent under (b) or (c), and the consent as regards (b) and (c) may be either verbal or in writing. (It is otherwise enacted as regards subsection (a)). Fifthly, it may be pointed out that the section does not prevent the ward from revoking or cancelling a previous Will, since such an act is not a disposition of property by him. Their Lordships must express their regret that this was not pointed out to the ward when he became dissatisfied with the Will of the 28th July, 1904.

What then was the authority conferred by the letter of the 25th May, 1904? The words relied on by the respondents are "the Court of Wards will not withhold its consent" to a will in certain terms, a sentence which it is suggested contains a verb in the future tense and refers to a future effective consent. Their Lordships after carefully weighing the arguments are unable to take this view. The future tense, in the context in which it is found, may naturally be explained by the circumstance that the consent refers to a future event, namely, the execution of a will. The point may be illustrated by supposing that the consent required was a consent under sub-clause (b) to adopt a son. If, after examination of all the relevant facts, the Court of Wards wrote to the effect that "in the circumstances they will not withhold their consent to the proposed adoption," it would be difficult to contend that any further consent was necessary; and the position would be at least as clear if the Court of Wards wrote to one of its officers instructing him to inform

the ward that "the Court of Wards in the circumstances will not withhold its consent to the proposed adoption."

The view their Lordships have taken is supported by the letters written by Mr. Dunne and Mr. Partridge (the Deputy Commissioner) as well as by the unambiguous letter of the 8th June, 1904, written by the Secretary of the Board of Revenue to the Commissioner, Lucknow Division. Indeed no one concerned in the matter seems to have doubted that an effective consent to the will had been given until July, 1906, perhaps not even then, for there is no suggestion that Mr. Dunne or Mr. Partridge had exceeded his authority.

In the result their Lordships must agree with the careful and able judgment of Mr. Justice Kisch and they are unable to agree with the opinions expressed by the learned Judges of the Chief Court of Oudh on appeal. In particular they think the view that the Court of Wards could withdraw its consent after the will had been executed pursuant to a consent is unsound, nor do they think that what took place in 1906 can properly be taken as qualifying the legal effect of the events prior to the execution of the will in July, 1904. The result may be unfortunate, but that is a circumstance which their Lordships are not entitled to take into consideration in this case.

Their Lordships think it proper to add that the only effect of their decision is that letters of administration with a copy of the Will annexed must be granted as prayed, but this will not in any way prejudice any proceedings against any of the beneficiaries which may be open to the respondents or any of them.

For the reasons above stated their Lordships are of opinion that the appeal should be allowed with costs here and below and the decree of the trial judge restored. They will humbly advise His Majesty accordingly.

In the Privy Council.

DWARKA NATH SINGH AND OTHERS

v.

MUSAMMAT RAJ RANI AND OTHERS

DELIVERED BY LORD MAUGHAM

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