**PRIVY COUNCIL**

(Srimati) Sarat Kumari Bibi

Vs.

Rai Sakhi Chand Bahadur

Privy Council Appeal No. 21 of 1927
(Lords Phillimore Atkin and Sir Lancelot Sanderson JJ.)

30.11.1928

**JUDGMENT**

**SIR LANCELOT SANDERSON J.**

1. These are consolidated appeals by *Sarat Kumari* Bibi against two decrees of the High Court of Judicature at Patna dated 9th December 1925, whereby the decree of the learned District Judge of Bhagalpur dated 23rd June 1924, was reversed. The respondents, *Rai Sakhi Chand Bahadur, Babu Ganesh Lal, Madusudan Das* and *Moulvi Jamaluddin Khan,* who are four out of the five trustees named in the will purporting to have been made by one *Raghunanda Lal* on 24th July 1923, filed an application for probate on 27th February 1924, in the Court of the said District Judge of Bhagalpur.

2. *Raghunandan* died on 31st August 1923, leaving two daughters, *Raj Kumari* Bibi and *Sarat Kumari* Bibi. His other near relations were his widowed sister *Rajdulari Bibi and Krishna* Bibi, the widow of *Raghunandan's* brother, Jadunandan Lal. Caveats were filed by the two daughters and by Krishna Bibi; but objections were filed by Krishna Bibi and Sarat Kumari Bibi only. In these appeals the Board is concerned only with the objections raised by the daughter, Sarat Kumari Bibi, who is the sole appellant. At the hearing of the appeals before the Board the four above-named executors and Srimati Rajdulari Bibi, who is one of the respondents in the second appeal, appeared by learned counsel. Krishna Bibi was not represented.

3. Three issues were framed by the learned District Judge as follows :

1. Was the will validly executed and attested?
2. Was the testator in a sound disposing state of mind at the time of execution of

the will?

3. Was the will executed under the undue influence of Moulvi Jamaluddin Khan?

4. The learned Judge answered issue 2 in the affirmative and issue 3 in the negative. On issue 1 he held that the will was not validly executed, and he answered the first portion of the issue, viz., as regards execution, in the negative and the second portion, viz., as regards attestation, in the affirmative. The ground of his decision was that the propounders of the will had failed to satisfy him that the testator was aware of the contents of the will and that the will expressed his intention. He was of opinion that a very active part in the preparation of the will was taken by Jamaluddin, who was the manager and confidential servant of the testator, and that he took a substantial benefit under the will.

5. Applying the principles laid down in *Barry v. Butlin 2 Moore. P.C. 480*, and *Tyrrell v. Painton*, the learned Judge held that the circumstances in connexion with the preparation of the will aroused suspicion, that such suspicion had not been removed, and that he was not satisfied that the testator was aware of the contents of the will. The learned Judge accordingly refused to grant probate of the will to the executors. Rajdulari Bibi and the four above-named executors appealed in two separate appeals to the High Court of Judicature of Patna. The learned Judges of the High Court on 9th December 1925, allowed the appeals, set aside the decree of the learned District Judge, and directed that probate should issue as prayed. They held that the will created no trust in favour of Jamaluddin, that the learned District Judge was wrong in thinking that there was any suspicion inherent in the will which took the case out of the ordinary rule, viz., that the proof of capacity and the fact of execution carry with them the presumption that the testator had knowledge of the terms of the will.

6. The learned Judges said that they were prepared to go further and hold that there was satisfactory evidence to satisfy the conscience of the Court that the testator had full knowledge of the terms of the will, including those contained in para 12.

7. Sarat Kumari Bibi, a minor appearing through her guardian and next friend, Jugal Krishna Prasad, has appealed against the said decrees of the High Court to His Majesty the King-in-Council. At the hearing before the Board it was admitted by learned counsel appearing for the appellant that the will was undoubtedly executed by the testator, that it was duly attested and registered, and that now there was no suggestion of undue influence. The argument presented on behalf of the appellant was that the view of the High Court in regard to the benefit alleged to the conferred on

Jamaluddin under the will was not sound, and that the conclusion of the learned District Judge in holding that it had not been satisfactorily proved that the testator was aware of the contents of the will, was correct. It was further contended that in any case there was no reliable evidence that the testator was aware of the provisions contained in para. 12 of the will, and that the probate, if granted, should be granted excepting the said para. 12. The main provisions of the will are that the two daughters are given legacies of five hundred rupees monthly each, which will descend as far as their children's children. The testator's sister is given five hundred rupees monthly and the testator's residential house and furniture. Three hundred rupees monthly is given to an aunt of the testator Rama Bibi, two hundred monthly to Masudan Dass, a second cousin, and after one or two other smaller legacies the balance is to go in the first instance to the improvement of the estate and, secondly, to the constitution of a Poor Students' Fund. Para. 12 of the will is as follows :

> 12. For carrying out the above-mentioned provisions, I, the executant appoint five trustees; (1) Rai Bahadur Babu Sakhi Chand, Superintendent of Police, at present manager of the Jagannath Temple, residing at present at Puri; (2) Rai Bahadur Surja Prasad, son of Babu Ras Bihari Sahay, deceased, Vakil, resident of Mahalla Khanjarpur, District Bhagalpur; (3) Babu Ganesh Lal, my Khalera brother-in-law (cousin-in-law), resident of Mahalla Guari, Patna City; (4) Babu Masudan Das, son of Babu Ram Narayan Das, deceased, (who is) my relative, resident of Mahalla Golaghat, Bhagalpur, and proprietor of the Gopal Steam Press, Bhagalpur; (5) Maulvi Jamaluddin Khan, the present manager of my estate, resident of Mahalla Imamnagar, District of Bhagalpur. The said Maulvi has up to this time been serving me faithfully and conscientiously and he is acquainted with everything. He is therefore assigned the position of manager for life in addition to that of a trustee. His monthly salary for manager's work is fixed at Rs. 250. Over and above this salary, proper conveyance charges shall be given to him, and travelling and daily diet expenses shall be given as in my time, or the trustees may make proper arrangement therefore (?) in such manner as they may think proper. In (case of) increase of the income of the estate, the trustees shall allow him such increment of salary as may be decided upon by them. This item of expenditure shall be a charge on my estate under the head - establishment charges. Travelling expenses both ways, etc., shall be paid to trustees Nos. 1 and 3 when they shall come over on business of the estate, and the same rule shall apply to the trustees living at a distance. This (item of) expenditure shall be a charge on my estate under the head - allowance to

trustees.

8. The will purported to have been signed by the testator in the presence of Sarja Prasad and Satish Chandra Dey, and to have been acknowledged by the testator to Gauri Shankar Sahay. A note at the foot of the will is as follows :

> "I certify that I have read over and explained this will to the testator, who seemed to understand it perfectly,"
> and it is signed by Jamal Khan, i. e., Jamaluddin. The will is signed in another place by Jamaluddin as the scribe of the document.

9. On 24th July 1923, the will was presented at the Sadar Registration Office, Bhagalpur, by Raghunandan, the testator, who was identified by Sarja Prasad. In dealing with the rule laid down by the above-mentioned cases, viz., *Barry v. Butlin* and *Tyrrell v. Painton* and the question whether Jamaluddin took a benefit under the will, the learned Judges of the High Court held that

> "the benefit must be a pecuniary benefit, a legacy, for instance, more or less of a substantial nature."

10. Their Lordships are not able to agree that the principle laid down in the above mentioned cases is limited to such a benefit as that indicated by the learned Judges of the High Court. Their Lordships are relieved from the necessity of discussing this matter at any length, for it was not seriously argued before them by learned counsel for the executors that Jamaluddin did not receive a benefit under the will in view of the fact that the testator had thereby appointed him manager of his estate for the period of his life at a monthly salary of Rs. 250.

11. Their Lordships agree with the finding of the learned District Judge, which was to the effect that the undisputed facts of the case show that Jamaluddin took an active part in the preparation of the will, and inasmuch as, in their opinion, Jamaluddin did take a benefit under the will by reason of the provision in para. 12 of the will, by which he was appointed manager of the estate for life at a salary, the principle laid down by the above-mentioned cases is applicable to this case, and these appeals must be decided in accordance therewith.

12. It will be sufficient to refer to the statements of the rule made by Lindley and Davey, L. JJ., in *Tyrrell v. Painton*, at pp. 157 and 159 :

13. The rule in *Barry v. Batlin*, *Fulton v. Andrew* and *Brown v. Fisher* is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in

which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will... (Lindley, L.J.)

* * * *

> It must not be supposed that the principle in *Barry v. Butlin* is confined to cases where the person who prepares the will is the person who takes the benefit under it - that is one state of things which raises a suspicion; but the principle is that, wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed... (Davey, L. J.).

14. The material facts relating to the preparation and execution of the will are as follows :

> In July 1923, the testator was ill; he had been an invalid for a considerable time, and he left his home in Bhagalpur on 25th July 1923, and went to Calcutta for treatment. As already stated, he died on 31st August 1923. It was alleged by Jamaluddin that a few days before the testator went to Calcutta he handed to Jamaluddin two or three pages of notes, written in Urdu by the hand of one Hasan Ali, who had acted as tutor to the testator when he was a boy, and that the testator instructed him to take the notes to a vakeel, named Banjit Sinha, for the purpose of having them put into the form of a will.

15. Accordingly, on the evening of 21st July 1923, Jamaluddin took the notes to Ranjit Sinha, who dictated a draft of a will which Jamaluddin wrote in Urdu. On the morning of 22nd July 1923, Jamaluddin is alleged to have taken the draft of the will to the testator, and at his request to have read it to the testator, who asked him to read some parts again and to explain them. This he did, and he then handed both documents to the testator. It was alleged by Jamaluddin that the provision appointing him manager for life at a salary was in the notes given to him by the testator and in the draft will dictated by Ranjit Sinha. Unfortunately, neither of these documents has been produced and Ranjit Sinha was not called as a witness. The explanation for the absence of the latter from the witness-box was that he was appearing as vakeel for the executors at

the hearing of this case before the learned District Judge.

16. Hasan Ali, the tutor, gave evidence and said that he wrote the notes at the dictation of the testator, who kept what he had written. When cross-examined, he stated "that it was in the notes that Jamal would be a life manager on Rs. 250". On the next day, viz., the 23rd July, according to the evidence of Jamaluddin, the testator gave the draft to him, saying "There are some cancellations in it : copy it out again." It appears, however, from a later passage in his evidence that Jamaluddin made the cancellations in the draft at the order of the testator. Jamaluddin made a fair copy of the draft, but he omitted from the fair copy the paragraph relating to the appointment of trustees and to the appointment of Jamaluddin as manager of the estate for life. He alleged that he was told by the testator to omit that paragraph from the fair copy.

17. The explanation given for the omission was that the testator wished Surja Prasad, the Government Pleader at Bhagalpur, to be one of the trustees of the will, that he wished to consult Surja Prasad as to the will, and the testator feared that if Surja Prasad saw his name as trustee and executor he might refuse to give his advice. That evening Surja Prasad went to the testator's house, and the testator asked Jamaluddin to produce the fair copy of the will which he had made that day. Accordingly, Jamaluddin brought it and in the presence of the testator read it out.

18. The testator asked Surja Prasad to see that it was all right. Surja Prasad said he would see it next morning, whereupon the testator told Surja Prasad to take the draft away with him, and that he would send Jamaluddin in the morning. The next morning, i. e., on 24th July 1923, Jamaluddin went to the house of Surja Prasad, who suggested two alterations in the draft, viz., that the Rs. 500 monthly to the daughters should be made an absolute estate of inheritance and that the grant for educational purposes should be specified. Jamaluddin, in reply to such suggestions, said that it was the testator's wish that the disposition should be as in the draft. Accordingly Surja Prasad did no more than make some verbal alterations and gave the draft back to Jamaluddin. The draft shown to Surja Prasad has not been produced, but there is no doubt that it did not contain the paragraph numbered 12 in the will relating to the appointment of trustees and manager. Janaluddin took the draft back to the testator, who instructed him to make a fair copy and to add the paragraph as to the appointment of trustees and manager.

19. There is no direct evidence that Jamaluddin reported to the testator the advice which Surja Prasad had given in respect of the two matters already referred to. It

appears that Jamaluddin took upon himself to reject Surja Prasad's suggestions, relying on his own alleged knowledge of the testator's wishes.

20. Jamaluddin then made a final fair copy, including para. 12, and took it to the testator, read it out to him, and added and signed the certificate that he had read over and explained the will to the testator, who appeared to understand it perfectly. In the afternoon of the same day Jamaluddin and Satish Babu went with the testator in a car to the Court. Surja Prasad was called, and the testator, sitting in the car, executed the will signing his name on each page; this was done in the presence of Surja Prasad, Satish Babu and Jamaluddin. Gauri Babu was then called, and the testator admitted his signature to him. The will was then placed in an envelope, which was sealed. The testator, Surja Prasad and Jamaluddin went to the Registry Office, where the will was deposited. Surja Prasad in this evidence said that he was aware :

> "That a man who takes substantial benefit's under a will should not take part in its preparation, but I did not know until next day at the registration that Jamal took a benefit under it. That clause was not in the draft."

21. In another part of his evidence Surja Prasad said :

> "I intended to renounce my executorship. It was after the registration that Jamal Babu told me I was down as a trustee and executor. I said that I ought to have been consulted first, and that I objected, since I was about to retire from my practice. No executor or trustee was in the draft shown to me."

22. From the above-mentioned evidence it is not clear whether the information given by Jamaluddin to Surja Prasad as to the former taking a benefit under the will, and the latter being a trustee, was given in the presence of the testator. It is possible that it was; on the other hand, it is equally possible that it was not, and to assume that the information was given in the presence of the testator would be mere guess-work. Surja Prasad did, in fact, refuse to act as trustee and executor. In view of the above-mentioned facts, in their Lordships' opinion there is ground for suspicion that the testator was not aware of the provision in Clause 12 of the will by which Jamaluddin was appointed manager of the estate for life at the salary of Rs. 250 per month, with the accompanying provisions for the payment of charges and expenses and the possible increase of salary.

23. Indeed, it was not seriously argued by the learned counsel for the executors that there was no ground for suspicion. The point on which the learned counsel laid stress was that the evidence was amply sufficient to remove the suspicion and to satisfy the

Board that the testator was aware of and understood all the provisions, including para. 12, of the will. The learned counsel for the executors further argued that in any event probate should be granted of all the provisions in the will except that part of it which provided for the managership of Jamaluddin, and he relied on the decision in *Rhodes v. Rhodes,* 24. In their Lordships' opinion, there is no ground for holding that the testator was not aware and did not approve of all the provisions of the will with the exception of para. 12.

25. The question, therefore, is narrowed down to the consideration whether the testator approved and was aware of the provisions of para. 12. Their Lordships are satisfiedthat part of the paragraph which deals with the appointment of the five trustees was in accordance with the testator's wishes. They are not however, satisfied that the appointment of Jamaluddin as manager of the estate for life and the terms of such appointment were in accordance with his wishes or that he was aware of the provision in the will relating thereto.

26. It is not necessary for their Lordships to set out in detail all the reasons for holding that the suspicion in respect of the above-mentioned provision has not been removed. It will be sufficient to refer to some of them. The evidence as to the existence of the above-mentioned provision in any of the drafts made prior to the fair copy of the will, which was executed is limited to the evidence of Jamaluddin and Hassan Ali, who was speaking merely from his recollection. None of the material notes or drafts was produced. Ranjit Sinha, whose evidence would have been very important was not called as a witness. There is no evidence beyond that of Jamaluddin, the interested party, that on the morning of 24th July 1923, the will was read to the testator or that he read it himself. There is no doubt that when the draft of the will was shown to Surja Prasad it did not contain para. 12 or any such provision.

27. The explanation given in the evidence of Jamaluddin for its omission was to the effect that the testator did not wish Surja Prasad to know that he was to be a trustee. It is difficult to accept this as a sufficient and reasonable ground for withholding the provisions of that paragraph from the knowledge of Surja Prasad. The position, therefore, in respect of the case is that the clause in the will under which Jamaluddin was to receive a substantial benefit was by his action withheld from the knowledge of Surja Prasad, the Government Pleader, whose advice was sought as to the will, and no satisfactory explanation is forthcoming for such action. There are some grounds to support the opinion of the learned District Judge that it was at least doubtful whether the testator could have read the Urdu script in which the will was written. It is curious

that Jamaluddin should have endorsed on the will the certificate that he had read it over and explained it to the testator, who seemed to understand it perfectly, if it were the fact, as alleged by Jamaluddin, that the testator could read the Urdu script and that he had, in fact, read the will for himself.

28. The above are some of the reasons which have actuated their Lordships in coming to the conclusion that the evidence is not sufficient to remove the suspicion attaching to the provision in question, and to satisfy them that the testator knew and approved of the said provision. The result of their Lordships' conclusions is that probate should not be granted of that part of para. 12 which confers the benefit upon Jamaluddin; in other words probate should not be granted in respect of that part of the paragraph which begins with the words. "The said Maulvi has up to this time," and ends with the words "This item shall be a charge on my estate under the head - establishment charges." This decision, however, does not mean that probate should be refused in respect of the remainder of the will. See *Rhodes v. Shades (L. R. 7 A. C. 192.)*

29. Their Lordships, therefore, are of opinion that the decrees of the High Court should be set aside and an order should be made that probate should issue in respect of the will with the exception of that part of para. 12 which has been heretofore specifically mentioned. There remains the question of costs. The appellant, Sarat Kumari Bibi, has succeeded in the appeal to His Majesty in Council, but to a limited extent only. She has been contending all through the proceedings that probate in respect of all the provisions of the will should be refused and that there should be an intestacy. In this contention she has failed. On the other hand, the executors have been contending all through the proceedings for probate in respect of all the provisions of the will. In this contention they have failed. Their Lordships, therefore, are of opinion that there should be no order for costs as between the appellant and the executors in any of the proceedings, and that any costs paid under any orders of the Courts below ought to be returned, but that the executors should be at liberty to get their taxed costs out of the estate. The position adopted by Rajdulari before the Board was that probate should be granted in the form and to the extent hereinbefore indicated. Consequently their Lordships of opinion that the appellant should pay the costs incurred by Rajdulari in the High Court and in the proceedings before the Board. Their Lordships will humbly advise His Majesty accordingly.

Decree set aside.

Cases Referred.

[1894] P. 151 : 6 R. 540 : 42 W.R. L. T. 453

[1882] 7 A. C. 192.