CALCUTTA HIGH COURT

Jarat Kumari Dassi

Vs

Bissessur Dutt

(Lawrence H Jenkins, C.J. K.C.I.E and Woodroffe, JJ.)

18.07.1911

JUDGMENT

Lawrence H. Jenkins, C.J.

1. After setting out the facts, his Lordship continued: I propose here to examine the judgment under appeal. The key to the decision is, I think, this: there are a number of circumstances which in the opinion of the learned Judge create suspicion: the occasion for suspicion has not been removed therefore the will has not been proved.

2. In so handling the case the learned Judge professed to be guided by Tyrrell v.
Painton (1894). As I understand that decision it laid down no new principle, but it merely applied a well established principle to an exceptional set of circumstances.
That principle was enunciated in *Barry v. Butlin*[1] where it was said: "The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: The first, the onus probandi lies in every case upon the party propounding a 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. The second is, 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, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

3. The effect of this decision is tersely stated by Lord Davey, as he afterwards became, in *Tyrrell v. Painton*[2] where he said: "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 the suspicion is removed."

4. The suspicion to which allusion is made must, I think, be one inherent in the transaction itself, and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction.

5. Now, while I willingly concede the value to us of these decisions, it must not be forgotten that the law is laid down for us in clear and imperative terms by Acts of the Indian Legislature, and it is by the provisions of those Acts that we must be guided. Gopessur was a Hindu, and the law applicable to any will alleged to have been executed by him is to be found in the Hindu Wills Act, which incorporates the sections of the Succession Act to which I will refer.

6. By Section 46 of the Succession Act it is provided that every person of sound mind and not a minor may dispose of his property by will. In Explanation 4 to this section it is said that no person can make a will while he is in such a state of mind, whether arising from drunkenness, or from illness, or from any other cause that he does not know what he is doing. A light is thrown on the meaning of the section by the illustrations appended to it. By Section 48 it is provided that a will or any part of a will the making of which has been caused by fraud or coercion or by such importunity as takes away the free agency of the testator is void.

7. Section 50 prescribes the rules for the execution of unprivileged wills, and enjoins (among other things) that the testator shall sign the will; that his signature shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will; and that it shall be attested by two or more witnesses.

8. So much then for the conditions necessary for a valid will. Next we have to see how the existence of those conditions is to be established. For this I turn to the Evidence Act, which declares by Section 3 that a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The disproof of a fact is similarly treated. It appears to me that the learned Judge has required a higher standard of proof than the law prescribes. Thus at one place he says--"but even so it cannot be said that there is no doubt regarding Gopessur's possession of the requisite mental activity at the point of time in question;" again, in discussing the signature on the will he says: "It is therefore impossible to express a decided opinion on this point:" and he ultimately formulates his attitude towards the problem before him in these words: "The question is--Is the evidence of the witnesses whom he has called to support her case so unimpeachable, so absolutely trustworthy in itself, as by its own merit, to dispose of all objections and allay all doubt and suspicion?" But the materials on which Courts have to pronounce are necessarily imperfect; for apart from the inherent uncertainty of human affairs, the presentment of them to a tribunal is ordinarily the outcome of faulty observation, defective memory, inaccurate description and natural bias, and even that is blurred liere by the intervention of interpretation.

9. Demonstration, or a conclusion at all points logical, cannot be expected, nor can a degree of certainty be demanded of which the matter under investigation is not reasonably capable. Accepting the external test which experience commends, the Evidence Act, in conformity with the general tendency of the day, adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof.

10. The Evidence Act is at the same time expressed in terms which allow full effect to be given to circumstances or conditions of probability or improbability, so that where, as in this case, forgery comes in question in a civil suit, the presumption against misconduct is not without its due weight as a circumstance of improbability, though the standard of proof to the exclusion of all reasonable doubt required in a criminal case may not be applicable: *Cooper v. Slade*[3] *and*

Devine v. Wilson[4]

11. I have dealt with this topic in some detail, as, at first blush, it would almost appear as though we are asked to dissent from the learned Judge's appreciation of the evidence, and that I should hesitate to do in the absence of very strong circumstances justifying such a course. What we have to see in this case is whether, after considering the matters before us, the Court ought to believe the two main facts alleged by the petitioner, or to consider them so probable that a prudent man ought, in the circumstances of this particular case, to act upon the supposition that they are true. These two facts alleged are, first, that Gopessur was of sound mind at the time of the alleged execution of his will, and, secondly, that he in fact duly executed his will.

12. First I will deal with the problem whether he was mentally capable of making the will propounded, bearing in mind that, for this purpose, it is on the petitioner to establish affirmatively that he was at or about 8 or 8-30 on the evening of the 27th of June, 1909, of sound mind, and not in such a state of mind from illness or any other cause that he did not know what he was doing (Section 46 of the Indian Succession Act). If the story of the preparation of the will be accepted, a lower standard of capacity would be requisite: *Pereira v. Pereira*[5] still I propose to discuss the evidence in the first place without reference to the view that Gopessur had a prior knowledge of the contents of the alleged will.

13. His Lordship then dealt with the evidence of the petitioner's medical witnesses, commenting on the circumstance that they were not cross-examined as to Gopessur's mental condition.

14. I pause here to say that, though these three witnesses may be experts, their evidence in this case has not been that of experts, but of men who had observed relevant facts, and whose evidence derives an enhanced value from the circumstance that they had favourable opportunities, peculiar facility and obvious incentive for accurate observation, and that their training would fit them to appreciate and describe what they observed.

15. At this point, it will be convenient to consider the evidence of the medical man who was called by the caveator by way of counterblast.

16. He is Colonel Pilgrim, also a medical man of repute in Calcutta, but without the advantage of having seen Gopessur. He comes before the Court as an expert pure and simple, and without discussing the argument as to the characteristics of this type of remunerated witnesses, or determining how far he is merely to be regarded as a man who is paid a retainer to make a sworn argument, it is impossible to get away from the fact that he labours under a disadvantage to which his medical brethren, if the difference of schools permits this description, were not subject. They saw the patient; he did not. The learned Judge seems to have read the expert's evidence as supporting his own view that the evidence of the three doctors was meagre and unsatisfactory in the extreme.

17. But it is important to see what was the question that elicited from the expert, the reply to which the learned Judge apparently alludes.

18. This is the question that had such momentous consequences-
How would you describe the clinical picture such as it is that is presented by the evidence of the

three doctors?
A. Meagre and incomprehensible.

19. But as I read the evidence of the three doctors, they did not profess to paint a "clinical picture," whatever that may mean, but as plain honest men to give a true and plain account of Gopessur's mental condition on or about the 27th June 1909, as it appeared to them. Had they been required to paint a clinical picture for the expert's purposes, I see no reason to suppose they would have been incapable of responding to the demand.

20. To clinch the matter, counsel put this question to his expert-
Q. Upon the meagre and incomprehensible clinical picture presented by the evidence of the doctors are you able to form a clear, satisfactory and convinced opinion as to the mental condition of the patient during, say, the last eight hours of his life?
A. No, I am not.
Q. Or during the last 8 or 10 days of his life?
A. No, I am not.

21. So much the worse for the expert; but I fail to see how this discredits the evidence of facts given by the three doctors.

22. His Lordship then dealt with other evidence on the first issue.

23. The conclusion then to which I come, on the best consideration I have been able to give to the case, is that on the 27th of June, at the time when Gopessur was alleged to have executed the will, he was of sound mind, and that, though very feeble and debilitated, he was capable of knowing what he was doing and of exercising a judgment as to the proper mode of disposing of his property.

24. Then, was the instrument now propounded in fact executed by Gopessur?

25. His Lordship then examined, the evidence on the question of execution:

26. In my opinion of the evidence directly bearing on the question whether Gopessur executed his will on the 27th June as alleged by the petitioner, there is a distinct preponderance in favour of its execution. Is there then anything in the probabilities of the case that disturbs this preponderance?

27. In dealing with the probabilities of the case, his Lordship considered the relations between Gopessur and Bissessur, the absence of internal evidence of forgery, the purport of the will, *Dowlat Koer v. Ramphul Das*[6] and the nature and preparation of the three drafts of the 20th June.

28. The conclusion to which I come is that the story of the three documents is in the main true, and though Sambhu Nath may not have been so detached as the evidence would make out, I hold that exhibits B, C and D were written out as the witnesses describe, and that Gopessur was responsible for them, and knew and understood their contents. His mental capacity at that time has not been questioned, so that had it been necessary, it would have been open to the petitioner to rely on the doctrine recognised in *Pereira v. Pereira*[7]

29. It now only remains for me to express the view I take of the whole case. The weight of evidence in my opinion is strongly in the petitioner's favour, both as to Gopessur's mental condition and the fact of execution. Though there are matters on which there is room for doubt, I am unable to regard the probabilities as opposed to the case made by the petitioner; rather otherwise. Moreover, the mere improbability of this or that in so complex a transaction as that under consideration cannot go for much against the clear and distinct evidence of witnesses of good general character, and, after all, probability and improbability of the type with which we sire here concerned is apt to become a matter of speculation and prediliction, for different persons act differently in similar circumstances. And much of that which has been classed as improbable in this case comes to little more than a failure to observe a higher standard of precaution and to do the wisest and safest thing under the circumstances.

30. The conclusion then to which I come is that Gopessur did sign Exhibit D on the evening of June 27th as alleged by the petitioner, that he intended by so signing to give effect to the writing as his last will, that at the time he was of sound mind and capable of exercising a judgment as to the proper mode of disposing of his property, and that he knew what he was doing. No dispute was raised before us as to the legality of the attestation.

31. The judgment of Chitty J. should, therefore, be reversed, and a grant of probate made to the petitioner, Sreemutty Jarat Kumari Dassi. The costs of the suit and appeal throughout must be borne by the respondent, Bissessur Dutt.

Woodroffe, J.

32. A considerable number of decisions have been cited upon the question of the nature of the proof required in the case of wills. In my opinion a reference to them is unnecessary, for I am not aware that a probate case is in any respect singular, as regards the application of the general principles of proof. Those general principles have been stated in the Evidence Act to be as follows:

Whoever desires any Court to give any judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist" (Evidence Act, Section 101). In this case we are asked to give judgment as to the existence of the will propounded and as to the legal right which follow such a conclusion. Section 3 shows the meaning of proof to be that the fact (in this case the will) is proved when the Court, after considering the matters before it, either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Each case must therefore be determined on its own facts. Upon however the decisions cited I would observe that the rule in Tyrrell v. Painton [1894] P. 161 applies in my opinion to cases where the circumstances of suspicion arise from the nature of the case as put forward by the propounder. In such cases the propounder must remove the suspicion which his own case creates. Where, however, the alleged suspicion against a will arises from facts which form part of the impugnant's case then the Court must see whether the facts which are said to give rise to the suspicion are proved or whether the plaintiff's case is proved. The rule therefore does not apply where the question is simply which set of witnesses should be believed: *Shama Churn Kundu v. Khettromoni Dasi*[8] In the present case the defendant puts forward (though in an uncertain way

and at a late period of the case) a charge of forgery. This the learned Judge has found to be not established.

Of the defendant's eight witnesses, the first and last are formal. The learned Judge does not accept the caveator's evidence, nor that of the two former servants. He does not, at one passage at least, consider Colonel Pilgrim's evidence necessary for his decision, though on other points he does refer to it. The bulk of Colonel Pilgrim's evidence was irrelevant. He stated that he was unable to pronounce an opinion either as to the cause of death or as to the physical and mental condition of the alleged executant. This admission substantially disposes of his evidence. Other portions of his testimony are inadmissible as being mere advice to the Court on the evidence and outside the opinion rule; or, if admissible in form, are not in the present circumstances of value or relevant. This testimony appears to have been asked whether it correctly represented the substance of what he had told the caveator's attorney. The question, though objected to, was allowed and answered affirmatively. It is not necessary to consider whether it was admissible, as the document itself was subsequently rejected. I would observe, however, that the Court could not assume that the document was proved from the refusal of opposing counsel to cross-examine to it. The latter was entitled to wait until the Court ruled whether the document had been proved or not. A question has arisen in connection with this as to the right of counsel to inspect a document which opposing counsel has put in the hands of a witness. The rule on this point appears to be correctly stated in Taylor on Evidence, 1452, as follows: "On the whole the practice seems to be that if the cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity, his adversary will have no right to see the document, but that if the paper be used for the purpose of refreshing the memory of the witness or if any questions be put respecting its contents or as to the handwriting in which it is written as in *Peck v. Peck* [9]cited to us in argument, a sight of it may then be demanded by the opposite counsel.

33. His Lordship then dealt with the evidence, and concurred in decreeing the appeal.

Cases Referred.

1(1838) Moo. P.C. 480
2[1894] P. 151, 159
3(1857) 6 H.L. Cas. 746, 772
4(1855) 10 Moo. P.C. 502, 531
5[1901] A.C. 354
6(1897) I.L.R. 25 Calc. 459
7[1901] A.C. 354
8(1899) I.L.R. 27 Calc. 521 : L.R. 27 I.A. 10
9(1870) 21 L.T.R. 670