CALCUTTA HIGH COURT

Prasannamayi Debi

Vs

Baikutha Nath Chattoraj

(Asutosh Mookerjee, C.J. Buckland, J.)

14.04.1921

JUDGMENT

Asutosh MooKerjee, J,

1. The subject matter of the litigations which have culminated in these two appeals is the estate left by one Mandakini Debi, a Hindu lady, who died on the 16th September 1918. On the 1st October 1 18 Baiknntha Nath Chattoraj, the surviving brother of her deceased husband, Brahmananda Chattoraj, made an application for Letters of Administration to the estate It ft by her. On the 28th July 11H9 her sister, Prasannamayi, the widow of Rajballabh Chattora, another brother of her husband, applied for Probate of an unregistered Will alleged to have been excepted by her on the l4th September 1918, two days before her death. Tbe relationship of the members of the family is set out in the annexed genera-logical table:

MAUHUSUDAN CHATTORAJ.

Badkaballav,	Brahmananda.,	Rajballabh,	Baiknntha
died 1900	died 1903,	died 1902,	Nath,
	widow Mandakini	widow	(Caveator).
Asutosh	(Testatrix)	Prasanna.	
		mayi,	
Jamini,		(Propounder)	

2. By Consent of parties, the Administration land Prostate proceedings were tried on the tame evidence. In the Probate proceedings, the District Judge same to the conclusion that the genuineness of the Will had not been established; accordingly, he granted Letters of

Administration to the petitioner in the other proceedings. Two appeals have, consequently, been presented to this Court by Prasannamayi: Appeal No. 31 of 1920 is dueled against the refusal of Probate; Appeal No. 35 of 1020 is directed against the grant of Letters of Administration. The Substantial point is controversy is the question of genuineness of the Will,

2. The Will purports, on the fate of it, to have been, executed by Mandakini whose name was signed by Natabar Mookerjee, who also signed his own name as the scribe, and there were in addition seven attesting witness. The scribe and four of the attesting witnesses have been examined on behalf of the propounds. The Will recites that Brah-mananda, the husband of the testatrix, had a brother Pajballav who had taken her sister, Prasannamayi, as his second wife. Brahmananda and Rajballabh used to live in joint mess and estate as members of a Hindu family, and since their death, Mandakini and Prasannamayi had likewise lived in joint mess arid estate. Rajballav had bequeathed his property to his widow, that is, to her sister Prasannamayi, and in his Will had appointed her husband as executor. Her husband had taken out Probate of the Will of his brother and had, out of the income and profits of his own property and of the estate left by his brother, acquired properties in his own name. All these proper-ties he bad bequeathed to her and had up-pointed her cousin (mother's siter's son), Kalibbusan Mookerjee, as executor. After these recitals, the testatrix proceeded to give directions for the disposal of her estate in five paragraphs. In the first clause, she dedicated a property to goddess, Durga, and appointed Baiknntha Nath (her husband's younger brother) and Asutosh (son of her husband's elder brother) as managers of the property so dedicated. In the sesond clause, she directed her brother-in-law and nephew-in-law to feed Brahmins annually on the occasion of the Durga Pooja, for the spiritual benefit of her husband, out of the income of two other properties. In the third clause, she directed Rs. 1,500 to be spent in the performance of her Sradh ceremony. In the fourth clause, she directed the residue of her estate to vest absolutely in her sister, Prasan-namayi. In the fifth clause, she directed the expenses of the annual Sradh ceremony of herself and of her husband to be met out of the income of the estate vested in her sister. These directions do not seem unnatural; on the other hand, they constitute the kind of disposition which might well have been made by an elderly Hindu lady in the position of the testatrix. She had children; her sister had married in the same family as herself, their husbands were brothers who bad lived joist in mess and estate and separate from their other brothers. Her nearest relations by marriage were her husband's younger brother and elder brother's son. In a family so constituted, it was not surprising that a pious Hindu lady would dedicate some property for the worship of the deity, appoint her brother-in-law and nephew-in law as managers thereof, make provision for her own Sradh ceremony and the annual Sradh ceremonies of herself and of her husband, and leave the residue of the estate to the sister whom she dearly loved. These provisions of the Will can in no sense be deemed inofficious or unnatural; on the other hand, they are prima facie reasonable, as they do not disregard the moral

claims of the relatives of the testatrix whioh the ties of kinship suggest; they are consequently not calculated to excite suspicion as to the genuineness of the disposition: *JagraniKosr v.Durga Parshad* [1]Wenow proceed to consider the evidence as to the actual execution and due attestation of the Will by the testatrix; but before we do so, it is necessary to state the circumstances which led up to the discovery of the Will for, as will presently appear, their true bearing upon the question of genuineness of the Will has not been fully appreciated by the Trial Judge.

3. As previously stated, the applicant for Letters of Administration presented his petition to the District Judge on the 1st October 1918. On the same date, the District Judge made an order for the appointment of Babu Lalit Mohan Banerjee, a Pleader, as Commissioner to make an inventory of the articles and cash to be found in the iron safe and boxes belonging to the deceased. The Commissioner went to the residence of the deceased on the following day. Thereupon, Prasannainayi objected to the interference of the Commissioner on the ground that her sister, Mandakini, had bequeathed all her properties to her by means of a Will. She further stated that the key of the iron chest in which the moveable properties left by the deceased were kept was not with her, but was with Kalibhushan Mookerjee, the son of her mother's sister, who lived in Pakhanna 14 miles off. She added that she trusted no body else and would not open the iron chest or box till he came. She further declined to show anything as she had got everything in pursuance of the Will. What she stated was reduced to writing by the Commissioner, and, later on in the day, she asserted again that her sister, Mandakini, had bequeathed her property to her by means of a Will. The Commissioner submitted a report to the Court on the following day, in which he explained his inability to make an inventory. On the 3rd October, the District Judge recorded that Prasannamayi claimed the property under a Will, directed her to show cause on the 6th November 1918 why she should not be criminally prosecuted for disobedience of the orders of the Court, and issued instructions that in the meantime the boxes and the safe containing the property, of which, an inventory was sought to be made, be kept by the Commissioner in a separate room under seal, the key of the room to remain in the custody of the Commissioner. On the 4th October the Commissioner again went to the residence of the deceased, collected the movables left by her, made a list there of and placed them in a separate room which was locked up and sealed by him. The contempt proceedings against Prasannamayi dragged on for sometime, but were subsequently abandoned. On the 21st December 181b a reference to arbitration was made at the instance of the parties, but this also, as might have been anticipated, proved anfractuous in the end, as the question of the genuineness of a testamentary instrument cannot be settled by compromise. Ultimately, the Commissioner again went to the residence of the deceased under the orders of the Court dated the 31st January 1919, He reached the place on Saturday, the 1st February, opened the room on the following day, and made a list of the safes, boxes and other articles as also of their contents. This list was filed in Court on the 3rd February 1919 and contained the following entry:

"IRON CHEST Contents.

(1) Unregistered Will of Srimati Mandakini Debi by the pan of Natabar Mookerjee of Pratrasayar, dated 28ih Bhadra, 1325 B. S.

(2) Draft of a Will by Srimati Mandakini Debi. These two are tied is a pie#@ of cloth."

4. The list, as expressly stated in the report of this Commissioner dated 3rd February 1919, wag prepared by him in the presence of Kalibhusban Mookerjee, Baikuntba, Nrath Chattoraj (the petitioner) and Baba Upendranath Das, Pleader for Prasannamayi. The articles found in the room were, after the preparation of the list, left there, and, the room itself was again locked up and sealed. On the 3rd February 1919, that is, the day after the discovery of the Will in the iron safe, Prasannamayi made a petition to the arbitrators in which she recited the previous incidents and prayed that they might send for the Will. On the requisition of the arbitrators, the Biatrial; Judge directed the Commissioner on the 10th February to bring the documents and file them in court. On the 16th February the Commissioner went to the house again, " brought the unregistered Will and a draft of Will found in an iron safe " and filed them in Court on the following day, " wrapped in a piece of cloth." It is thus clear that the Will was inside an iron safe which was looked up and placed inside a room, the doors whereof were locked up and sealed by the Commissioner and remained so sealed from 4th October 1918 up till 2nd February 1919. Consequently, the Will mast have been in existence as early as the 4th October 1918. It has been boldly suggested, ho waver, that the Will might have been manufactured later and smuggled into the iron safe when the room was opened and the safe wa9 unlocked on the 2nd February 1919. But there is manifestly no foundation whatever for this ingenious suggestion which is not based on any evidence in the record. As already stated, the Commissioner reported to the Court on the 3rd February 1919, that he had prepared the list of the contents of the room and of the safes and boxes in the presence of Baikuntha Nath Chatteraj, and the list specified in explicit terms the Will and draft tied in a pieces of cloth," as found among the contents of the iron best. Baikuntha Nath might have forth with objected that this was an incorrect statement, and that the Will was smuggled in when the safe was opened by the Commissioner; his omission to takes exception at the time is significant, and no weight fan be attached to the much belated after thought that the Will might have been surreptitiously introduced into the safe when it was opened by the Commissioner; Such a suggestion plainly involves a serious charge of carelessness against the Commissioner, and ho should, in all fairness, have been examined before the charge should be entertained. On the other hand, such evidence as there is on the record including the statement of the aaveator as to what took place when the Commissioner opened the room and unlocked the safe, indicates that the work was done in the presence of many people, anxiously watching the proceedings; in such circumstances, it is improbable ins the highest degree that a desperate

attempt would be made to smuggle in the two documents, or, that if made, it should escape dedication. We must consequently hold that the Will and the draft were inside the iron safe on the 4th October 1918, when it was praise inside the room which was locked up and sealed by the Commissioner. This conclusion, as we shall presently see, is supported by reliable evidence on the record.

5. Natabar Mookerjee, the god-son of the testatrix and the writer of the Will, has deposed that he used to serve in the Na. karka Colliery, (Post Kotwalgar, District Manbhum) 300 or 400'miles distant from his house which was about 6 miles off from the residence of Mandakini and that he came home in September 1919 to see his wife who was ill and also to negotiate for the marriage of his daughter. On or about the 13th September, he went to see Manda-kini an usual as she was his god-mother and found her ill. Prasannamayi also was ill, and, according to the witness, both1 of them probably had an attack of influenza. He was told that Mandakini would execute a Will On his stating that he had no experience in Will drafting, she said that she had a draft prepared by Upendra Babu of Bankura who was her retained Pleader from before. The draft was in a wall almirah, wrapped up in a rag. The draft showed that Mandakini was willing away in favour of Prasannamayi and Prasaanamayi was in her turn willing away in favour of Mandakini. The draft, in fast, was for a mutual Will. Natabar did not approve of the draft, and on the suggestion of Rajendra Narayan BJiwas.

6. Babu Bhutnath Mandal, a Pleader of the Burdwan Bar, who had some to the village on business was sailed in. The Pleader examined the draft and dictated the Will to Natabar who wrote it out. After the Will had been written out, it was read over and explained to Mandakini by the witness. At her request, he signed her name as executants, Bhutnath Mandal also became a witness and he was followed by other attesting witnesses. The Will was then taken to Prasannamayi who was lying bedridden in another room. As she was not able to get up, she asked the witness to take it back to Mandakini. After she had been helped to get up, she went into another room and kept the Will and draft tied up in a rag inside an iron chest. It was in this safe that the two documents were found on the 2nd February 1920. On this evidence, it is difficult to realise how a doubt could be seriously raised as to the genuineness of the Will. The Court below, however, has not taken a comprehensive view of the case and has looked at every incident with suspicion which appears to us to be groundless. The attempt to break town Natabar Mookerjee in cross-examination was by no means successful. The suggestion was made that he was not present in the village and in the house of Mandakini on the date of execution of the Will. He emphatically repudiated the imputation. If his statement was untrue, he could have been completely contradicted by Jasakibal-lav Hazra, his superior officer in the Colliery where an attendance register was kept; but it is significant that though his name was included in the list of witnesses, effective steps were not taken to serve the writ on him and to place him in the witness-

box. The warrant issued against Janaki was not served for want of an identifier, and the application for re-issue of process was renewed at so late a stage of the case, that the District Judge rightly refused to grant it. It is further clear from the evidence of Natabar Mookerjee that subsequent to his return to the Colliery after the execution of the Will, he did not go back to the village for many weeks. A post card written by him on the 7th November 1918 to Prasannamayi is alleged to have been found on or about the 2nd December,1918 in a window in the house, though it is not mentioned by Baikuntha in his examination-in-chief. The contents of this communication, which the witness was never called upon to explain, have been supposed to militate against the theory that Natabar was present when the Will was executed, The letter, however, is capable of a very different interpretation, and is consistent with the view that when Natabar left Mandakini, her illness had not taken a serious turn (as, indeed, is shown by other evidence on the record) and also that Natabar was not informed of her death for some considerable time. The letter was evidently written on receipt of intimation of news of her death from Prasannamayi, who communicated with him while the proceedings for contempt were pending against her. The letter brings out the very important fact that even on the 7th November 1918, Natabar was at the Colliery and thus corroborates his assertion that he did not return to the village till after its date. This also could have been verified or contradicted if the petitioner had secured the attendance of the Colliery officer Janakiballav Hazra and secured the production of the attendance register. It is not enough to suggest doubts as to the veracity of h witness; if the means of contradiction are available to the party who challenges his truthfulness, these should be produced before, the Court. We must consequently take it as established beyond reasonable doubt that Natabar was present at the house of Mandakini on or about the 14th September 1918 took part in the preparation of the Will and did not again return to the village till after the 7th November 1918. This conclusion completely demolishes the theory that the Will was manufactured after the death of Mandakini on the 16th September 1918, for, as has already been shown, the Will was inside the iron safe as early as the 4th October 1918, If Natabar, the scribe of the Will, was 300 or 400 miles away, at the Colliery, from the 15th September 1918 to the 7th November 1918, the question inevitably arises when and where did he manufacture the Will to be placed inside the iron safe not later than the 4th October 1918. No hypothesis, probable or improbable, has even been suggested as a satisfactory solution of this crucial difficulty in the pith of the respondent,

7. Apart from this, there is other weighty evidence besides that of Natabar Mookarjea, to support the genuineness of the Will. The testimony of Baba Upsndra Nath Das, a Pleader of long: standing of the Bankara Bar, is unimpeachable He asserts that he prepared the the draft which was subsequently found inside the iron safe along with the will. There is no inherent improbability in the terms of the draft, which could be used either for a mutual Will or for a Will by That sister in favour of the other. The Trial Judge has summarily discardedthe evidence of the

Pleader, because he could not remember the date when he made the draft; the suggestion apparently was that he might have prepared it after the death of the testatrix. This is a more hypothesis, not supported by evidence. The Judge has further commented adversely upon the circumstance that the witness did not produce his account; the obvious answer is that he was never ailed upon to do so, even though he offered, when asked in cross-examination about his accounts, to produce them on the following day. The objection that the accounts of Mandakini were not produced is equally futile; her papers, any, were in the custody of the Commissioner and no attempt was made to examine them. In our opinion, there no reason why the evidence of Babu Upendranath Das, so far as it goes, should not be accepted as a perfectly honest and straightforward statement. But if the Pleader is unable to re-call the exact time when he prepared the draft, the date is fixed with some approach to accuracy by Trailokyanath Karak who was formerly, in the service of Mandakini. He swears that he was sent by Mandakini to Babu Upendranath Das to get the draft prepared and that this took place not less than 10 more than 30 day before her death. The witness also describes the incidents connected with the actual exception and attestation of the Will. There is no reason why he should be disbalievad, except the fact that he had been in the Service of Mandakini. We need not refer in details to the evidence of Nagendranath Ghose whose statements do not seam probable, and whose cross-examination was improperly disallowed even after ha had turned hostile, {Surendra Krishna Mondal v. Ranee Dassi (2)] nor, is it necessary to rely upon Surendranath Mandal whose manner is described by the Judge as suspicious. But we do not see adequate reasons for rejecting the testimony of Babu Bhutnath Mandal, a Pleader of the Burdwan Bar. The District Judge was evidently annoyed when it was found difficult to secure his attendance, but the explanation offered by him for his failure to attend punctually has the ring of truth. Apart from this, his evidence in support of the Will was trustworthy and remained unaffected by cross-examination. It may be noted that the Judge considers him unworthy of credit because his professional income as a lawyer is small; but clearly it cannot be affirmed as a general rule that a person is not trustworthy because he is not wealthy, and the Judge himself does not hesitate to believe Kalipada Ray, a witness for the caveator, though his income as a medical man is equally limited. The position, then, is that there is a large body of respectable evidence in support of the case made by the propounder, and that evidence fits in with the two cardinal points that the Will must have been in existence as early as the 4th October 1918, and that no hypothesis has been propounded to show that the Will could have been manufactured after the 15th September and before the 4th October 1918. As against this evidence, the caveator produced a physician Kalipadda Ray, who asserted that be was approached in January or February, 1919, with a request that he should for a consideration of Rs. 400 become witness to a Will exe.uted by Mandakini, and a deed-writer Anantalal Ghosh, who alleged that he had been invited in the middle of November 1918 to forge a Will by Mandakini for a bribe of Re. 200. These witnesses are obviously unreliable, and their statements must be

deemed untrue when it is remembered that, at the dates spoken to by them, the Will was inside the iron safe. The other witnesses give evidence of a negative Character which does not neutralise that adduced by the petitioner. The adverse comments made upon the evidence of Prasannameyi are really not justified; there is nothing to show (but she knew that the Will which had been taken to her and returned, was deposited in the iron safe; it is further not shown that be obtained the key of the safe after the death of her sister or that, if the had the key, she ever opened it and examined the contents; she may have heard of the matter dating her ill seep, but it is not improbable that as stated by ber in her petition to the arbitrators on the 3rd February 1919, it may have escaped her memory, In these circumstance, we are clearly of opinion that the District Judge has arrived at an erroneous conclusion on the question of the genuineness of the Will, His judgment shows that his opinion is not based upon a careful analysis of the evidence and has been it influenced by unfounded suspicion. As was pointed out by Jenkins, C. J, in *Gopestsur Dutt v. Bisiessur Dutt*[2] the standard of proof to establish a Will required by the Indian Statutes is that of the prudent man and not an absolute or conclusive one. The Indian Evidence Act, while thus adopting the requirements of the prudent man as an appropriate concrete standard by which to measure proof, if, 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]*Dcvine v. Wolson*[4].If the evidence is tested from the point of view just indicated it leaves no room for escape from the conclusion that the Will was in fact executed by Mandakini.

8. The only other question which could possibly arise would be that of her testamentary capacity. On this part of the case, however, Sir Asutosh Chaudhuri conceded that if it was found that the Will bad tear, in fact, executed by Mandakini, be could not contend that she had not at the time a sound disposing mind. No doubt as pointed out by the Judicial Committee in *Earry v. Butlin*[5] affirming I Curt. 614; l63 E. R. 215. the onus probandi lies in every case upon the party propounding a Will to satisfy the conscience of the court that the instrument propounded is the list Will of a free and capable testator; in other words, as stated by laced Davey in *Tyrrell v. Painton*[6] wherever a Will is prepared under cerium-stances wbi'oh 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. The suspicion to which allusion is thus made must 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. Considered in the light of these principles, the question of testamentary capacity is free from difficulty. The evidence adduced by the propounded affords overwhelming proof that the testatrix was in full possession of her mental faculties when the executed the Will, and this is borne out even by the evidenae of

Bijay chandra Ghose, Jaminibhushan Chaitoraj and Bipinbihari Mandal called by the caveator. We have further the important fact that the Will was executed according to a draft prepared at the instance of Mandakini some time before her illness and there is nothing to indicate that Prasanna-rnayi influenced the disposition in her favour. Some strees was laid, not unnaturally, on the circumstance that all the attesting witnesses were not called; but though it is desirable that all the attesting witnesses capable of being called should be examined to remove all suspicion of fraud, it is not absolutely necessary that where, as here, there are many attesting witnesses, the absence of every one not called should be specifically explained; *Surendra Kritkna Mordal v. Ranee Dassi*[7] It has been finaly urged that the Court should be slow to interfere with the findings of fast of the Trial Judge who saw atd beard the witnesses and had an opportunity of noting their demeanor, This is a salutary rule and it may be conceded that as pointed out by the Judicial Committee in *Bombay cotton Manufacturing. v. Motilal*[8]*,* the verdict of a Judge trying the case should not be lightly disregarded where the issue is simple and straightforward and the only question is which set of witnesses is to be believed. The case before us is of a different description. Here the determination of the question of genuineness depends not merely upon assertions of witnesses but upon surrounding fasts and airaamstansea whose existence is either admitted or indisputably proved, and the judgment of the District Judge if, in our opinion, vitiated by his failure to text the veracity of the witnesses by refineries thereto. The deviations reviewed in *Lall ee Mahomed v. Dadabhai Jivnnji Gutdar*[9] and Surendra Krishna Mondal v. Ranee Dassi (2), show that two eorfliating view-points have to be i reconciled, namely, on the one hand the undoubted duty of the Court of Appeal to review the recorded evidence an 1 to draw its own- inferences and conclusions, and on the other hand the unquestionable weight which must be attached to the opinion of the Judge of the primary Court who had the advantage o seeing the witnesses and nothing their look and manner. We have kept in view these considerations and have arrived at the conclusion that the opinion of the District Judge on the question of the genuineness of the Will cannot be supported on a right appreciation of the evidence.

9. The result is that the appeals must he allowed and the Will admitted to Probate. The application for Probate is granted while the application for Letters of Administration is dismissed. The appellant will have costs in both Courts in the two proceedings.

Bucland, J.

10. I agree,

Cases Referred.

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3(1858) 6 H. L. C. 746 at p. 772 : 27 L. J. Q. B. 449 : 4.Jur,(n. s.) 791 : 6 W. R. 461 : 10 E. K. 1489 : 108 R.R, 292
4(1865) 10 Moo. P, C, 502 at p, 531, 14 E.R, 581,110, R. R.83
5(1838) 2 Moo. P. C. 480 at p. 482 : 46 R. R. 123 : 12 E. 11.1089 : 4 S. E C. (o. s.) 175
6(1894) P. 151 : 6 R. 540 : 70 L, T, 453, 42 W. R. 343
759 Ind. Cas, 814 : 47 C. 1043 at p. 1075 : 33 C. L. J. 34, 24 C W. N. 860
829 Ind. Cas.229 : 39 B. 38 : 21 0. L, .J. 528 : 42 I. A. 110 : 19 C. W. N. 617s 17 M. L. T. 408 : 28 M. L. J. 593 : 17 Bom. L. R, 45 : 2 L. W. 521; (1915) M. W. N. 788 (P.C)
938lnd. cas 307: 43 C. 333 at p 3D : 23 C, L. J. 190 : 20 C, W, N, 335