CALCUTTA HIGH COURT

Efari Dasya

Vs

Podei Dasya

(B.B Ghose, J.)

29.06.31927

JUDGMENT

B.B. Ghose, J.

1. This is an appeal against the judgment and decree of the District Judge of Assam Valley Districts refusing to grant probate or letters of administration of the draft of a will alleged to have been executed by the testator, Jipati Thakuria, in January 1904. The applicant was the daughter of the testator. The testator died on 25th June 1910. At the time of his death, he had his daughter, the petitioner, his widow Podei, the objectrix, an infant son, Kali Charan, and another stepson named Nanmal. At the date of the will his son, Kali Charan, was not born. By the will, a 3rd share each was given to Efari, the petitioner, Podei, the wife, and to Nanmal. It is alleged by the petitioner that after the death of the testator each of the three persons was in possession by taking pattas from the revenue authorities of the lands loft by the testator and they were in joint possession till the year 1923. In 1934, disputes commenced among those parties and the petitioner was sought to be deprived of her share of the properties and that is the reason why she has applied for probate of the draft of the will in May 1925. The will is alleged to have been lost. Efari, the petitioner, says that she gave the will to Osharam Gaonbura, a relation of the testator, for the purpose of mutation of names in the revenue register after the death of the testator. Osharam never returned the will to her and she never asked for it, but when the disputes arose, she sent a registered notice to him to make over the original will to her. The registered letter containing the notice was not accepted by Osharam and was returned to the petitioner. Osharam also did not give the original will to her and it is on that account that she has asked for probate of the draft from which the will was written out and executed by the testator. The objectrix, Podei, denied the execution of the will and she supported her allegation by her own evidence as well as the evidence of her witnesses. The learned Judge was of opinion that Jipati did execute a will in terms of the draft but he held that after the birth of his son, Kali Charan, he would probably have wished to revoke the will or to modify its terms and he could have revoked the will by simply tearing it up. He apparently came to the conclusion that that was whit the testator himself did.

2. The learned Judge then discussed the evidence as to the existence of the will after the death of Jipati, which fact he noticed is only supported by the evidence of Efari herself and by the evidence of a witness named Adhiram. The learned Judge holds that Adhiram is not a reliable witness and he does not believe the story that Efari made ever the will to Osharam as she alleges, the learned Judge being of opinion that it is unlikely that Efari would have left the will with Osharam for some 15 years. He also refers to the fact that there is no mention of the will in the patta and, in his view, the record of the three names is probably due merely to the fact that they were in joint possession of all the property of Jipati. He came to the conclusion that the evidence as regards the existence of the will at the time of the testator's death was unreliable and, therefore, refused to grant probate.

3. The first objection taken on behalf of the petitioner in her appeal is that the question of revocation of the will was-improperly decided by the District Judge, as that was not the issue raised by the objectrix nor was any evidence led in support of that story. The whole question on which the parties went to trial was: Was there a will executed or not? The learned Judge having found that the will was executed, he ought to have placed the burden of proof upon the objectrix to show that the will had been? revoked by the testator. The mere fact that a son had been born to the testator after the date of the execution of the will is not sufficient to raise the presumption that the will was revoked. The contention on behalf of the appellant is therefore that at any rate the case should be remanded to the lower Court for the purpose of a fuller enquiry as to the question of revocation. In answer to the contention of the appellant, the respondent submits that the question of revocation although not distinctly raised in the issues was sufficiently raised in the pleadings of the parties. It is pointed out to us that in the petition of then appellant herself it is stated that Kali Charan, the son of the testator, was born in 1316 B.S., in the month of Pous. The will was, however, not revoked. In answer to that, the objectrix states that according to the draft filed it is clear that the late Jipati had no son of his then, but on the birth of his son he would1 never keep any such will outstanding.

4. However inartistic these statements may be it cannot be said that upon these allegations the Judge was not justified in going into the question of revocation of the will by the testator on the birth of his son. The point next urged on behalf of the appellant is that if it is shown-that the will was in the possession of the testator till the time of his death, then only the loss may be referred to the presumption of revocation by the testator himself. If it is shown that the will was-not in the possession of the testator up to the time of his death, no such presumption of revocation by the testator arises. In support of this contention he relies upon the cases of *Sarat Chandra Basaok v. Golap Sundari Dasya*[1] and Anwar *Hossein v. Secretary of State*[2]. The contention is that the burden of proof is upon the objectrix to show that the will was actually in the possession of the testator till his death. It seems, to me that the question as to the presumption of the will being revoked by the testator with reference to the fact of its being in his possession till the time of his death is to be decided more or less upon the circumstances of each case. In my opinion, it cannot be laid down as a rule of law, that under certain circumstances a presumption should be made

that the will was revoked by the testator or not. I may refer to the case of *Allan v. Morrison*[3] which was cited by the learned advocate on behalf of the respondent in support of this proposition. It seems to me, however, that the present controversy should be decided on the terms of Section 237, Indian Succession Act of 1902 - which corresponds to the repealed Section 24, Probate and 'Administration Act 5, 1881. The section runs thus:When a will has been lost or mislaid since the testator's death...and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced.

5. In this case the petitioner asks for probate of the draft of the will. She must, therefore, prove that the will has been lost or mislaid since the testator's death. The petitioner gave her evidence in support of the allegation that the will was in existence after the testator's death and it has since been lost. Her story is that the will was in the possession of the testator for two years after its execution. Then it was made over to her and she made it over to Osharam for the purpose of mutation of names. This story his not been accepted by the District Judge If this story is believed, then there is no question, as is admitted on behalf of the respondent, that the appellant would be entitled to the grant asked for. But is this story probable? The first difficulty which arises in believing this story is, why should the testator make over the will to the daughter instead of to his wife, and even if he did so, is it natural that he should not ask it back after the birth of his son who would be left destitute under the terms of the will? The story also of the petitioner having made over the will to Osharam is incredible, and Osharam swears that it was never made over to him. If that story falls to the ground, then the petitioner has not been able to prove that the will has been lost or mislaid since the testator's death. That being so she has failed to satisfy the terms of Section 237, Indian Succession Act, and is, therefore, not entitled to probate. The appeal must, therefore, be dismissed with costs.

Roy, J.

6. I agree.

Cases Referred.

1[1913] 18 C.W.N. 527
2[1904] 31 Cal. 885
3[1900] A.C. 604