CALCUTTA HIGH COURT

Surendra Nath Chatterji

Vs.

Jahnavi Charan Mukherji

(B.B. Ghose, J.)

01.05.1928

JUDGMENT

B.B. Ghose, J.

1. This is an appeal by the applicant for probate of a will and a Codicil against a portion of the decree of the District Judge of Hoogly. The will was alleged to have been executed by one Ram Lal Mukherji, dated 6th September 1914 and the Codicil was executed by the same gentleman dated 11th September 1920. Ram Lal died on 9th April 1923, He was a gentleman of considerable properties and died at a good old age. It is said that he was 85 years of age at the time of his death. It is unnecessary to state in detail the members of his family at the time of his death and shortly before that as the facts have been fully set out in the judgment of the District Judge. It is sufficient to say that he was survived by four sons, Mritunjoy, Ganga Charan, Jahnavi Charan and Jahnavi Prosad and two daughters and a large number of grandchildren. Ho became a widower in the year 1890, and after that he went to live more or less as a recluse in a house built on a rock near the town of Monghyr in the province of Bihar. Previouly he was a permanent resident of Boinchee in the district of Hoogly. The house in which he lived at the time of his death was described as Pirpahar. None of his sons lived there and it appears from the evidence that if any of them ever visited him it must have been on rare occasions. The most curious thing is that one of the sons, Ganga Charan, practised as pleader at Monghyr and lived about 2 miles from the house of his father, but even he seems to have seldom visited his father.

2. It appears that on one occasion when he required some money for the marriage of his daughter, he wrote to his father by post about the money and on another occasion it appears that Ram Lal wanted information from Ganga Charan about the repair of a motor car belonging to himself and the information as to where the motor car could be repaired was intimated by Ganga Charan by a letter written through the post. Again it appears that Jahnavi Prosad one of the sons, who is one of the respondents here, wanted to have some money from his father a short while before his death and he went to Monghyr from the district of Hoogly and lived with his brother Ganga Charan from which place he asked for permission to see his father. Apparently that permission was not granted and from the correspondence it appears that Jahnavi Prosad came back disheartened on account of his father not allowing him to see him. It appears further from the evidence that two of his grandsons by his first son Mritunjoy, named Kashipati and Pashupati used to live with Ramlal, that they were both favourites of Ramlal, but that Pashupati was much

more so than Kashipati. One test of this greater affection which Ramlal felt for Pashupati is that in 1904 he made a gift of the house at Pirpahar to Pashupati and the fact that that gift was a genuine gift appears from the statement made by Ramlal in 1920 that the house in which he lived belonged to Pashupati's widow, Pashupati having died at that time. Kashipati died in 1918 and Pashupati died in May 1919 at Benares. Certain other grandchildren had also died about that time. These things must have been as the learned Judge observed, a serious blow to the old man. It will be seen later what effect these bereavements had on his mind as regards his power of discrimination. The will of 1914 was attested by several respectable witnesses including Lt. Colonel Megaw, I.M.S. (them Major) who afterwards became the Director of Tropical School of Medicine in Calcutta, Babu Baidya Nath Bose who was the -well-known Principal of the College at Monghyr and his son Babu Hem Chandra Bose, a pleader of the place who was apparently in good practice as he was Public Prosecutor of that place for some time. The will was deposited with the Sub-Registrar under the provisions of the Registration Act, and the usual note was made on the sealed cover by the testator himself, which we have seen. The Codicil was also attested by several witnesses. With this Codicil I shall have to deal in detail, and it is unnecessary to deal with this Codicil alone having regard to what I am just going to say. The application was resisted by two of the sons of Ramlal, Jahnavi Prosad and Jahnavi Charan. The other sons and the grown up grandsons did not take part in these proceedings. But this is a matter of very little importance one way or the other. Those other persons might think that it was not worth their while to fight the case, and no presumption can be made either in favor of the applicant on account of their silence nor against the objectors on that ground.

3. The grounds on which the two objectors resisted the application of the petitioner, shortly stated were that the will had been executed when the alleged testator was 76 years of age, and the Codicil when he was about 82 years old, that from about 12 years before his death he became weak and infirm both physically and mentally and incapable of managing his own affairs owing to softness of the brain, that other persons wielded considerable influence over his mind and the alleged testator became a mere creature in the hands of these persons. Amongst those persons was his grandson Pashupati and other persons connected with him including Surendra Nath Chatterji, the appellant before us and petitioner before the lower Court. It was alleged specifically that the deceased was not in a sound disposing state of mind at the time of the alleged will or of the alleged Codicil and that therefore the application for probate should be refused. The learned Judge in an elaborate judgment considered all the circumstances of the case and in the result allowed the application of the propounded in part. He made an order granting probate of the will of 1914 and refused probate of the Codicil dated 11th September 1920. From the part of the decree refusing probate of the Codicil the petitioner in the Court below appeals to this Court. The objectors in the Court below, the respondents here, prefer a cross-objection against that part of the decree by which the District Judge granted probate of the will of 1914.

4. Mr. Choudhury, counsel for the respondents, candidly stated before us that having regard to the nature of the evidence and the findings of the learned District Judge he doe3 not consider it proper to take up the time of the Court in pressing the cross-objection. But at the same time he reserves the liberty for his clients to press their objection before any higher Court if they choose to carry the case further. Our labour has been a good deal lightened by the course which Mr. Choudhury has thought proper to take with regard to this case. We have therefore to look to the propriety of the order made by the District Judge with reference to the Codicil dated 11th September 1920.

5. The observations of the learned Judge with regard to the Codicil in question are to be found in his judgment at pp. 172 and 173. It is not quite clear although the learned Judge criticized the evidence of the attesting witnesses to the Codicil, whether he found that it was duly executed and attested or not. The learned Judge says that the memory of the alleged testator had been failing and that the contents of the Codicil show that it was not only for the benefit of Pashupati's children but for strengthening the hands of Suren Babu and for his immediate benefit. The two question in my opinion have not been kept separate by the learned Judge, that is, as to the matter of due execution and attestation and as to the question of undue influence and of sound disposing mind. The learned Judge states in one place in his judgment that the effect of the bereavements on the old man's health and mind, especially the death of the youthful and promising and beloved grandsons, was very great and he seems to think that his mind was so unhinged that he was not capable of understanding what he was doing. He concludes that portion of the judgment by these words:

> At this time (that is, at the time of Pashupati's death) he was more than 80 yoars old and if as pointed out he had lost his faith in Jahnavi Charan also the old man could not but have been unbalanced.

6. The learned Judge also seems to have been of opinion that undue influence was exercised on the mind of the testator where he states:

> It may be the old man was a willing victim; but as years passed by and from proved conduct of Suren Babu and Arun, I find that the influence was exercised unduly and improperly,
> and
> I am convinced from after Pashupati's death in 1919 it does not appear he had power of discrimination or will power which would enable him to make a disposition of his property properly.

7. The District Judge concludes his finding in this way:

> As regards issue 4 (that is the issue with regard to the will) I find that there is satisfactory evidence oi exeoution and attestation and it has not been proved the will is the outcome of undue influenoe. The probate therefore may be granted. My conclusion is that this second Codicil has not been proved to have been legally executed and attested and further, I am of opinion that at the time of this Codicil Ram Lal Babu could not have possessed a disposing frame of mind. On the other hand, he was under the influence of Suren Babu which influence has clearly been unduly and unfairly exercised. This is my answer to issues 5, 6 and 7. In answer to issue 8 I say that the conscience of this Court has not been satisfied and the Court declines to grant the probate of this document.

8. I will first deal with the question of sound disposing mind of the alleged testator at the time of the execution of the Codicil. (His Lordship then discussed evidence and came to the following

conclusion). All these facts show that Ramlal was not deficient in intellectual powers towards the end of 1920 and afterwards and the finding of the learned Judge on the evidence that Ramlal was quite capable of executing the will, but had no sound disposing mind when he executed the Codicil seems to he inconsistent.

9. Ram Lal was under the impression that Pashupati had been foully done to death. His belief was that although he had sent medical men to attend on Pushupati, the medicines prescribed by these medical men were not allowed to be administered to him. Further there is a hint that incantations were used for the purpose of hastening his death. Ram Lal was a believer in Occult powers and his letters to Jahnavi Charan show that he thought that Jahnavi Charan was a saint and a seer possessed of occult powers. I may here interrupt myself to say that Jahnavi Charn was a graduate of the Calcutta University and an M.A. If he falsely led his father to believe that he had occult powers that was certainly very wrong. But there are believers in occult powers in the country as well as in other contries among men who are undoubtedly of the keenet intelligence. Although Ram Lal believed in the occult powers of Jahnavi Charan, his letters show that he was very parsimonious about money for acts done by Jahnavi on his behalf for acquiring merit in the other world. As an instance, it appears from certain letters that he used to pay L 25 for saving a cow from slaugther and L 10 or so for saving a sheep and small sums of money for saving fish and putting them back into the river. But these letters show at least in two instances that an extra sum of L 2 was paid to Jahnavi Charan and that money was directed to be kept in deposit although Jahnavi Charan was addressed in these letters as the blessed one, a seer, lord and so forth. There appears to be one reason why Jahnavi Charan was addressed by his father in such honorific terms and the reason seems to have been that Jahnavi Charan led his father to believe that by his pious spititual exercises he could cure Pashupati of the discease from which he was suffiering. After the death of Pashupati the letters do not show that Jahnavi Charan was addressed in the same high flown language although the letters do not show any particular dislike towards Jahnavi Charan. However, it is nobody's case that the fact that Earn Lal believed in ceeult powers show that his intelligence had suffered in any way in the least. The position therefore after the death of Pashupati was this:

> Ramlal was against all persons who were in some way or other connected with the will alleged to have been executed by Pashupati. He had also suspicions as regards the people who were about him at Benares at the time of his death that they neglected his proper treatment, and these people were the father of Pashupati, Suvankari the widow of Kashipati, and there may be other porsons we do not know. After the death of Pashupati the appellant Surendra Nath seems to have come into contact with Ram Lal. He brought down from Benarea the widows of Kashipati and Pashupati and their children to Monghyr. The evidence is that Surendra met Ramlal only on a few occasions, 3 or 4, 4 or 5. On each occasion he stayed with Ramlal for a very short time. He undoubtedly went there before the execution of the Codicil. Surendra also went there when Ramlal was examined with reference to Pashupati's will. But he used to live in the town of Monghyr. It further appears that Ramlal felt very much attached towards the son of Pashupati as he would naturally be if he loved Pashupati as appears from the evidence. Pashupati was the person who assisted him in managing the zemindari and as a matter of fact the objectors say that it was Pashupati who had exercised undue influence upon him for the execution

of the will of 1914 This 'was the state of the family and the condition or state of mind of Ramlal at the time of the execution of the Codicil.

10. The learned advocate for the respondents did not contend and could not contend that there was any evidence of undue influence being exercised on Ramlal for the execution of the Codicil in question. He also had to admit, as I have already stated, that Ramlal had sufficient mental capacity for executing the Codicil. Mr. Choudhury's argument was that the judgment of the District Judge may be supported on other strong grounds and he put his argument as follows : Ramlal was really advanced in years. He was hard of hearing as is natural at his age. His eye-sight was growing dim. He himself stated in his evidence in January 1921 that since two months previous to that date his eye sight was getting dim. It was his habit to have his work done in the matter of correspondence by Norendra Kumar Biswas who was the tutor of Kashipati and Pashupati when they were young. He acted as a sort of Secretary after they had grown up, and was known as the Master Mohasaya. The Codicil was drafted by a Firm of Attorneys in Calcutta under instructions received from Surendra Nath.

11. Suxendra Nath does not come forward to give evidence as to what instructions he received and what instructions he conveyed to the attorneys. It should also be remembered that the attorneys were the attorneys of Surendra himself and they never previously acted on behalf of the testator. The reason given for Surendra not giving evidence in the case is certainly not satisfactory. The learned advocate argues upon these circumstances that there is a gap in the chain of evidence, and it has not been proved that the Codicil was prepared according to the instructions of Ramlal or that he executed it with full knowledge of its contents. It is evident that the instructions which were sent through Surendra could not have been verbal instructions because the draft contains various dispositions which could not possibly have been given or carried verbatim by word of mouth. Reference is made to the Will of 1914 in the draft and it is quite apparent tbat a copy of the will must have been in the possession of Ram Lal which was given to Surendra for the usa of the Solicitors for the preparation of the draft. The evidence with regard to this is very unsatisfactory. But in my opinion the respondents should have asked the clerk from the attorney's office who produced the Day Book of the Attorneys from what instructions the attorneys had prepared the draft. Now the argument of the respondents resolves itself into this, that the condition of Ramlal should be taken into consideration in judging whether the Codicil was one which was really executed by him with full knowledge of its contents. It is not denied that Ramlal knew English, but it is said that his knowledge of English was very limited. It requires a greater knowledge of English than what Ramlal seems to have possessed in order to understand the draft, and there is no evidence that the draft or the Codicil itself as drawn was ever read over to him. Surendra takes some benefit under the Codicil, although it is small. The greatest benefit is taken by Pashupati's son a minor of tender age. The learned Judge has stated that there is no reason why Kashipati's sons should be deprived of what was given to them under the will and Pashupati's son be made the object of bounty of the testator who had 85 lacs from his father. Now the statement of fact by the learned Judge that Pashupati'a son had got 85 lacs from his father is not supported by evidence. It would rather seem that if the fact had not been different Ramlal would not have taken such keen interest in getting the will rejected. We cannot dive into the mind of the testator why Kashipati's son was not made an object of his bounty. Nor can we divine why Siva Prosad a grandson was deprived of the four annas share of the dwelling house at Boinchee which was given to him under the will of 1914. If the Codicil is

proved otherwise these facts are not sufficient for discrediting the document.

12. The main question is whether there are such grounds for suspicion as would lead us to hold that it has not been sufficiently proved that Ramlal had really executed the Codicil with full knowledge of its contents. Now I must take the findings of the learned Judge one by one. There is no reason to suppose that the Codicil was not legally executed. It is unnecessary to state in detail the facts which the learned Judge considers as damaging against the witnesses. The Codicil was registered by Ramlal, the execution was admitted before the Sub-Registrar and there is no reason to suppose that the attesting witnesses did not see the testator put his signature to the Codicil or that they had not attested the signature as required by law. True, Arun Deba is a junior pleader and Abinash Babu is the health officer of the local municipality and they were called for the purpose of attesting the document and the other attesting witnesses ware the Secretary of Ramlal, Narendra Kumar and a Gomastha, Saukhi Lal. There is no good reason for disbelieving their testimony that the Codicil was executed by Ramlal in their presence and attested by them. There is also no question that Ramlal at the time did possess sound disposing mind. The only question is whether Ramlal executed the Codicil with full knowledge of its contents. The expression of the learned Judge that the conscience of the Court was not satisfied with regard to this Codicil must have been taken from the well-known case of *Barry v. Butlin*[1] The expression that the conscience of the Court is to be satisfied, I presume, is a heritage from the observations of the Ecclesiastical Courts in England which had formerly jurisdiction with reference to wills. Now what is the evidence that is necessary for the purpose of removing any suspicion as regards wills ? In a recent case, *Robins v. National Trust Co*[2]. Lord Dunedin remarks. Now the English Courts have gone what some might think pretty far on the question of what duty lies on those who propound a will.

13. That was also what appears to have been directly held in the case of *Jarat Kumari Dassi v. Bissessur Dutt*[3] There the learned Chief Justice, Sir Lawrence Jenkins, observed and it was concurred in by Woodroffe, J., that in India there was only one test or proof with regard to all civil cases. I respectfully agree with the opinion of the learned Judges in that case, and I would say that in all cases whether it is a will case or a case with regard to any other document, the Court must be satisfied upon the evidence in order to make a decree in favor of the party relying on the document. There is no absolute test for weighing evidence, specially as regards oral evidence which is given by the contending parties in a Court of justice. The Judges should try their bast to ascertain the truth and that can only be done in the manner provided in the Evidence Act, and the proof nacassary to establish a will in this country is not an absolute or conclusive one, but such proof as would satisfy a prudent man.

14. Moreover, it seems to me that the propounder of a will hag to remove only such suspicious circumstances as are suggested by the objectors. The question therefore in this case is what is the suspicion that is raised in this case which must be removed by the petitioners. I have stated the main objections of the respondents put forward in the Court

[1][1840] 2 Moore P.C. 480 [3][1912] 39 Cal. 245

[2][1927] A.C. 515

below. The facts alleged by the objectors have not been supported by the evidence. There is absolutely no evidence of undue influence exercised by anybody. The evidence is quite clear that Ramlal had sound disposing mind at the time of the Codicil and long after. The ordinary burden upon the propounder to prove due execution and attestation has in my opinion been discharged.

Then the question is whether Ramlal executed the Codicial after knowing its full contents. The general rule, I need hardly say, is that on proof of the signature of the deceased of his acknowledgment that he has signed the will, he will be presumed to have known the provisions of the instrument he has signed. This presumption however is liable to be rebutted by proof of suspicious circumstances, such as if the testator from want of education or physical infirmity was unable to read or unable to understand the provisions of the document or his capacity for executing the instrument is doubtful. Then the propunder of the will, is bound to remove those suspicious circumstances. But as I have already said I do not think wills stand on any different plane from any other instrument which a person is bound to prove in order to succeed. In this case whatever might be the suspicious circumstances alleged on behalf of the objectors here for the first time, these are in my opinion removed by the evidence adduced in this case notwithstanding that Surendra has not given evidence as to the instructions given. The draft of the Codicil has been produced and there is a note on the draft by Ramlal with his own hand that he approved it, and it was sent back to the Firm of Attorneys by post with a covering letter, Ex. 5, dated 19th August 1920. The letter runs thus:

> Dears Sirs, I have received the draft Codicil drawa by you according to my instructions sent to you through Babu Surendra Nath Chatterji. I have carefully gone through the draft and find the same in order and drawn in exact accordanca with my instructions. I have made an alteration and I enclose the same herewith. Please have it engrossed and return it to me at an early data for execution. Yours faithfully: Ram Lal Mukherji. Enclosure-Draft Codicil.

15. This letter is in the hand-writing of Narendra and signed by Ramlal. Narendra was cross-examined on this and his reply was that the whole of the letter was dictated by Ram Lal. No question was put to him as to whether Ram Lal was capable of dictating such a letter as that. If this is believed, and there is no reason to disbelieve it, then Ram Lal had a fairly good knowledge of English. Moreover as the learned Judge observes if his knowledge of English was limited, the sons would not have carried on correspondence with him in English. In any case from the proved fact of the strong will of Ram Lal it cannot be assumed that he ever signed the paper without fully knowing its contents. Narendra says:

> Exhibit 5 is the verbatim reproduction of what Ram Lal Babu dictated. When the Codicil arrived by post the Babu read it through to himself.

16. From the fact of the note on the draft which was written and signed by Ram Lal with his own hand and the letter, Ex. 5, I have no doubt in my mind that Ram Lal executed the Codicil with full knowledge of its contents.

17. One other fact should be mentioned here. The letter Ex. 5 states that there was only one alteration in the draft while the draft shows that there are 2 or 3 alterations. But that one alteration was an important alteration that the executor shall not be liable to account to any one and will deal with the property as if he was the malik. It seems that Ram Lal thought that was the only one important alteration which should be mentioned. There is no evidence in whose hand-writing the alterations were made. Jahnavi Prosad, who only of the two objectors gave evidence, says that it was in Surendra's hand-writing but Surendra does not appear to have been there at the time

when the draft reached Ram Lal by post and no question was put to any of the witnesses for the applicant as to the hand-writing of the alterations. I do not therefore attach much importance to the evidence of Jahnavi Prosad that the alterations are in the handwriting of Surendra. It has also been contended why should a perfect stranger to Ram Lal like Surendra be made the absolute master of the property. It is difficult to understand what motive led Ram Lal to act like that. Apparently Ram Lal had no faith in any member of his family when he thought that Pashupati had been done to death by his own people. He found this stranger Surendra, who is a sort of cousin of Pashupati's widow, had interested himself on behalf of Parijat and her infant son and was conducting the litigation with regard to Pashupati's will. He might have thought that this is the person who would take interest in the affairs of the infant. The provision that Surendra would not be accountable to any person is of no serious consequence, because he would be liable to account to the legatees whether the testator says so or not.

18. I think I have disposed of all the objections raised and in my view the learned Judge's decision with regard to the Codicil must be set aside and probate granted to the petitioner of the Codicil dated 11th September 1920.

19. I have not made any observations with reference to another Codicil which the learned Judge has not believed. That Codicil was executed in March 1920, and that has only an indirect bearing on the case. No probate was asked for and it is unnecessary to deal with the execution or proper attestation of that document.

20. The appeal is allowed, the judgment and decree of the learned Judge with reference to the Codicil of 11th September 1920 is set aside and probate of the same should be granted to the applicant.

21. The cross-objections are dismissed without costs. Having regard to the fact that the legal heirs of Ram Lal are the objectors and the other circumstances of the case the costs of both parties in both Courts will come out of the estate. We assess the hearing-fee at L 500.

Garlick, J.

22. I agree.

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