

DELHI HIGH COURT

Devi Charan

Vs.

Durga Porshad (Delhi)

Letters Patent Appeal No. 146 of 1963.

(I. D. Dua and T. V. R. Tatachari, JJ.)

15.2.1967

JUDGEMENT

I. D. Dua and T. V. R. Tatachari, JJ.

1. This Letters Patent Appeal under Clause 10 of the Letters Patent (Punjab) is against the judgment of P. D. Sharma, J. dated 30th August, 1963, in Appeal F. A. O. Case No. 87-D of 1957, which reversed the judgment and order of Shri S. B. Capoor, District Judge at Delhi, dated 3rd May, 1957, in Probate Case No. 5 of 1956.

2. The application for probate of the will of one Shrimati Jog Maya, out of which this appeal has arisen, was filed on 27th November, 1955, by one Durga Pershad, in the following circumstances : -

3. It was alleged in the application that Smt. Jog Maya was a resident of Mohalla Rangmahal, Nahar Sadat Khan, Delhi, that she executed her last will and testament on the 1st of July, 1947, that the applicant was the legatee and executor named in the said will, and that she died at Delhi on the 22nd of October, 1955, leaving at the time of her death the properties described in the schedule to the application, which consisted of a number of fixed deposits in the National Bank of India Ltd., *Chandni Chowk*, Delhi, and a house of the testatrix, as well as a small sealed metal box containing unknown contents kept in the National Bank of India Ltd., Delhi. The applicant, Shri Durga Pershad, stated in his application that the original will of the testatrix was in the aforesaid sealed metal box kept in the safe custody of the National Bank of India Ltd. *Chandni Chowk*, Delhi.

4. Among the respondents cited in the application was one Shri Devi Charan, who was described as the adopted son of Shri Sham Lal, deceased husband of Smt. Jog Maya.

He contested the application and filed his objections

5. The applicant Durga Pershad prayed that a Local Commissioner should be appointed to open the sealed metal box and secure the will in the presence of the parties. Accordingly, the learned District Judge appointed Shri Amar Raj Lal, Pleader, as Local Commissioner for the said purpose. The Local Commissioner filed his report, dated 10th April, 1956, stating that he opened the sealed metal box in the presence of the parties, that the box did not contain any will of Smt. Jog Maya nor any other document, and that the box contained only a number of ornaments, a list of which was appended to the report.

6. The applicant, Durga Pershad, thereupon filed in an application on 16th April, 1956, in which he stated that he had locked a portion of the house opened by the deceased Jog Maya on the date of her death, that he placed the key of the said lock with some residents of the Mohalla to avoid trouble between the parties, and that the Commissioner should be directed to visit the said house, open the said lock, and search for the original will amongst the various articles left by the deceased and locked in the said house. Accordingly, the District Court appointed on the same date, Shri Amar Raj Lal as Commissioner to open the locked portion of the house, to search for the will and, if available, to produce it in Court, and to lock the premises again.

7. The Local Commissioner filed his report, according to which no will was found in the premises in the locked portion of the house, but a document which purports to be a draft of a will, was found by him.

8. As the original will was not found, the applicant had to amend his application for probate. He, therefore, filed his amended petition for probate on 7th of May, 1956. In this amended petition, it was stated by him that the deceased Jog Maya, two days before her death, told the applicant that the will was in the safe custody with the bank, and that she also delivered original cash-deposit receipts and articles-deposit receipt and other documents to the applicant two days before her death. It was also stated that he tried to have the will produced the Court from the National Bank of India Ltd., Delhi, but it was not found there, that the original will had been lost or mislaid and was not, therefore, forthcoming, that the will was a registered will and was presented for registration by the deceased Jog Maya on 5th of July, 1947, in the office of the Sub-Registrar, Delhi, and was registered as document No. 530 in Book No. 3, Vol. No. 70, on pp. 77-81, on 9th July, 1947, that a certified copy of the said will has been produced in Court, that the said will was never revoked by the testatrix, and that,

under the circumstances, the Court may be pleased to grant probate of the said will to the applicant. The said certified copy of the will, dated 1st of July, 1947, is Exhibit P-10 in the case.

9. The contesting respondent, Devi Charan, filed fresh objections on 22nd May, 1956. In those objections, he pleaded that Smt. Jog Maya never executed the alleged will propounded by Durga Pershad. He denied that the alleged will was executed according to law or that it was executed by her as a free, capable and willing testatrix. He also denied that Jog Maya delivered any deposit-receipts or any documents to the applicant, Durga Pershad, at any time before her death. He stated that he was informed that Durga Pershad and his wife entered the courtyard in front of Smt. Jog Maya's room by breaking open the 'jal' covering it, that Jog Maya was lying unconscious, that they removed all receipts and other documents and all the valuables including jewellery from Jog Maya's safe, and that on the morning of the 22nd October, 1955, Durga Pershad and his wife carried the dead body of Smt. Jog Maya downstairs and placed it in the courtyard in the ground-floor of the house. He also submitted that Smt. Jog Maya never deposited the alleged will in the National Bank of India Ltd., Delhi, or elsewhere, that the alleged will, if at all executed, was destroyed by her with the intention of revoking it, that, under the circumstances of the case it must be presumed that Smt. Jog Maya revoked the alleged will, if at all executed by her, by destroying it, and that the applicant Durga Pershad was not entitled to the relief claimed or any other reliefs. Devi Charan also raised some additional pleas denying that Smt. Jog Maya, at the time of the alleged execution of the will propounded by Durga Pershad was not in a fit state of mind or body to execute any will or to fully appreciate what she was doing as to the disposition of the property. Devi Charan further pleaded that Durga Pershad was in no way connected with the late Jog Maya and was an absolute stranger to the family, that the will propounded by Durga Pershad was unnatural and suspicious, and even if the said will was proved to bear her signatures or thumb impression, the same must have been obtained by undue influence and by practicing fraud and coercion on her, and that this was borne out by the draft of the will which was found by the Local Commissioner during his search of the house. He thus objected to the granting of the probate prayed for by Durga Pershad.

10. On these pleadings, the learned District Judge framed the following issues:-

- (1) Did Smt. Jog Maya execute the alleged will dated 1-7-1947 (certified copy of which has been put on the record)?
- (2) Was Smt. Jog Maya of sound disposing mind when she executed the above

will?

(3) Was the above will in existence at the time of the testatrix's death?"

11. On issues Nos. 1 and 2, the learned District Judge, by his judgment dated 3rd May, 1957, held that Smt. Jog Maya executed the alleged will dated 1st of July, 1947, that she was of sound and disposing state of mind when she executed the said will, and that there was nothing concrete in the present case to show that any fraud had been committed by Durga Pershad as pleaded by Devi Charan. On issue No. 3, however, the learned District Judge held that there was no positive or reliable evidence in the present case to show either that the will was in existence at the time of the testatrix's death or that it had been destroyed by her, but that having regard to the various circumstances set out in his judgment, it can be assumed or inferred that Jog Maya must have had the desire to revoke the will, and that it is quite possible that she might have changed her intention of benefiting the applicant, Durga Pershad, and therefore, taken out the will from the bank and destroyed it. In all the circumstances of the case, the learned District Judge felt unable to hold that the applicant Durga Pershad had proved that the will, on which he relies, was in existence at the time of the death of the testatrix. In the result, the learned District Judge dismissed the application for probate.

12. Against the judgment and order, Durga Pershad preferred an appeal, F. A. O. Case No. 87-D of 1957, to the High Court of Punjab. The appeal was heard by a learned Single Judge (P. D. Sharma, J.) of the Circuit Bench of the Punjab High Court at Delhi. By his judgment, dated 30th of August, 1963, the learned Judge agreed with the view of the learned District Judge on issues Nos. 1 and 2, that the evidence was sufficient to prove that Smt. Jog Maya executed the will (copy Ex. P-10) and was of sound and disposing state of mind at the time of the execution of the said will. But, on issue No. 3, the learned Judge took the view that the will was neither destroyed nor revoked by the testatrix in her life-time, but has been misplaced somewhere, and that the will was in existence at the time of the death of the testatrix. In this view, the learned Judge set aside the order of the learned District Judge and granted the probate to Durga Pershad as prayed for by him in his application.

13. It is against the said judgment and order of the learned Single Judge, that this Letters Patent Appeal has been preferred by Devi Charan.

14. It is now well settled that a Division Bench of a High Court, in hearing a Letters Patent Appeal from a First Appeal, which was heard by a Single Judge of the High Court, can review even findings of fact, particularly when the judgment of the learned

Single Judge is not one of affirmance, but one which reverses the judgment of the trial Court. In an unreported decision of the Supreme Court of India (B. P. Sinha, C.J. P. B. Gajendragadkar, K. N. Wanchoo K. C. Das Gupta and J. C. Shah, JJ.) dated 11-1-1963, in *Alopati Kasi Viswanathan v. A. Sivarama Krishnayya (SC)*, ¹ their Lordships of the Supreme Court observed as follows :-

"A Letters Patent Appeal from the Judgment of a Learned Single Judge in a first appeal to the High Court is not exactly equivalent to a second appeal under section 100 of the Civil Procedure Code and, therefore, it cannot be held that a Letters Patent Appeal of this kind can only lie on a question of Law and not otherwise. The matter would have been different if the Letters Patent Appeal was from a decision of a learned Single Judge in a second Appeal to the High Court. In these circumstances, it will be open to the High Court to review even findings of fact in a Letters Patent Appeal from a first appeal heard by a learned Single Judge, though generally speaking the Letters Patent Bench would be slow to disturb concurrent findings of fact of the two courts below. But, there is no doubt that in an appropriate case a Letters Patent Bench hearing an appeal from a learned single Judge of the High Court in a first appeal heard by him is entitled to review even findings of fact."

15. Thus, in the present Letters Patent Appeal, the Judgment of the learned Single Judge appealed from, being one which reversed the judgment and order of the learned District Judge, it is open to us to review even the findings of fact.

16. Sri Bishamber Dayal, the learned Counsel for the appellant, contended before us that the findings of the learned Single Judge on the issues Nos. 1 and 2 as well as the issue No. 3 were erroneous and contrary to law, the weight of the evidence, and the probabilities of the case. We will, therefore, consider each of the said findings given by the learned Single Judge.

17. As regards the issues Nos. 1 and 2, as already stated above, the learned Single Judge held that the evidence on record was sufficient to prove that Smt. Jog Maya executed the will (copy, Ex. P. 10), and that she was of sound and disposing state of mind at the time of the execution, as held by the learned District Judge. Both the Courts have thus given concurrent findings on issues Nos. 1 and 2, viz., on the questions as to whether Jog Maya executed the alleged will dated 1st July, 1947, (a certified copy of which has been put on the record and marked as (Ex. P.-10), and whether Jog Maya was of sound and disposing state of mind when she executed the said will. The learned Counsel for the appellant has not been able to show any valid

reason which calls for an interference by us with the aforesaid concurrent findings of fact. We, therefore, affirm the said findings given by the learned Single Judge of the High Court and by the learned District Judge on issues Nos. 1 and 2.

18. As regards the findings of the learned Single Judge on issue no. 3, viz., that the said will was in existence at the time of the death of the testatrix, it is necessary to refer to certain facts and circumstances of the case, for a proper appreciation of the respective contentions of the parties.

19-20. It appears from the evidence on record that the testatrix. Smt. Jog Maya, was of a pious disposition. She purchased a house situated in Rang Mahal Nahar Sadat Khan, No. 667, in or about 1933. She resided in the front portion of the ground-floor, and leased out the back portion on the ground-floor to tenants. She got a temple constructed in the upper storey of the said house, and installed on 11th of March, 1935. the idols of Lakshmi Narain and Hanuman. On 7th of May. 1935, she executed a will and got it duly registered on the 9th of May. 1935. (After considering the recitals of the will the judgment proceeded) :

The various recitals in the aforesaid will clearly show that she was very particular that the house should be Wakf property for the purposes of the temple.

21-23. subsequently, on 12th July, 1938, Jog Maya executed another will, and got it registered on 18th of July, 1938. (After considering the recitals of the will the judgment proceeded :)

The various recitals and provisions in this will also show the religious and charitable disposition of Jog Maya, and how particular she was about the up-keep and maintenance of the temple and the proper management of the endowed properties.

24. Then, on 1st July, 1947, Jog Maya is said to have executed the impugned will, a certified copy of which was filed (as Ex. P. 10). In this will, it was recited that she formerly executed a will dated 18th August, 1938, that times had however altered and, therefore, she cancels and declares the said former will as void, and executes the will under execution which should be acted upon after her death, that she has one house No. 667, Rs. 4000 in deposit in Bank in her name, gold and silver ornaments, clothes and household effects, and shares in Delhi Cloth Mills, that the temple constructed by her was private temple in which she worships, that the executor of the will will be Pandit Durga Pershad, resident of Phatak Habash Khan, Delhi, that the executor is entitled on her death to take possession of all her moveable and immoveable

properties etc., that the executor himself will perform her funeral ceremonies, that no one will have any right of interference or of asking for accounts from him, that the executor Pandit Durga Pershad will on her death be the owner of all her moveable and immovable properties, but that he will have no right of alienating the house, that he will be entitled to realize the rents from the house, and from the income of rents he will spend whatever he considers proper in the performance of Puja in the temple, and appropriate the balance for himself, that the said executor was loyal and devoted to her, and she was satisfied that in his hands the temple and the house will be safe, that he will appoint another man to manage after him the temple and house, that she has an adopted son Devi Charan who had executed a release deed, dated 26th August, 1929, that she had no connection with him, and that he has no concern with her estate, moveable and immovable, and he should not even touch her dead body and that by this will she cancels all her previous wills.

25. The scribe of this will was stated to be one Abdul Roof. He was not examined as he is stated to have migrated to Pakistan. The will was in Urdu, but her signature was in Hindi, and her thumb impression also is stated to have had been affixed. Durga Pershad admitted in his evidence that Jog Maya did not know Urdu. The will purports to have been attested by seven witnesses, though normally two witnesses would be sufficient to satisfy the requirements of law. The first will dated 7th May, 1935, was attested by two witnesses, and the second will dated 12 July, 1938, was attested by three witnesses. Six out of the seven witnesses who purported to have attested the impugned will (Ex. P 10) were stated to be residents of Phatak Habash Khan the same place of residence as that of Durga Pershad. The will was registered on 9th of July, 1947.

26. As already stated, the version of Durga Pershad was that two days before her death, Jog Maya, told him that the will was in the safe custody of the National Bank of India Ltd., *Chandni chowk*, Delhi. But, it was not found in the sealed metal box of Jog Maya kept in the said Bank, or in the house of Jog Maya. On the other hand, a document which purports to be a draft of a will of Jog Maya was found by the Commissioner in the house of Jog Maya. This document was marked as Ex. C. - 1. It appears to be a draft will by Jog Maya. But, it was neither signed nor attested. In this draft will, the age of Jog Maya was stated as sixty-three years, which was the same as that given in the will copy (Ex. P.-10), dated 1st July, 1947. It means that Exhibit C-1 was written at or about the time when Ex. P -10 was written. In Exhibit C-1 after referring to the two previous wills, dated 7th of May, 1935, and 12th of July, 1938, it

was recited that after the execution of the said two wills, the circumstances had varied, that most of the trustees whom she had appointed had died and that it had, therefore, become necessary to cancel the previous two wills and execute the present will (Ex. C-1). The properties of Jog Maya were then enumerated as, one house No. 667, a balance of Rs. 4,000 left from out of the sum of Rs. 7,000 cash mentioned in the previous wills, shares of Delhi Cloth Mills of the value of Rs. 1,325, silver and gold ornaments valued approximately at Rs. 1000 and house-hold goods, utensils and clothes. It was then recited how Jog Maya constructed the temple, installed the idols, and made the house a Wakf (dedicated) for the idols, and it was again declared that the house will as before remain Wakf for ever, and that Jog Maya will manage and perform the puja etc. during her life-time. Durga Pershad (Respondent herein) and one Pandit Ramnath were appointed as executors and trustees. The other recitals and provisions in the will were similar to those contained in the two earlier wills, dated 7th May, 1935, and 12th July, 1938.

27. The various recitals in this draft also show that Jog Maya had a religious and charitable disposition, and was very particular that her properties should be applied for the purposes of the temple and for other charitable purposes. Yet, we find that she executed will (Copy Ex. P-10) on 1st July, 1947, under which, excepting the expenses to be incurred for the Puja in the temple, the rest of her income and properties were bequeathed to Durga Pershad. She lived for about eight years thereafter, and died at Delhi on the 22nd of October, 1955.

28. But, the original of the will, dated 1st July, 1947. was not found either in the sealed box kept by Jog Moya in the Bank, or in her house. The contention of Shri Bishamber Dayal, learned Counsel for the appellants Devi Charan is that, in the circumstances of the case, it should be held that Jog Maya revoked the will by destroying the same, while the contention of 'Shri Shanker, learned Counsel for the respondent Durga Pershad is that there is no evidence in support of the contention that the will was revoked by Jog Maya by destroying it, and that the original will might have been lost or mislaid by Jog Maya.

29. The question for consideration is, therefore, whether the will was revoked by Jog Maya. Section 70 of the Indian Succession Act provides as follows :-

"70. No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which

an unprivileged will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same."

In *Satya Charan Pal v. Asutosh Pal*,² at pp. 659-660, a Division Bench of the High Court of Calcutta (G. N. Das and Debabrata Mookerjee, JJ), after referring to the decisions in *Welch v. Phillips*, *Padman v. Hanwanta*,⁴ and *Efari Dasya v. Podei Dasya*,⁵ and other decisions, held;

"The burden of proving that a will has been revoked no doubt rests on the objector. The burden may be discharged either by direct evidence or by an inference to be drawn from certain facts which the objector may succeed in establishing. In dealing with the question of revocation, the Court may also resort to a presumption which has been raised in similar cases by the Courts in England, and applied with caution by the Courts in this country".

The presumption raised in such cases is that where a will is traced to the possession of the testator and is not forthcoming after his death, the will must be taken to have been destroyed by the testator with the intention of revoking the same. It was further observed in the above mentioned decision that, "No hard and fast rule can be laid down as to whether or not the presumption should, as a matter of law, conclude the matter. The question has to be determined in the light of the facts which arise for decision in each case".

30. In the present case, it is the version of Durga Pershad himself, as deposed to by him, that Jog Maya brought the will after registration, showed it to him, and kept it with herself. Thus, the will was admitted to have been in the possession and custody of the testatrix, and is not forthcoming after her death. The will was not found among the deceased's effects, and, as deposed to by Durga Pershad, "the original will is not traceable in spite of efforts". In these circumstances, as observed by Colling Wood, J. in *In re : Wyatt (deceased)*, 1952) 1 All E. R.1030 at p. 1031. "the presumption arises that the will was destroyed by the testatrix with the intention of revoking it, and, in the absence of any evidence to repeal it, that presumption prevails".

It is true that, as observed in *Arya Pratinidhi Sabha, Punjab v. Dev Raj*,⁶ at p. 212, the above mentioned rule of presumption in English Law should be applied in India with caution. This only means, as observed by the learned Judges of the High Court of Calcutta in AIR 1953 Calcutta 667 referred to above, the question has to be determined in the light of the facts and circumstances in each case.

31. In the present case, there is no positive evidence to show that the will was in existence at the time of the death of the testatrix. (After considering the evidence the Judgment proceeded :)

This evidence, in our opinion, excludes the probability of any person having taken away the document, or of Jog Maya having mislaid the document somewhere during her life-time.

32. Nor was there any possibility of some one having taken away the document either just before the death of Jog Maya or immediately after her death, (After considering the evidence the judgment proceeded :)

Thus, no one could have removed the will just before or immediately after the death of Jog Maya. From this, the inevitable inference is that the will was not in existence by or at the time of the death of the testatrix.

33. It has next to be considered whether the circumstances were such as to support or repel the presumption, that the will was destroyed by the testatrix with the intention of revoking the same. As already stated, by the will, dated 1st July, 1947, (Copy Ex. P-10), almost all the properties of Jog Maya were given away to Durga Pershad. Admittedly, he was not related to the testatrix. Even according to his own evidence, he did not live in the house and help Jog Maya throughout. All that appears from his evidence was that he used only to write the rent receipts on behalf of Jog Maya. The evidence does not show that Jog Maya had any attachment to or affection for Durga Pershad, apart from the recitals in Exhibit P-10 about his good behavior towards her. Whatever might have been the reasons for her executing the will making him the main beneficiary, there was no reason or circumstance which prevented her from changing her intention to benefit him. On the other hand, there was a very plausible reason for her changing her mind. As stated earlier, she was a pious lady with a religious and charitable bent of mind. She built a temple in the upstairs portion of her house, and got the idols of Lakshminarayan and Hanuman installed therein. She had previously executed a will on 7th May, 1935, endowing all her properties for the purpose of Puja and service in the said temple. Again, when the circumstances had slightly changed. she took care to execute another will on 12th July, 1938, making appropriate changes in the provisions, but emphasising her desire for the careful maintenance and upkeep of the temple, and declaring in clear terms the dedication of her properties for the purposes of the Puja and service in the said temple.

Then, in 1947, for some reason or the other, she executed the will, dated 1st July,

1947, (copy Ex. P-10), under which she made Durga Pershad the main beneficiary, though he was not related to her and had no ostensible claim for her affection or bounty. She lived for about eight years thereafter, and during that time she managed her properties and performed the Puja and service in the temple herself. As pointed out by the learned District Judge, it would, not, therefore, be strange if towards the end of her life, she reverted to her original religious and charitable intentions. There was thus a very plausible reason for her to change her intention to benefit Durga Pershad, to revoke the will executed by her as far back as 1947, and to revert to her original intention of endowing or dedicating her properties to the temple built by her, as held by the learned District Judge. These aspects, in our opinion, probalilise and strengthen the presumption that Jog Maya destroyed the will with the intention of revoking the same.

34. The learned Single Judge of the High Court who heard the appeal against the judgment of the learned District Judge, did not advert to and consider in detail the various aspects set out above. After setting out the contentions of the learned counsel for the appellant (Durga Pershad), before him, the learned Judge merely expressed his view that he was inclined to agree with the said contentions on behalf of Durga Pershad. The contentions were that "Jog Maya was an independent and shrewd woman and whenever she wanted that her property should be dealt with in a particular manner after her death, she always expressed her intention by executing formal documents complete in all respects", that "if Jog Maya had any time intended to revoke the will so that her estate could be donated for the purposes of the temple, as observed by the Court below, she would have certainly executed a formal document evidencing her intention beyond any doubt" and that "the act of the testatrix in handing over the cash deposit receipts and the receipt for the deposit of metal box in the Bank, two or three days before her death, clearly indicated that she had neither revoked nor destroyed the will" After setting out these contentions. The learned Judge merely expressed his view that "the above defects go more to prove that the will was neither destroyed nor revoked by the testatrix in her life-time and has been misplaced somewhere."

We are not able to agree with the said view of the learned Judge. The independent and shrewd nature of Jog Maya, far from proving the mislaying of the will, shows the character or nature of the custody of the document, and probalilises that she would not have carelessly mislaid the document. Again, to say that Jog Maya could have executed a formal document of cancellation if she had such an intention to cancel,

would be, in our opinion, to beg the very question which has to be answered. The non-execution of a formal document of cancellation does not necessarily negative or improbabilise the destruction of the will with the intention to revoke the same.

35. Lastly, the alleged handing over of the deposit receipts etc. to Durga Pershad does not show in any manner that the will was mislaid. On the other hand, the fact that the will was not handed over to Durga pershad along with the deposit receipts would show that the will was not in existence, or at any rate that it was not in the possession or custody of Jog Maya. It has to be noted that the version of Durga Pershad was that Jog Maya told him that the will was kept in the Bank, and that this version was belied by the absence of the will in the sealed box kept in the bank by Jog Maya.

36. The learned Judge referred next to the decision of the Supreme Court in *Anil Behari Ghosh v. Smt. Latika Bala Dassi*,⁷.

That decision has no bearing on the question for consideration in the present case, viz., whether the presumption of the destruction of the will with the intention to revoke the same arises on the facts of the present case. In the decision of the Supreme Court, it was held that it is not enough to allege that the testator had at one time entertained the intention to revoke the will, because such an intention without being translated into action has no effect on the will. The question regarding the presumption was not raised or considered in that case before the Supreme Court.

37. The other decisions referred to by the learned Judge, viz. AIR 1963 Punjab 208; *Feroze Din v. Mula Singh*,⁸ and *Babu Lal v. Baijnath*,⁹ laid down that the rule of English law regarding the aforesaid presumption should be applied in India with caution. We have already referred to and considered this aspect.

38. Thus, the learned Judge did not advert to and consider in detail the various aspects referred to and discussed by us in the earlier part of this judgment. We, therefore, are unable to agree with his view that the original will, dated 1st July, 1947, was not destroyed by the testatrix with the intention to revoke the same.

39. The circumstances discussed above clearly showed at any rate gave support to the presumption, that Jog Maya destroyed the will with the intention of revoking the same.

40. Sri Shankar the learned counsel for the respondent Durga Pershad, pointed out to us certain circumstances which according to him, rebut the said presumption. Firstly he submitted that Jog Maya was an intelligent and shrewd lady who could attend to her

own affairs, that she was keen about making some arrangement regarding her estate which is clear from the execution of a number of wills by her that she was apprehensive that Devi Charan might give trouble, and, therefore, she must have intended to allow the will, dated 1st July, 1947, to remain in force, but not to revoke the same. He argued that if she really wanted to revoke the said will, she would have executed another registered will or document, revoking the will, dated 1st July, 1947, instead of merely destroying the will. He also pointed out that Durga Pershad was on good terms with Jog Maya, and even gave him the deposit receipts, and that she would not have revoked the will which she executed in his favor. These contentions of the learned counsel cannot be accepted, because the aforesaid circumstances pointed out by him would rather lead to the inference that Jog Maya must have intended to revoke the will and not the inference that she intended to allow the will to remain in force. Jog Maya, who was, even according to the learned counsel, intelligent and keen about making some arrangement regarding her estate, and was apprehensive of some trouble from Devi Charan, would have taken great care to preserve the original will, if she had intended the will to remain in force and take effect after her death. She would have also handed over the original will to Durga Pershad, when she delivered to him the deposits receipts etc., two days prior to her death, as alleged by Durga Pershad and would have asked him to keep it safely as his entire right to her estate vests upon that document. She would have taken that care in view of her alleged good feeling towards Durga Pershad, if she did not have the intention to revoke the will. In our opinion, the only inference that can be drawn from the absence or non-existence of the original will, either in her house or in the sealed box kept by her in the Bank, is that she destroyed the original will with the intention to revoke the same.

41. For all the above reasons, we hold that Jog Maya must be presumed to have destroyed the original will with the intention to revoke the same, and that the will was not, therefore, in existence by or at the time of her death. Consequently, no probate can be granted to Durga Pershad. We accordingly allow this appeal, set aside the judgment and order of learned Single Judge (P. D. Sharma, J.) dated 30th August, 1963. in F. A. O. Case No. 87-D/1957 (Punj) and restore the judgment and order of the learned District Judge, dated 3rd May 1957. in Probate Case No 5 of 1956, dismissing the application of Durga Perihad for probate. In the circumstances of the case, we order that each party should bear his own costs throughout.

Appeal allowed.

Cases Referred.

1. C.A. No. 232 of 1961,
2. AIR 1953 Calcutta 657
3. (1836) 1 Moore P.C. 299,
4. AIR 1915 PC 111,
5. ILR 55 Cal 482
6. AIR 1963 Punjab 208
7. AIR 1955 Supreme Court 566
8. AIR 1925 Lahore 540
9. AIR 1946 Patna 24,