ORISSA HIGH COURT

Brundaban Chandra

Vs

Ananta Narayan Singh Deo

First Appeal No. 5 of 1950

(Panigrahi, C.J. and Misra, J.)

15.01.1955

JUDGMENT

Panigrahi, C.J.

1.The appeal arises out of an application for Letters of Administration on a certified Copy of a Will. The late Raja Birabar Narayan Chandra Dhir Narendra Bahadur of Madhupur executed and registered the said will on 27-12-1945, in favour of the plaintiff-respondent, who is the second son of his daughter Sm. Brajeswari Devi, bequeathing to him his house at Cuttack, known as Madhupur Kothi. He died on 2-7-1946 at Garh-Madhupur leaving him surviving his adopted son, viz., the defendant-appellant and the said Brajeswari Devi, his only daughter and the mother of the plaintiff. It is the common case of both parties that the late Raja's wife had pre-deceased him, and that his daughter Brajeswari Devi who was married to the Raja of Dharakote and became a widow in 1938 had been living with her father till his death.
On the day previous to her marriage the defendant. Shri Brundaban Chandra Dhir Narendra who is the brother of Brajeswari's husband, was adopted by the late Raja of Madhupur as his son. The plaintiff's case was that the Will was in the custody of his mother till the Raja's death, and in the confusion following the death of the Raja necessitating the removal of articles and furniture from the room where the Raja died, the suit-case containing the will was mislaid, and the Will had remained untraced till then. The suit was filed on a certified copy of the Will, which has been marked Ex. 2. The case for the objector, namely the present Raja of Madhupur is that the execution of the Will was brought about by undue influence exercised by the plaintiff's mother Sm. Brajeswari Devi and that it was subsequently revoked by destruction 'animo revocandi'. The learned Additional District Judge has found that the Will was the free expression of the testator's intention to benefit his second grandson and that it was not tainted by undue influence or coercion. He has also found that the alleged destruction of the Will by tearing it and consigning it to the fire was not made out by the defendant.

2. The valid execution of the Will is not seriously contested before us. The only point in controversy is whether it was revoked by the testator a few days prior to his death. Apart from the oral evidence of the two witnesses examined by the defendant who speak to the destruction of the Will, learned counsel for the appellant asks us to raise a presumption, in favor of his client,

that the Will must have been destroyed, if it is traced to the custody of the testator at the time of his death and has not been found since then. It is, therefore, necessary to state a few facts before examining the merits of this contention.

3. The plaintiff's case is that the Will was made over to his mother in his presence sometime during the summer of 1945 when the plaintiff had returned from his studies at Dehra Dun and that his mother had kept it in a leather suit-case which was kept in the second floor of the Palace along with the other boxes and suitcases of his grandfather, on the death of his grandfather all his belongings were removed from the second floor to the first floor as the apartment where he was living had to be cleaned and sanctified. After the completion of the ceremonies following the funeral the plaintiff had to leave Madhupur with his mother (P.W. 1) and his elder brother (P.W. 7) when it was discovered that the particular suit-case containing the Will was missing. The fact that the suit case contained some cash as well as the Will, and that it was missing, was brought to the notice of fee defendant by the plaintiff's elder brother (P.W. 7), and it is alleged that the defendant gave P.W. 7 a verbal assurance that he would look into the matter and send the Will as soon as it was traced. The case for the defendant is that two days after his return from Puri, that is on 26-6-1946, the late Raja sent for his manager (D.W. 3) and another friend of his (D.W. 2) and told them that he had given enough cash to his grandson (the plaintiff) and that he did not like to part with his house at Cuttack. He therefore asked D.W. 1 to tear up the will who accordingly did so and threw the pieces into the fire that was there.

4. The learned Additional District Judge accepted the plaintiff's case that the Will had been kept in a leather suit-case in the second floor and was lost, but he was reluctant to believe that the Will was in the custody of the plaintiff's mother (P.W. 1) at the time of its loss. The learned Judge while holding that it was not unlikely that the testator would have made over the Will in question to Brajeswari Devi, to keep it on behalf of the plaintiff who was then a minor was not prepared to accept her further statement as to how the loss had occurred as, in his opinion, the conduct of her elder son (P.W. 7) was not consistent with her story. We are not impressed by the reasoning adopted by the learned Judge on this part of the plaintiff's case. Having regard to the fact that P.W. 1 had lost her only source of consolation and help in the death of her father, with whom she had been living ever since her widowhood and that the plaintiff (P.W. 2) was a minor, there was nothing unnatural in her having entrusted the matter to her elder son P.W. 7 and leaving it there. P.W. 7 also had just then come of age and the defendant was no other than his paternal uncle. Furthermore, the Will in question had been registered and a certified copy could easily be obtained. There was no reason to doubt the *bona fides* of the defendant at that time and the mere fact that no steps were taken on behalf of the plaintiff to recover the will is not enough to discredit the evidence given by the plaintiff and his mother.

5. The question however, is whether apart from any legal presumption the Will had, as a fact, been revoked by destruction. As stated already, the defendant put forward a specific case of destruction by tearing and burning, and this issue has to be decided on the evidence of the two witnesses D.Ws. 1 and 2 who speak to the destruction of the Will.
D.W. 1 is the manager of the defendant and for the reasons given by the Court below we have no hesitation in agreeing with him, that he is deeply interested in the defendant. D.W. 2 is likewise, an interested witness and his testimony has been rightly rejected as unreliable. Learned counsel for the appellant has not been able to give any cogent reason as to why we should differ from the trial Judge on the question of credibility of these witnesses. Apart from their interestedness, the

story put forward by them is highly improbable. The Raja had, after mature deliberation, executed the Will in favor of his second grandson who was a junior member of the Bharakote Raj family and no property of his own. He was deeply attached to his only issue, namely, Brajeswari Devi (plaintiff's mother); and there is no evidence given as to what particular attachment lie had for his adopted son (the defendant). On the other hand, the evidence shows that he had sent the plaintiff to the Doon School at Dehra Dun for his studies and was solicitous about his future. The last letter which he wrote to P.W. 7 on 29-6-1946 (Ex. 1) shows that he was deeply attached to his second grandson as would be evident from the following passage :

> "As regards Saheb Deo (plaintiff) you know pretty well my affections towards him. I very dearly brought him up from his infancy. It will be better and helpful in my recovery if he will spend this Vacation here, to refresh my mind at this stage of my health. If he goes away it will be a shock to me. Think over the matter and let me know your views".

The tone of this letter is consistent with the recital in the Will in which the late Raja Sahib said that he bequeathed his house at Cuttack to his grandson "as he is the second son of my beloved daughter, the Raj Mata of Dharakote and as I hold him in love and great affections". There is no evidence of any altered circumstance which would incline us to believe that there was a change in his feelings towards the plaintiff. If the alleged destruction of the Will on 26-6-1946, that is to say three days prior to the above letter Ex. 1 is to be accepted, then one must presume that the late Raja was exceedingly hypocritical in his professions of love and affection towards the plaintiff even after depriving him of the benefit of his Will. It is, however, suggested, that the Raja had good reason for changing his mind as he is alleged to have said that he had given enough to his second grandson and that there was no need for the disposition made in the Will. But no evidence has been adduced to show that the Raja had given any thing to the plaintiff other than the house bequeathed by the Will. The books of account, the diaries maintained by the Raja or other similar unimpeachable evidence could have been produced to substantiate it, but nothing of the kind has been done. Another significant circumstance bearing on the Point is that P.W. 6 the doctor who was in constant attendance on the Raja was not taken into confidence at any time by the Raja, about his change of mind or about the actual destruction of the Will.
The evidence of D.Ws. 1 and 2 is that nobody was present except themselves when the destruction took place and they were asked not to disclose the fact to anybody. It is curious that neither of these witnesses disclosed the fact even to the defendant after the death of the Raja. It is also difficult to understand why the defendant himself was not taken into confidence by the late Raja as the destruction of the Will would have been for his benefit only. We are unable to discover any reason why such secrecy should have been maintained even after his death.

6. The defendant's plea that he did not know of the existence of the Will or of its destruction until he enquired from D.W. 1 sometime in December is equally unconvincing. The correspondence between the defendant and P.W. 7 has been exhibited and throws much light on this aspect of the matter. (After discussing this correspondence His Lordship proceeded :) The exact date of destruction has also not been satisfactorily established. In the written statement of the defendant it is alleged that the late Raja returned to Madhupur from Puri on or about the 24th June 1946 and that two days after returning to Madhupur from Puri, the late Raja expressed his desire to revoke the said Will and that it was destroyed in his presence and under his orders. The date of his return and the date of destruction are left vague and, in his evidence the defendant says that

D.W. 1 told him that "there was a Will by my adoptive father and it was destroyed two or three days before his death". The Raja died on 2-7-1946 about a week after the alleged date of destruction, and according to the-evidence of D.W. 1 the Raja became unconscious since 30-6-1943 till his death.
It could not, therefore, have been destroyed two or three days before his death. In our opinion, no reliance can be placed on this sort of evidence which is neither cogent nor conclusive on the point.

7. Another feature of the defense story, which has been left vague, is whether the Will, said to have been destroyed is the original of Ex. 2, the certified copy. D.W. 1's evidence on the point is :

> "He asked me to read and I read. It was a registered will. He then made over the Will to me and asked me to tear it and destroy. I tore it and threw the pieces into the fire burning near his bed".

In cross-examination he was asked about the contents of the will which was destroyed, and his reply was :

> "I do not remember who was the identifier. I remember so far as the Cuttack house was concerned, and I do not remember the other details of recital".

This witness was not asked to identify Ex. 2 as the copy of the original will supposed to have been destroyed. No other evidence was led to indicate the contents of the destroyed Will. If the witness had, in fact read the Will, as he says he did, it is curious that he remembers no other detail except that "that Cuttack house was concerned". He does not even say that the Cuttack house had been bequeathed to the defendant. D.W. 1 also says that Kanhyalal (D.W. 2) aid not read the Will and that it was the Raja who read it. Kanhyalal however says that he read it but could not say whether the Raja had read it. He frankly admitted that he did not remember the contents, nor did he identify Ex. 2 as the copy of the will alleged to have been destroyed. It must be remembered that the Raja was a public man and was a member of the Orissa Legislative Assembly; and it is hard to believe that he took this extraordinary step of destroying the registered will when he could have more effectively revoked the same by an endorsement upon it in his own hand. I am of the view that where it is sought to prove the revocation of a will by oral evidence only, such evidence must be stringent and definite, free from vagueness and uncertainty. It is clear that there is no such evidence in this case.
8. The evidence of the plaintiff and his mother, on the other hand, is amply Corroborated by the letter of the testator, Ex. 1, dated 29-6-1946, and by the other circumstances. P.W. 1's integrity has not been impeached and the position she occupied in the house of the testator was exceptional. There is no evidence that the defendant had anything to do with his adoptive father during the period of the latter's prolonged illness either at Puri or at Garh Madhupur. The daughter, on the other hand, had been his daily companion for many years and the father in his turn, was very much attached to her not only on account of her widowhood but also on account of the fact that she had been deranged in mind for sometime. She was also in exclusive occupation of the second floor of the Palace as she was constantly in attendance upon her father. In these circumstances, I am unable to see any reason why her statement that the Will in question had been in her custody should not be accepted.

9. Nor can I find any reason why the testator should keep the Will in his own custody, after having executed and registered the same cut of love and affection for his second grandson. I find sufficient independent corroboration of P.W. 1's statement with regard to the custody of the Will. from the evasive and disingenuous statement made by the defendant himself. P.W. 1's evidence on this point is as follows : I kept the Will in my box as soon as the Will was delivered to me. The box is a double-lock leather-suit-case. The box contained some letter papers, envelopes, and Rs. 800/- in cash at the time when I kept foe Will. I had the key of the suit-case with me. The cash and its other contents must have been in the box at the time of my departure from Madhupur". The defendant's version is :

> "There was no box or suit case in the bedroom or in the room attached thereto of my late father at Madhupur. There were furniture, photographic goods, medicine and some books, there were a number of suit-cases and trunks in Madhupur and they are still now.
> They were being kept in the luggage room of the first floor by my father. Trunks and suit-cases are still intact in the same house and in the game room. Never I asked my manager to identify the suit-case which contained the will in dispute. The suit-case which contained the Will is either in the luggage room or in the bedroom. I have not seen the suit-case as yet."

D.W. 1, however, asserted that he was asked by the late Raja Sahib to bring a small attache case of leather from his sleeping room. He further said :

> "It was within a closed almirah. He gave me the key. I brought out the case and placed it before him. He then asked me to open it. It had been locked, I opened it with the key given to me by the Raja and placed it again before him".

Further cross-examined he said :

> "Nothing was removed from the bedroom to any other place after the death of the Raja. All the articles are there still".

It would, thus, appear that there is a divergence of opinion between D.W. 1 and the defendant (D.W. 3) as to whether there was any suitcase in the bedroom belonging to the testator and as to its whereabouts after his death. According to the defendant, he had not seen the suit-case till he went into the witness box and there is no reason given as to what happened to the key with which the suit-case was opened by D.W. 1.
That there was an attache case in the second floor of the palace where the Raja was sleeping as further corroborated by D.W. 2 also. P.W. 1's statement that there was an attache case in the bedroom of the Raja on the second floor is admitted by D.Ws. 1 and 2 while the defendant's version is altogether different-he denies the existence of any suit-case in the bedroom on the 2nd floor. P.W. 1 says that she had the key of the suit-case with her when she left Madhupur after her father's death. It should have been easy for the defendant to have the particular suit-case identified by D.Ws. 1 and 2 and to challenge P.W. 1 to produce the key which she said she had with her. Having regard to these circumstances, I am loath to accept the statement cf. the

defendant that he had not seen the suit-case until he gave evidence in Court, as true.

10. There is one other circumstance to which I should like to advert before recording my conclusion on this point. The Will, Ex. 2, does not contain any clause of revocation and purports to be an unconditional bequest. The testator did not reserve to himself any power of revocation as is usually done, though doubtless a Will id revocable irrespective of whether such a clause is incorporated or not. Nevertheless, it is significant that the Will which was drafted by a lawyer contains no such clause which leads me to conclude that the testator had no mental reservation about the bequest he was making and had made up his mind unreservedly to give it to his second grandson, viz., the plaintiff. It is clear, therefore, that the Will represented a well considered disposition. In such circumstances, is it reasonable to hold, or is it probable that, without any apparent reason a change had come over his mind and that he suddenly ceased to entertain the same affection for the plaintiff as he had at the time of making the will Neither the Doctor (P.W. 6); nor the private Tutor (P.W. 4) who was in the confidence of the late Raja and had attested the Will, was asked whether the last Raja had at any time expressed even a desire to cancel the Will.
On the other hand, it is plain that P.W. 1 had enjoyed the confidence of the testator right to the end and it is hard to imagine why he should conceal from her the fact that he had revoked the Will. It is preposterous to think that he had kept up the pretence of undiminished affection and interest towards her and her second son even after he had done so much to injure his interest by cancelling the Will. The reason given by the witnesses for the alleged cancellation is palbably false and falls to carry conviction. It has neither been properly proved nor can it be held sufficient to warrant the inference. Nor are we prepared to assume that the testator suddenly became imbecile on 26-6-1946 and made up his mind to destroy the Will and thereby sowed the seeds of further discord between his adopted son and his grand son.

11. On a consideration of all these circumstances I have arrived at the conclusion that the Will in question was in the custody of P.W. 1 and that it was in her attache-case in the bedroom of the tastator at the time of his death and that thereafter she lest trace of it owing to her leaving the second floor at a time of great mental distress. I am also in agreement with the view taken by the trial Judge that the story of destruction of the Will has not been established and that consequently the alleged revocation has not been made out.

12. Nonetheless learned counsel for the appellant contended that the plaintiff should be denied relief as he has failed to discharge the onus of proving the existence of the Will at the death, of the testator. The revocation of a Will can be brought about by burning, tearing, or otherwise. Where a Will is destroyed 'animo revocandi' it amounts, in law to a revocation. This is a question of fact which has to be proved by the objector. But there is formidable English authority for the preposition that if a testament was in the custody of the testator at the time pf his death, and is not forthcoming on his death it is presumed to have been destroyed by himself-See - '*Welsh v. Phillips*[1]', '*Allan v. Morrison*[2]', '*Sugden v. Lord St. Leonards*[3]', This presumption can however, be rebutted; and the weight to be attached to such presumption will depend upon the character of the custody which the testator had ever the Will. In England wills are usually deposited either in a Bank or with a Solicitor. But the same presumption is hardly applicable in all circumstances in India where the habits and conditions of the people vary.
Here, in India, deeds are not preserved with that, amount of care as is done in England : See - '*Anwar Hossain v. Secy. of State*'[4], '*Shibsabitri Prasad v. Collector of Meerut*'[5], *Padman v. Hanwanta*[6]'. and '*Babulal Singh v. Baijnath Singh*[7]', On the other hand, where a document is

registered no care is taken at all of its custody as a certified copy is easily available, and the law allows its production in proof of the original. Consequently, having regard to the habits and conditions of the people here, when a document like a registered Will is not forthcoming after the testator's death, presumption may well arise that it has been mislaid as seems to have happened here. Their Lordships of the Privy Council made the following observations in 'AIR 1955 PC 111 at page 112 :

> "Much stress has been laid on the view expressed by Baron Parke in - '(1836) 1 Moo PC 299'. (A); that when a Will is traced to the possession of the deceased and is not forthcoming on his death, the presumption is that he destroyed it. In view of the habits and conditions of the people of India this rule of law, if it can be so called, must be applied with considerable caution.

In the present case the deceased was a very old man and towards the end of his life almost imbecile. There is nothing definite to show that he had any motive to destroy the Will or was mentally competent to do so. On the other hand, the circumstances favor the view, the Chief Court has taken, that the Will was either mislaid or stolen.
It follows that in this country a presumption of revocation of a Will cannot be drawn merely from the fact of its disappearance. See - *'Feroze-Din v. Mula Singh*[8]*',* *'Efari Dssya v. Podei Dasya*[9]*',* and *'Chidambara Pillai v. Swaminathan*[10]*',* It has also been held that the onus of proving destruction of the Will lies upon the party alleging it, - 'See AIR 1946 Patna 24; and *'Ramachandra v. Ranganayaki*[11]*,.* Before the presumption can be raised in favour of the appellant, the Court must be satisfied that the Will was not in existence at the time of the testator's death. Learned counsel for
the appellant relied on the evidence of P.W. 1 in proof of the fact that the Will was in
existence at the time the testator died. If her evidence about the existence of the Will can be accepted, there is no reason why her evidence regarding its custody and less should be rejected. On the other hand, the defendant pleads ignorance of the existence or otherwise of the Will and goes to the extent of saying that he has not even seen the box containing it. A presumption of its having been destroyed can be raised in favour of the appellant only, if he satisfies the Court that a search had been made among the papers of the deceased by an independent person and no such document could be found among his effects. If, on the other hand, as the evidence in this case reveals, the defendant had access to the effects of the deceased immediately after his, death and it is obvious that he is interested in causing its disappearance, the presumption must be deemed to have been rebutted.

13. There is yet another fallacy in the contention raised by learned counsel for the appellant. P.W. 1 no doubt admits that the Will was in the attache-case in the bedroom of the testator, but asserts that she was in possession of the keys thereof and that the Will was in her custody. The initial fact that the Will was in the testator's own possession has not been established so as to entitle the Court to raise a presumption in favor of the defendant that it was destroyed.

14. Much reliance was placed on the case of - *'Adit Ram v. Bapulal*[12]*',* where Macleod, C.J. referred to the headnote in '1900 AC 604', and seems to have been of opinion that the presumption of destruction could always be made if the Will was not forthcoming on the death of the testator. But it should not be overlooked that in that case their Lordships of the Privy Council

felt themselves bound by the concurrent judgments of the Courts below on a question of fact. There it was proved that the Will was in the testator's depository the keys of which were in his possession, and no access could be obtained to it without either his permission or a fraudulent abstraction of the keys. In such circumstances the Privy Council held that the presumption could be raised and refused to disturb the decision of the Courts below that the presumption was not rebutted. This case is no authority for the extreme proposition that in every case, regardless of circumstances, such a presumption should be raised as if it were a matter of law. The limits of the rule governing lost Wills are defined1 thus in a well-known passage in Jarmon on Wills. Edn. 6 Vol. I, at page 152 : If a Will is traced into the testator's possession and is not found at his death, the presumption is that he destroyed it for the purpose of revoking it : but the presumption may be rebutted, and it will be more or less strong according to the character of the custody which the testator had over the will. It is difficult to lay down my general rule as to the nature of the evidence which is required to rebut the presumption of destruction; it depends to a considerable extent on the testator's property and his relations towards his family. Where the will makes a careful and detailed disposition of the testator's properties and nothing happens to make it probable that he wishes to revoke it, the presumption raised by the disappearance of the will may be rebutted by slight evidence, especially if it is shown that access to the box or other place of deposit where the will was kept can be obtained by persons whose interest it is to defeat the will. In fact, it may almost be said that in such a case the presumption is the other way, namely, that the testator did not intend to the intestate." In view of my finding of fact that it has not been proved either that the testator had custody of the will at the time of his death or that he destroyed it, and that the defendant had access to the place where the will had been deposited, a suspicion arises that the defendant had, got hold of it and refused to produce it. In - '*Brown V. Brown*[13]*',* Lord Campbell, C.J. remarked :

> "The fact of the will being lost traced to the possession of the testator and not being found, is not conclusive that he cancelled it. If, for instance, it could be shown that the heir at law had access to the place where the testator had deposited the Will and grounds could be shown for a suspicion that he destroyed it, it would be a case to consider.

The presumption invoked by the appellant would not arise "unless there is evidence to satisfy the Court that it was, not in existence at the testator's death" - See *'Pinch v. Finch*[14]*',* in which Sir J.P. Wild cited with approval the following passage from - '*Podmore v. Whatton*[15]*',*

> "A material question of fact has to be decided in this case before any presumption arises on either side; and it is this, was the will found at the decease of the testatrix or not ? If it was found at her death and is in unmutilated state, then she did not revoke it.

If it was not so found, then there is room and foundation for the revocation which the law will presume, in the absence of testimony, to rebut it. In most cases the solution of this question presents no difficulty for the depositories of the deceased are duly searched by those whose good faith is not impugned and who vouch for the fact one way or the other..... But that difficulty does not present itself in the present case, for the depositories of the deceased before they could be searched by any independent person, were already accessible to and are proved in evidence to have been investigated by the only person who was interested in destroying the will if it existed,

viz., the defendant. The question is whether the circumstance that the Will could not be found after the defendant had access to and had searched the depositories, ought to satisfy the Court that it was not in existence when the testator died". If this were an English case I have no doubt that the evidence would be held sufficient to rebut the presumption. It is enough to say that Courts in India have, in similar circumstances, either refused to raise such a presumption or have held it to be rebutted - See '29 All 82', and *'Deputy Commr., Lucknow v. Tej Kishen[16]', (P).*

15. I would, therefore, uphold the judgment, of the learned Additional District Judge and order the grant of Letters of Administration to the respondent. He will also have the costs of this litigation in both the Courts.

16. The appeal is accordingly dismissed with costs throughout.

Misra, J.

17.I agree.

Appeal dismissed.

Cases Referred.

[1](1836) 1 Moo. PC 299 (A)
[2]1900 A.C. 604 (B)
[3](1876) 1 P. D. 154 (C)
[4]31 Cal 885
[5]29 All 82
[6] AIR 1915 PC 111
[7] AIR 1946 Pat 24
[8] AIR 1925 Lah 540
[9] AIR 1928 Cal 307
[10]13 Mad LJ 135
[11] AIR 1941 Mad 612
[12] AIR 1321 Bom 143
[13](1858) 112 RR 813
[14](1867) 1 P 371
[15](1867) 10 L. T. 754
[16]8 Ind Cas 695 (Oudh)