

Privy Council Appeal No. 37 of 1922.

Bengal Appeals Nos. 12 and 13 of 1921.

Baikuntha Nath Chatteraj ^s - - - - - *Appellant*

v.

Prasannamoyi Debya and another - - - - - *Respondents*

Same - - - - - *Appellant*

v.

Prasannamoyi Debya - - - - - *Respondent*

(Consolidated Appeals.)

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 8TH DECEMBER, 1922.

Present at the Hearing :

LORD PHILLIMORE.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

LORD SALVESEN.

[Delivered by SIR LAWRENCE JENKINS.]

These are consolidated appeals from two decrees of the High Court of Judicature in Bengal, dated the 14th April, 1921, reversing two decrees of the Court of the District Judge of Bankura dated the 20th February, 1920.

Madhusudan Chatteraj, a Hindu governed by the Dayabhaga School of Hindu law, died leaving four sons, Radha Ballav, Brahmananda, Raj Ballav, and the present appellant Baikuntha Nath.

Brahmananda died in 1913 leaving all his property by will to his widow, Mandakini Debi.

Mandakini died on the 16th September, 1918, and her sister Prasannamoyi Debya, the widow of Raj Ballav, and the respondent in these appeals, propounds in this litigation a paper writing dated the 14th September, 1918, as the last will of Mandakini.

She is opposed by Baikuntha Nath, her husband's younger brother, and by Asbutosh Chatteraj, Radha Ballav's son. The interest of the objectors is not in dispute.

The District Judge pronounced against the will and granted letters of administration to Baikuntha Nath. The High Court, reversing this decision, ordered and decreed that probate of the will should issue to Prasannamoyi, and that the application for letters of administration made by Baikuntha Nath be dismissed.

The outline of the story as to the preparation and execution of the alleged will as presented on behalf of the proponent is briefly as follows. On the 13th of September Natabar Mukerji, it is said, chanced to call on Mandakini, whom he describes as his Dharam mother, and found her suffering from fever. He was told by the night of that day that she intended to execute a will, and that he should stay there to manage its execution. On the 14th at 2 p.m. he was asked to arrange for the execution of the will, and on his protesting that he had no experience in will drafting, he was given a draft that had been prepared for Mandakini by a pleader named Upendra Nath. A pleader named Babu Bhut Nath Mandal was then called in; he examined the draft, and dictated the document now propounded to Natabar, who wrote it out.

At 4 or 4.30 in the same afternoon it was read over and explained to Mandakini, but as she was illiterate Natabar signed her name for her. The paper writing was signed by seven attesting witnesses, Bhut Nath Mandal, Kandarpa Behari Ghose, Raj Narayan Biswas, Trailokhya Nath Karak, Nagendra Nath Ghose, Surendra Nath Mandal, and Gosta Behari Mandal. It was then taken to Prasannamoyi, who was in an adjoining hut, but as she too was suffering from fever, it was taken back to Mandakini, who, helped by Natabar, took the will to another hut and placed it in an iron safe together with the draft. Natabar stayed at the bari that night and then left. Mandakini died on the 16th of September.

This is the proponent's version of what happened. The objectors contest its truth.

In proof of the execution the proponent has called Natabar, the writer, and four of the seven attesting witnesses. On Surendra Nath Mandal no reliance has been placed by either Court, and his evidence need not be considered.

Nagendra Nath Ghose does not support the proponent's case, for in his examination in chief he declared that he did not know whether Mandakini executed any will, and that it was to a blank paper that he put his signature at the request of Ram Lal Gosain.

An application was therefore made to the District Judge to declare the witness hostile and to allow the proponent to cross-examine him.

This is a position for which provision is made by Section 154 of the Evidence Act, which says nothing as to declaring a witness hostile but provides that the Court may *in its discretion* permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

One of the Appeal Court's adverse comments on the Trial Judge's conduct of the case is that the cross-examination of this witness was improperly disallowed. No such objection was made in the grounds of appeal to the High Court, and it would seem as though this comment must have been made without the Court's attention being drawn to that portion of the order sheet in which the District Judge remarks, as the record of the deposition indicates, that the witness was virtually cross-examined, though the Judge in fact did not think he had turned hostile.

On this part of the case therefore it only remains to consider the evidence of the writer, Natabar Mukerji, and the two attesting witnesses Bhut Nath Mandal and Trailokhya Karak.

In a sense Natabar is the most important figure. The part he is said to have taken has already been indicated

Though his home was in the neighbourhood of Kundu Pushkarni where Mandakini's bari was, he was actually employed at the date of the alleged execution at the Nakarka colliery 300 or 400 miles distant. His story is that in September, 1918, hearing of his wife's illness, he returned to his home, which is 6 miles from Maudakini's bari, having taken seven days' leave for that purpose. He went on the 13th of September to see Mandakini reaching her bari about noon. On the 14th there was the preparation and execution of the will, which has already been sufficiently described for the present purpose. If this be accepted, as it was by the High Court, as a true story, there would be no difficulty in holding the will proved. But the District Judge before whom the witness was examined, did not believe Natabar's testimony. In arriving at this conclusion he was to a considerable extent influenced by the letter and post-card, Exhibits A and A 1. Though it possibly is not a matter of any great importance, it would seem probable, from such postmarks as are available, that the post-card, contrary to what has been supposed, was later than the letter.

The District Judge regarded the letter as showing in the light of the facts to which he refers that Natabar was not in Kundu Pushkarni on the date the alleged will is said to have been executed. The High Court did not share this view, and evidently was greatly influenced by the idea that Natabar was never called upon to explain the contents of the communication. The same contention has been urged on this appeal, but it is founded on a misapprehension.

The letter was not sprung on the proponent as a surprise at the trial. In the previous arbitration proceedings the letter and post-card were produced evidently as relevant to the issue whether the will set up by Prasannamoyi was a genuine and valid document, and for the purpose of raising a suspicion in the minds of the

arbitrators, as indeed would seem to have been its affect (see the deposition of Harish Chandra Sarkar).

When then the letter and post-card were shown to Natabar the purpose must have been well understood, and from the record of his deposition it is manifest that after being shown the letter he was directly asked whether it was not a fact that he was not at Mandakini's bari on the alleged date of execution.

On re-examination no attempt was made to elicit any explanation, and the learned Judge delivered his judgment in eight days, when the incident and the impression it created must still have been fresh in his mind. In their Lordships' opinion the materials on the record when carefully examined do not support the High Court's criticism.

But it is not by these exhibits alone that the District Judge was influenced. Natabar, though alleged to have been in constant attendance at Mandakini's bari from noon of the 13th to the night of the 14th, was not seen by the doctor, Sham Charan Barat, who was the lady's medical attendant throughout her illness and saw his patient every day. And not only did he not see Natabar, but he deposes that he did not hear of any will by Mandakini during the time he treated her. There are other witnesses to the same effect to whom allusion will be made later.

Bhut Nath Mandal is not only an attesting witness, but is said to have dictated the will using for that purpose the draft exhibit 2. Though he is a pleader of the Burdwan Court, his persistent attempt to evade his obligation to give evidence does not inspire confidence in him as a witness. The District Judge was unable to believe him: he certainly was in the best position to judge of his credibility, and no sufficient reason has been shown for disturbing his appreciation of this witness's testimony.

Trailokhya Karak is a junior servant of Prasannamoyi on the small pay of Rs. 48 a year.

He deposes to the due execution of the paper writing, but the Trial Judge did not think him a witness on whose testimony its genuineness could be supported. And it is significant that while Trailokhya is called, his senior and superior in service, Raj Narayan Biswas, the chief gomasta, though an attesting witness, was not cited.

Prasanna was examined on commission. She does not depose to the actual execution, of the paper writing, and her evidence does not materially strengthen her case.

This will be an appropriate place at which to allude to the evidence of Upendra Nath Das. He is not a witness to the execution of the will, but he deposes, and no doubt truly, to having prepared the draft exhibit 2. The Courts in India have in their Lordships' view attached more importance and significance to this document than it deserves. There can be no doubt that the alleged will was based on it, and with such modifications as were necessary for the purpose in hand was in effect a reproduction of it. It might have been of distinct value if the issue had been whether

Mandakini had understood an instrument admitted or proved to have been executed by her, or if her mental capacity had been questioned. But that is not the issue here ; the only matter in contest is the fact of execution by or on behalf of Mandakini. Upendra's statement that he cannot give the month or year of the draft, and that he cannot be positive if the draft was before or after the 16th September, which is the date of Mandakini's death, may in view of his intimate connection with the litigation invite a certain amount of comment, but their Lordships find nothing on the record that would justify any imputation that this pleader of 20 years' standing was party to any conspiracy or knowingly prepared the draft to further any sinister purpose. But at the same time their Lordships consider that his evidence has little or no bearing on the question whether or not the alleged will was in fact executed.

From this survey of the evidence it is apparent that this is eminently a case where the value of the proof depends upon an appreciation by the trial Judge of the credibility of the witnesses.

In their Lordships' opinion there is no sufficient reason shown for disturbing that appreciation, and in so saying they do not overlook what has been urged as to the propriety of the dispositions in view of the close relationship and intimacy between Mandakini and Prasannamoyi.

But the proponent's difficulties do not end with the infirmity of her direct evidence as to execution. There are other factors in the case which call for especial caution in approaching the proponent's story. The document was not actually signed by Mandakini, and so there is not the assurance of genuineness that would have been afforded by the presence on it of her recognised signature. Then again the absence of Mandakini's relations and connections invites comment, as does Prasannamoyi's conduct and her delay in putting forward the will after Mandakini's death.

In contradiction of the story of execution, several witnesses have been called who declare that, notwithstanding the opportunities of observation they possessed, Natabar was not seen by them at Mandakini's bari and no will was mentioned. Another witness, Kalipada Roy, described as a doctor, deposed that he was asked by Kandarpa Ghose and Ram Lal Gossain to become a witness to a will alleged to have been executed by Mandakini and further to say that he "had attended Mandakini during her last illness and that she executed a will in presence of such and such persons." This, he says, was after the death of Mandakini. The District Judge did not disbelieve him.

The High Court regarded this witness as "obviously unreliable," apparently under the impression that his evidence was that he had been asked to be an *attesting* witness to a will then in the safe. But that is not the sense in which their Lordships read his evidence, for the expression used by him points to a request to be a witness to the will at the trial, and this involves no such impossibility as the learned Judges ascribe to his words.

Ananta Lal Ghose's evidence may merit the doubt thrown on it by the High Court. No great reliance was placed on it by

the District Judge, nor will their Lordships treat it as of any value. It, however, calls for this remark that it does not in their Lordships' opinion justify the charge founded on it in the argument before this Board that there was a conspiracy on the part of the objectors to procure false evidence in order to defeat the will. No such suggestion was made in the grounds of appeal to the High Court, or even in the appellate judgment or the case for the appellant on these appeals. It was first advanced in the argument before the Board, and in their Lordships' opinion has no adequate foundation.

It may be that when the proponent's case was closed the precise character of the adverse evidence in disparagement of the alleged will was not anticipated, but the strength of the opposition must have been sufficiently apparent to show the urgent necessity for calling all available evidence. And yet Raj Narayan Biswas and Kandarpa Behari Ghose, two of the attesting witnesses, were not called, nor was Ram Lal Gossain, to whom Nagendra Nath Ghose refers, though he seems to have been assisting in the conduct of Prasannamoyi's litigation.

The conclusion at which the District Judge arrived after a careful consideration of the evidence and all the circumstances of the case was that the will was not a genuine document, but a forgery. In so finding he went beyond what the law requires. The burden of proving a will is on the person who sets it up, and it would have been enough for the purpose of this case to find, as their Lordships hold to be the case, that the alleged will was not proved. Their Lordships will, therefore humbly advise His Majesty that these appeals be allowed, the decrees of the High Court set aside, and those of the District Judge restored with costs throughout. The respondent Prasannamoyi must pay the appellant's costs of these appeals.

In the Privy Council.

BAIKUNTHA NATH CHATTORAJ

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PRASANNAMOYI DEBYA AND ANOTHER.

SAME

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PRASANNAMOYI DEBYA.
(Consolidated Appeals.)

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