

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Moni Bhusan, Minor, by his Guardian, Rakhaldas Chatterji v. Rajani Kant Mookerji, from the High Court of Judicature at Fort William in Bengal; delivered 13th May 1893.

Present :

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD MORRIS.

SIR RICHARD COUCH.

[*Delivered by Lord Morris.*]

This case comes on appeal from a judgment of the High Court at Calcutta dated the 24th July 1889 reversing the judgment of the District Judge of Moorshedabad dated the 25th April 1888. It appears that one Iswar Chunder Mookerji died on the 3rd Falgoon 1288, corresponding with the 15th February 1882, leaving a childless widow Brojo Soondari Debi; that on the 1st March following one Rakhaldas Chatterji petitioned the Court of the District Judge of Moorshedabad for probate of the will of the said Iswar Chunder Mookerji dated the day before his death, by which the said Rakhaldas Chatterji was appointed executor; that Rakhaldas having subsequently withdrawn in favour of the widow Brojo Soondari, probate of the will was on the petition of the widow granted to her on the

15th April 1882, and authority given to her with the consent of Rakhaldas to manage Iswar's properties and do all acts in connection with his will.

The first clause of the will gives to the widow power to adopt three sons in succession; the widow died on the 4th October 1887, having shortly before her death adopted the Appellant. The Respondent is the heir-at-law of Iswar, being his first cousin by half-blood. He was not cited and had no notice of the proceeding by the widow to prove the will. He, on the 17th November 1887, applied to the Court for the revocation of the probate. Several questions were argued before the District Judge:—Whether the Respondent was the heir of Iswar; whether he was precluded by lapse of time from having a revocation of the grant of probate; whether the adoption of the Appellant by the widow before her death was valid. But the only question raised before their Lordships has been the question of the authenticity and genuineness of the will.

The District Judge in a full, clear, and exhaustive judgment decided in favour of the will. The High Court on appeal reversed the judgment of the District Judge and held that the will was not a genuine will. Their Lordships have therefore to decide between these conflicting judgments. The evidence was conflicting as to the mental capacity of the testator and as to the genuineness of his signature. The leading facts as proved are as follows:—Iswar appears to have become ill at about eleven o'clock on the night of the 12th February 1891, and died about three o'clock on the morning of the 15th February. The evidence assigned sometime between nine and eleven o'clock on the evening of the 14th February as the time when he executed the will. The illness from which he suffered was a kind of fever known under the name of sajan fever which is attended with

delirium and unconsciousness, but with intervals of consciousness. Eleven witnesses were examined on the part of the Respondent against the will and about the same number on the part of the Appellant to support the will. Apart from the two medical witnesses, Srichurn Roy Kobiraj and Beni Madhub Bose, the most important witnesses in opposition to the will were Jagadish Chunder, Radha Raman Roy, and Kedar Nath Sanyal. Jagadish Chunder who was a nephew of the testator, stated that the will was written in a room in the testator's dwelling-house; that Kedar Sanyal, the pleader, dictated the will; and that Hurri Buttacharji wrote it, and then took it to the testator to sign it; that the testator did not sign it, and that Hurri Buttacharji asked the persons present to sign as witnesses, but that none would. He gives in detail the forgery of the name of the testator to the will by Hurri Buttacharji.

Radha Raman Roy gives evidence of Iswar's unconscious state on the 14th February; he alleges that he visited him at 2 and $\frac{3}{4}$ prohurs of the day on the 14th and when 6 dunds of the day were remaining and at 4 dunds of the night and at 1 and $\frac{1}{2}$ prohurs of the night, periods corresponding with 2 p.m., 4 p.m., 7.30 p.m., and 10.30 p.m.; he alleges that he remained on his last visit to him till 2 $\frac{1}{4}$ prohurs of the night, or about a quarter to one o'clock, and that at this last period Hurri Buttacharji came to Iswar with a paper in his hand, but that he did not see Hurri Buttacharji put Iswar's signature to the paper.

Kedar Nath Sanyal who is a pleader stated that he was sent for by Tincowri Buttacharji who was Iswar's principal man of business at about half-past nine on the night of the 14th February; that Tincowri told him Iswar had lost his speech, but that Iswar has previously told him what he wished to have put in his will, and that

if Iswar regained consciousness he would have it signed and sealed; that he, Kedar, then dictated the will on the instructions of Buttacharji; that it was first written out by Mohendra, a son of Rakhaldas, and was afterwards copied by Hurri Banerji or Chatterji.

Hurri Bhuttacharji in support of the will states that he wrote it from the draft made by Mohendra at the dictation of the pleader, and he gives evidence in detail of the execution of the will by Iswar. Rakhaldas the executor also describes in detail the signing and execution of the will by Iswar. Gokul Krishna proves that about twelve at noon on the 14th February he heard Iswar say to his wife who was then crying that she should adopt three sons in succession, and heard him tell Tincowri and Hurri Buttacharji to go and prepare a will, and bring it to him. Gokul further confirms the account given by Hurri Buttacharji and Rakhaldas of the execution of the will. There were four witnesses to the will. Two of them were dead at the time of the trial before the District Judge, Tincowri Buttacharji and Kali Churn Banerji. The evidence of Tincowri if available would be of the highest value, he being the person who, according to the evidence of Kedar, alleged that he had received Iswar's instructions; he was his principal officer and much trusted by him; his action, on the assumption that he was a trustworthy person, strongly supports the will.

The District Judge, who had the opportunity of observing the demeanour and manner of the witnesses, after reviewing the circumstances of the case came to apparently a clear conclusion in favour of the veracity of the witnesses who supported the will. On appeal before the Chief Justice and Mr. Justice Gordon, the learned Chief Justice, who gave the judgment of the Court, appears to have been influenced in his decision,

primarily by the evidence of the two medical witnesses, and also by his own observation of the alleged signature of Iswar to the will. He says on the latter point that the signature does not seem to be the signature of a dying man, and that the character of the signature supports the evidence of the witnesses who said that the signature was attached by Hurri Pershad after Iswar's death. Their Lordships have had the opportunity of seeing the document; the signature is in Hindu characters, and they are unable to form any opinion on this point. Their Lordships cannot attach much importance to this ground of reversal of the District Judge's judgment, seeing that no evidence was given at the trial on this point, nor so far as appears in the very careful judgment of the District Judge was there any argument suggesting it. The Chief Justice considers the medical evidence conclusive proof of the impossibility of the genuineness of the will, and that it covers the entire period of forty-eight hours before Iswar's death, and shows his insensibility and inability to execute a will. The Chief Justice does not appear to have accurately collected the evidence on this most material point. He says there is some question as to whether the will was made about six or eight o'clock on the evening of the 14th February, and that Iswar died about one o'clock on the morning of the 15th, whereas the evidence for the will puts the making of it somewhere between nine and eleven. Kedar the pleader, who was examined for the Respondent, states that he only arrived at Iswar's house at from a quarter to half-past nine, and the death of Iswar would appear to have taken place about three o'clock on the morning of the 15th. The mistake as to the time of the making of the will becomes most vital, because Beni Madhub fixes the time of his second and

last visit at between seven and eight o'clock on the evening of the 14th, when he says he found Iswar staring stupidly and unable to speak. Consequently, if the period of Beni Madhub's visit is made to correspond with the period of the execution of the will, his evidence would be, if credited, almost decisive against the will.

Beni Madhub only saw the deceased on two occasions during his illness, namely, at four or five o'clock on the evening of the 14th February, and again at seven or eight o'clock. On his first visit he could not say whether Iswar understood what he said, and he says Iswar was worse on his second visit. He further stated that he was not accompanied by Srichurn Roy Kobiraj on his visit at three or four o'clock.

Srichurn Roy Kobiraj's opportunity of observation of the deceased was very considerable. He says he cannot remember the month or year of the death of Iswar, but that he does recollect being called to visit him on the morning of the day before his death; that he saw Iswar that morning, again at noon, again in the afternoon, and also at night; that Iswar was overpowered by fever; that he was conscious to some extent, but that he could not speak; that he saw him again on the following morning; that Beni Madhub was then called in, and that they both saw Iswar between three and four o'clock on that afternoon. He states that he again saw Iswar at ten or eleven that night, and was with Beni Madhub. The period of time given by this witness for the second visit of Beni Madhub would correspond very much with the time when the will is alleged to have been made, but it is in contradiction of Beni Madhub's testimony, which fixes the period at seven or eight o'clock. He states that Iswar was then unconscious; that on the evening of the 14th February Rakhaldas, whom he describes as "an intimate

“ friend ” of Iswar’s, and “ reckoned in society as “ a respectable man,” told him “ a deed will have “ to be executed,” and that he saw “ that a “ deed was commenced to be written,” Tincowri, Kedar, and Rakhaldas being present. He says he thought as Iswar was a rich man he would probably execute a deed. He admits that he heard of the will being made seven or eight days after Iswar’s death. The evidence of these two medical witnesses is referred to by the District Judge, who comments on the discrepancies in their testimony and the impossibility of their accuracy of recollection without any notes after such a long interval. Their Lordships are unable to concur in the opinion that the evidence of Srichurn Roy and Beni Madhub completely disproves the case for the will, even on the assumption that their evidence was given truly. The disease afforded periods of consciousness, and if the deceased had previously given instructions to Tincowri in respect of the will, he and Rakhaldas would be ready to take advantage of any short period of consciousness to have the will executed. Neither of them derived any advantage under the will, except the indirect and very doubtful advantage that might accrue to Rakhaldas from being executor, which he abandoned by withdrawing in favour of the widow. Nor did she obtain any advantage or benefit; on the contrary an adoption by her of a son under the power given by the will would have the effect of depriving her of the possession of the property. A forgery in the circumstances stated by the witnesses for the Respondent would therefore be not only an audacious act but a worthless one to those engaged in it.

Again, the evidence of Srichurn Roy is open to grave remark. He admits that he knew that a forged will was being prepared and made no

remonstrance, and that shortly after the death of Iswar he knew the forgery had been completed, yet made no communication to any one on the subject.

On the whole the opinion of their Lordships concurs in result with that of the District Judge, and they will humbly advise Her Majesty that the judgment of the High Court ought to be reversed and the judgment of the District Judge restored. The Respondent must pay the costs of the appeal to the High Court and the costs of this appeal.
