Privy Council Appeal No. 13 *of* 1923.

Motibai Hormusjee Kanga - - - - - - - *Appellant*

v.

Jamsetjee Hormusjee Kanga - - - - - - *Respondent*

FROM

THE COURT OF THE BRITISH RESIDENT IN MYSORE, CIVIL AND MILITARY STATION OF BANGALORE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH NOVEMBER, 1923.

Present at the Hearing :

LORD DUNEDIN.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* MR. AMEER ALI.]

This appeal arises out of an application by the petitioner, a Parsee lady named Mrs. Motibai Kanga, in the Court of the District Judge of Bangalore for the probate of a will which she alleges had been executed by her husband shortly before his death, on the 17th August, 1920. The probate was granted by the District Judge, Mr. de Rozario, on the 19th December, 1921. His order was, however, reversed by the Resident of Mysore, Mr. Barton, who appears to have exercised, in his official capacity, the appellate jurisdiction over the Civil Court in Bangalore; hence the appeal to His Majesty in Council.

The testator, Mr. Hormusjee Rustomjee Kanga, resided in Bangalore, and he is described as having been a turf accountant. He became ill on the 2nd August, 1920, and his medical attendant, a doctor named Mylvaganam, diagnosed his complaint as malaria; but as he became gradually worse, his wife and friends became

anxious and called in two other doctors in consultation with Dr. Mylvaganam. They were of opinion that it was not malaria but septic poisoning, and they prescribed accordingly. The will is alleged to have been executed in the evening of the 16th August, and was registered by the Sub-Registrar of the Civil and Military Station, Bangalore, shortly after its execution. From his name (Mr. Burby) the Sub-Registrar appears to be an Englishman. As his evidence, in their Lordships' opinion, is of the utmost importance in the determination of this appeal and is very short in substance, they propose to quote it in full :—

> "I am Sub-Registrar of Assurances, C. and M. Station, Bangalore. I was so in August, 1920. I remember the 16th August, 1920. I was called to the residence of Mr. Kanga and a will was there given to me for registration. I registered it. Exhibit A is the will. It was signed by Mr. Kanga in my presence unaided. I had no suspicion whatever that anything was wrong with the will. I satisfied myself that Mr. Kanga was perfectly right in his mind."

He was not cross-examined at all on behalf of the caveator, the eldest son of the deceased, Mr. Kanga. His case was, in the first place, that his father was not competent or in such a condition, mentally or physically, as to make a valid disposition ; in the second place, that if it was competently made, it was made under the undue influence of his wife, the petitioner. The petitioner is the second wife of the deceased. He appears to have married her in 1917, and it is in evidence that they lived harmoniously and on good terms.

The attesting witnesses to the will are Aga Abbas Ali, a Mohammedan gentleman residing in Bangalore ; a Mr. W. H. Thomson, an Englishman carrying on business in that city ; and Dr. Mylvaganam. The facts connected with its execution are testified to by two Hindu gentlemen of the names of Mr. C. Sundara Raja Naidu and Mr. C. N. Suryanarayana Rao ; a Parsee of the name of Mr. K. D. Belgaumwala ; and a Mr. F. D'Souza, a furniture dealer.

As the deceased became gradually worse, it was considered advisable he should execute a will. It is not clear from the evidence from whom the proposition emanated, but there is nothing to show that it was not with his approval. Mr. Suryanarayana Rao, a prominent pleader of the Bangalore Bar, was asked by Mrs. Kanga to draft the will. He excused himself on the ground that he was a close friend of the deceased and apprehended a dispute ; he would rather it was prepared by some other lawyer. He accordingly introduced Mr. Naidu, another pleader, as a fitting man for the purpose. Mr. Naidu states that he came to the house on the 16th August and obtained Mr. Kanga's personal instructions about the will. His statement on this point is as follows :—

> "Mr. Kanga asked Mrs. Kanga to take some bank-books and title-deeds from an almirah and a chest of drawers. She took out some documents from each and handed them over to Mr. Kanga, who took up the books and documents one after another and gave me instructions. As he gave instructions I took down notes, which I have with me. I first asked Mr. Kanga whom he wished to appoint as executor. He said that his wife, Motibai Kanga, should be the sole executrix."

Mr. Naidu produced the notes of his instructions at the trial. They are short and direct. This witness states further in his evidence that a Mr. Godfrey, to whom the deceased owed some money, was present at the time in the room in which Mr. Kanga was lying, and that there was some discussion between the two regarding the amount of money due; that Mr. Godfrey stated it was something like Rs. 7,000, whilst the deceased said it was not so much but only about Rs. 4,000; and that thereupon he looked into the books, and it was found that he was correct: the amount thereupon was put down in the deponent's notes, Rs. 4,526. Mr. Naidu's statement regarding a discussion at the time about Rs. 7,000 or Rs. 5,000 is to a certain extent corroborated by Mrs. O'Neill, the nurse who attended the deceased for the last two days of his life, and who was called as a witness for the caveator. She does not remember exactly the details of the discussion, but says the amount spoken of was something between Rs. 4,000 and Rs. 7,000. There can be little doubt that she was referring to the same incident as Mr. Naidu deposes to. This witness (Mr. Naidu) says further, "Mr. Kanga was quite of sound mind when he gave the instructions." After he had taken down the notes he says he made a fair copy, which was completed by 7 or 7.30 p.m. Mr. Kanga signed the will and shortly after Mr. Burby, the Sub-Registrar, arrived and registered it. In cross-examination with regard to the physical condition of the deceased the witness stated: "His voice was a little weak. His wife was not talking to him in Gujerati: she was fanning him and using an endearing term—the same term right through." And he added: "Neither Mrs. Kanga nor myself made any suggestion to the testator to recall to his mind the various items in my notes." In re-examination he stated that the will was read over to the deceased twice—once by himself (the witness), the other time by Mr. Burby, the Sub-Registrar. It is to be remarked that the will itself is simple and short, and not requiring any great mental strain on the part of a sick man to grasp its meaning. Save the preliminary part, which is in ordinary form, it leaves everything to the wife.

Mr. Thomson (who describes himself as a director of the firm of Barton, Son and Co., Ltd.) states that he lived next door to the deceased:—

> "On the 16th August, about 6.30 in the evening, I saw Mr. Suryanarayana Rao and Dr. Mylvaganam in the compound of Mr. Kanga's bungalow. I dropped in to ask how Mr. Kanga was. I had heard Mr. Kanga was down with enteric. I asked the doctor. He said it was some kidney complaint and blood poisoning had set in. I asked him whether Mr. Kanga was in a critical state. He said 'No,' and he might get over it if he were a younger man. At all events, the doctor said, he would last four or five days. Mr. Suryanarayana Rao then asked me whether I would attest Mr. Kanga's will: he said it was being prepared at the time. I first objected, saying I was a perfect stranger, but afterwards consented. Mr. S. N. Rao represented that I was a disinterested party and I would do. I asked the doctor whether Mr. Kanga was in a fit condition to sign a will—I meant mentally. Dr. Mylvaganam said 'Certainly' and Mr. S. N. Rao 'Very much so.'"

The next witness to the will is Aga Abbas Ali, who describes himself as a landholder of Bangalore. The material part of his evidence is as follows :—

> " I stepped in at Mr. Kanga's to enquire about his health. I casually dropped in. Mr. Thomson, Dr. Mylvaganam and Mr. Suryanarayana Rao were there. Mr. S. N. Rao asked me to wait, saying I was wanted : he did not say why. I went into the sick room, and then I learnt I was required to attest a will. The will was read out to Mr. Kanga. Mr. Kanga signed the will. The nurse lifted him up. I do not know whether anybody else helped the nurse. The doctor signed first. I don't remember who asked me to sign. After I attested the will I stayed on. Then the Registrar came. I was in the room when he came. The Registrar read out the will to Mr. Kanga. He asked Mr. Kanga whether it was right. Mr. Kanga shook his head (nodded ?), by which I understood that he thought it all right. The Registrar registered the will and we all left."

Mr. Suryanarayana Rao's evidence is important. He is a man of position and of twenty-eight years' standing at the Bar of his province ; a prominent pleader in the Bangalore Court and appears to have absolutely no interest in the dispute, and knew the family well. He describes how the will came to be executed, the condition in which the testator was at the time, and the circumstances connected with its execution. The following passage in his evidence deserves notice :—

> " Just after the execution of the will Mr. Burby came. Somebody went and brought him. After execution and before Burby came the will was brought to me. I read it and was surprised that no provision had been made for the children, and I expressed myself to that effect to Mr. Abbas Ali and to Mr. Burby and to others. I remarked that it was an unjust will. Kaiku, the younger son, who understood what we were discussing, began to cry. I felt it and the others also felt it. They asked me to approach Mr. Kanga and ask him to make some provision for the younger boy. Meantime Mr. Burby went in and registered the will. He was standing by Mr. Kanga's bedside. I then went into the room. Mr. Kanga was lying in bed and appeared to be exhausted. I took up his hand and asked Mr. Kanga how it was he had made no provision for any of his children. He replied, ' My wife will look after everything.' Then I said he might at least make provision for the minor boy. He replied, ' My wife is a good woman. She will look after him.' Then I came out remarking, ' What is to be done ? The man is obstinate.' When I put the question he understood me and gave me a rational answer. I cannot depose about his mental state.' "

Mr. D'Souza and Mr. Belgaumwala gave similar testimony.

Mrs. Kanga in her evidence gives a clear account of what took place from the time the deceased became ill until his death. Her story tallies in every material particular with that told by the other witnesses. She was cross-examined at great length, but nothing appears to have been elicited to discredit her testimony. If all this evidence is accepted the validity of the will would be conclusively established, but Dr. Mylvaganam, although an attesting witness, has given evidence of a character which requires consideration. He states, in fact, that the deceased when he put his signature to the document could not understand

what he was doing. He says in one place in his examination-in-chief :—

> " I saw him sign. I attested the will. I was behind him. Mr. Abbas Ali and Mr. Thomson also attested. From his mental and physical condition I did not think that Mr. Kanga was able to make a detailed will. He was not comatose or imbecile. At times he used to be quite listless and we had to shake him to get a reply."

He also was present at the time when the Registrar came. In cross-examination, referring to the will Ex. A., he says :—

> " It is a long document. I do not think that Mr. Kanga would have understood all that in his then condition."

The Judge before whom the evidence was given was apparently astonished at the fact that although Dr. Mylvaganam had attested the will, he was now giving evidence to the effect that the testator could not have executed it with comprehension. The District Judge accordingly asked him certain questions, to which he makes the following answers :—

> " When I attested the will I thought that the details had been arranged previously. I regarded my responsibility to extend only to the witnessing of the signature. Mr. Kanga did not appear to me to be following the reading of the will with intelligence. Somebody asked him to sign, saying that his signature was required, and put a pen in his hand. He was lying with his eyes closed, and when he was propped up he was sufficiently alert for the signing. After the signing Mr. Kanga collapsed. On the 16th August I do not think Mr. Kanga would have been in a fitting state of mind to be able to scrutinise accounts." At the instance of petitioner's counsel : " After the will was read out I do not remember asking Mr. Kanga why he had left out his son in the will. To my knowledge there was no conversation with Mr. Kanga after the will was signed. He was not in a fit state for conversation. I do not remember anybody else asking Mr. Kanga about having left out his son—I do not think so."

The nurse, Mrs. O'Neill, says that the whole work of opening the iron safe and taking out the books, etc., for the purpose of noting the details in the will was carried out by Mrs. Kanga ; and that Mr. Kanga gave no instructions to the lawyer. She adds that the patient was very weak and his life seemed to be going ; he took no interest in what was going on.

Their Lordships do not think it necessary to refer to the nurse's evidence in detail ; it is sufficient to say that her statements are in direct contradiction to all the witnesses on behalf of the petitioner and even contradicts some of the statements made by Dr. Mylvaganam. Upon this balance of testimony the District Judge came to the conclusion that Mrs. O'Neill could not be relied on, and having regard to the fact that the capacity of the testator had been established by overwhelming testimony and no undue influence had been proved, he made a decree for the grant of the probate to the petitioner.

On appeal the Resident has set aside the order of the District Judge chiefly, as it appears, on suspicion.

The rules for the establishment of the capacity of the testator and the circumstances which would lead to the invalidation of a will are embodied in Sections 46 and 48 of the Indian

Succession Act (X of 1865), which practically embody the principles of the English law on the subject.

Counsel for the respondent invited their Lordships' attention to what he called the suspicious circumstances in the case: the delay in sending information to the eldest son of the critical condition of the father, the exclusion of the children from the will; and he relied on the dictum in *Tyrrell* v. *Painton*, 1894, P. 151. That case, however, differs in all its circumstances from the present. In this connection it may be useful to refer to the observations of Lord Westbury in the case of *Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty** :—

> ". . . in matters of this description" (he was dealing with a charge of fraud in connection with a sale in execution of a decree) "it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony."

It is quite clear that the onus of establishing capacity lay on the petitioner. It is also clear that if the caveator impugned the will on the ground that it was obtained by the exercise of undue influence, excessive persuasion or moral coercion, it lay upon him to establish that case. The evidence, however, that the deceased signed it with full comprehension of its meaning and contents is overwhelming and explicit. It is impossible to suppose that persons like the pleader, Mr. C. N. Suryanarayana Rao, Mr. Abbas Ali, the Sub-Registrar and Mr. Thomson, not to speak of the others, entered into a conspiracy with Mrs. Kanga to foist upon a moribund man a will which he did not understand and which he signed without comprehension. It is in evidence that the deceased had not been for some time on good terms with his eldest son; it appears also that he had adequately provided for him. The deceased's son-in-law, Mr. Khambata, who has apparently no interest in the dispute, says that the deceased had full confidence in his wife. Evidently relying on his trust in her, Mr. Kanga left her his whole estate, observing to the persons who were interesting themselves on behalf of his youngest son that she would look after him and do what was necessary. A man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing the Court will not interfere with the exercise of his volition. The evidence, which consists of the testimony of respectable and wholly disinterested witnesses, excludes the hypothesis of its having been obtained by undue influence. Their Lordships refuse to accept the testimony of Mrs. O'Neill and Dr. Mylvaganam. Their conduct does not seem to be consistent with what they stated in Court.

On the whole, their Lordships have come to the conclusion that the order of the Resident must be set aside and that of the first Court restored. The respondent will pay the costs in the Appellate Court and of this appeal. Their Lordships will humbly advise His Majesty accordingly. But they, at the same time, feel it desirable to say that they fully trust the petitioner will carry out the wishes of her husband with regard to his minor son. She herself stated in her evidence that she proposed to make a handsome provision for the boy, and their Lordships trust that she will give effect to it.

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* 11 Moore's I.A., 44.

In the Privy Council.

MOTIBAI HORMUSJEE KANGA

v.

JAMSETJEE HORMUSJEE KANGA.

DELIVERED BY MR. AMEER ALI.

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