

Privy Council Appeal No. 91 of 1916.
Bengal Appeal No. 37 of 1913.

Bankim Bihari Maiti - - - - - *Appellant*

v.

Srimati Matangini Dasi - - - - - *Respondent*

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 27TH OCTOBER, 1919.

Present at the Hearing :

LORD ATKINSON.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* SIR JOHN EDGE.]

This is an appeal from a decree, dated the 27th March, 1913, of the High Court at Calcutta, which reversed a decree, dated the 11th March, 1911, of a Subordinate Judge of Midnapur which had granted probate to Bankim Bihari Maiti of a will of Shiba Prashad Maiti of the 4th December, 1909.

The will, of which a grant of probate is sought by Bankim Bihari Maiti, the nephew and executor of the testator, is alleged to have been executed on the evening of Saturday, the 4th December, 1909, by Shiba Prashad Maiti, of Sontan Chuck in the district of Midnapur, who was a Hindu under the law of the Dayabhaga, and was possessed of considerable movable and immovable property which he purported to dispose of by the will. If it was his will, he was competent as a Hindu under the law of the Dayabhaga to dispose of his property as by the will he disposed of it. If Shiba Prashad Maiti had died intestate his widow, Barada Sundari Dasi, would have been entitled as his heir to the property of which he died possessed, as he had no son. Shiba Prashad left surviving him his widow, Barada Sundari

Dasi, Matangini Dasi, his daughter by a predeceased wife, his brother Ananda Lal Maiti, and Bankim Bihari Maiti, the son of that brother. By the will, if it is established, Bankim Bihari Maiti is entitled to by far the greater portion of the property which was left by Shiba Prashad. Bankim Bihari Maiti, who is the appellant here, applied for a grant of probate of the will. Matangini Dasi, who is the respondent here, entered a caveat. The Subordinate Judge of Midnapur, before whom the application for a grant of probate came, made a decree granting probate. That decree was successfully appealed to the High Court at Calcutta, and the application for probate was by the decree of that Court dismissed, hence this appeal. The questions which have to be decided in this appeal are: Was the will in fact executed by Shiba Prashad, and was he at the time of executing it mentally capable of understanding the dispositions of the will, and did he know what those dispositions were?

There is much conflicting evidence in the case. The Subordinate Judge carefully considered all the evidence, and although he discarded as unreliable some of the evidence in support of the application for probate, he, apparently with some hesitation, found that the will was proved and granted probate. The learned judges of the High Court also carefully considered the evidence, and came to the conclusion that "the petitioner (Bankim Bihari Maiti) has entirely failed to prove that the will propounded is the genuine will of Shiba Prashad Maiti." It was for the appellant to establish the mental capacity of the testator, that he understood the dispositions of the will, and that it was duly executed by him as his will. Their Lordships must now consider the evidence so far as it is necessary to do so, and in considering whether the evidence entitled Bankim Bihari Maiti to a grant of probate of the will they must bear in mind that in Indian litigation it is not safe to assume that a case must be a false case if some of the evidence in support of it appears to be doubtful or is clearly untrue. There is on some occasions a tendency amongst litigants in India, as elsewhere, to back up a good case by false or exaggerated evidence.

Their Lordships consider that it is proved that for some days before the 4th December, 1909, Shiba Prashad had been suffering from asthma and from a cough. Unfortunately it does not appear that he had been attended in his last illness and particularly on the 4th December, 1909, by any properly qualified medical man upon whose opinion of his then condition any reliance could safely be placed. Khiroda Nath Das, a witness called on behalf of the respondent, said in his evidence :--

"I treated Shiba Prashad once or twice before his last illness. That was in the third or fourth year before his death. . . . I treated Shiba Prashad during the last illness. I treated for eight or ten days. The disease was broncho-pneumonia. Both sides were affected. Bronchitis developed into broncho-pneumonia. I treated from the 23rd or 24th November up to the 2nd or 3rd December. On the day I left the patient had low muttering delirium with fever and pain in the chest and cough. He had consciousness at the time I left."

This witness said later in his evidence that he left Shiba Prashad's house at 10 or 11 o'clock on Thursday night, and went to Calcutta on the Friday morning. The Thursday to which he referred was Thursday the 2nd December.

Khirode Nath Das did not see Shiba Prashad after the 2nd December; he went to Calcutta on the morning of Friday, the 3rd December, and did not return from Calcutta until after Shiba Prashad had died. As to his qualifications he said that he had passed the vernacular examination in medicine from Cuttack School. Khirode Nath Das was the only medical man who appears to have been possessed of any qualifications who was called as a witness in the case, and some of the appellant's witnesses positively assert that he did not attend Shiba Prashad in his last illness. Whether it be true or false that Khirode Nath Das saw Shiba Prashad in his last illness, it may be assumed from his having been called by the respondent that the case which she intended to prove was that on the night of the 2nd December Shiba Prashad was in a dangerous condition, and had been seriously ill for some days. That is consistent with the evidence as to his illness which was given by witnesses for the appellant.

It is abundantly proved that for some years before Shiba Prashad died he had occasionally suffered from severe attacks of asthma. His daughter, the respondent, whose evidence on some other points, as will later appear, cannot be accepted as accurate, said :—

“ My father had had another attack of asthma two or three months before the attack he had in the month of Aghrayan (December). Formerly he had attacks of asthma every two or three months. I used to go (to him) whenever his asthma increased.”

The appellant's case was that Shiba Prashad, who was suffering from intermittent attacks of fever on Saturday, the 4th December, had in his possession an incomplete draft of a will which he intended to make; that in the forenoon of the 4th December he directed his mohurir, Ramesh Chandra Mandal, to make a copy of the draft will; that the mohurir made a copy of the draft and filled in the schedules of the will and some blanks which had been left in the draft; and that from that copy Biswa Nath Maiti, who was the Am-mukhtar of Shiba Prashad, dictated to Ramesh Chandra Mandal a fair copy, which having been read out to Shiba Prashad in the presence of many persons, was approved by him and was signed and sealed by Shiba Prashad as his will. Shiba Prashad's execution of his will was attested by the signatures, made in his presence, of twenty-one persons, including Ramesh Chandra Mandal and Biswa Nath Maiti. The will was written on several sheets of cartridge paper. Each sheet bears in its right hand upper margin the undoubted signature of Shiba Prashad, and the last sheet of the will bears at the foot of it an undoubted signature of Shiba Prashad.

The learned judges of the High Court who heard the appeal to that Court, regarded those signatures with great suspicion, although they stated in their judgment : " It is not seriously disputed that the signatures on the will are the genuine signatures of Shiba Prashad." The grounds of that suspicion were that it had been admitted by Ramesh Chandra Mandal and Biswa Nath Maiti in their evidence that there were a number of cartridge papers kept in Shiba Prashad's house ready signed by him for the purpose of being filled in as plaints in rent suits, and that those sheets were not produced in evidence. Those learned judges also thought that on some pages of the will it appeared that the signatures in the margin had been written before the body of the will was filled up. Looking at the will itself, which has been before the Board, and apart from the evidence, it is impossible to say whether the marginal signatures were made before or after the body of the will was written. It is not unusual for landholders in India having many agricultural tenants to keep sheets of cartridge paper signed by them in the upper margin ready to be filled up as plaints in rent suits, but such sheets would not be signed at the foot until the plaint had been filled up, as until the plaint had been filled up it would practically be impossible to know where the final signature at the foot of the plaint should appear.

Of those who signed the will as witnesses some were relations of Shiba Prashad, some were neighbours of his, some were men in his employment, and some lived at places more or less distant from the village where his home was. There is evidence that on Friday, the 3rd December, notice of his then condition had been sent to his relations and others. The witnesses to the will were persons who might reasonably be expected to have been present at his house in the evening of the 4th December. Of the witnesses to the execution of the will eight gave evidence in the Court of the Subordinate Judge. The absence from the witness box of the other attesting witnesses has been, in their Lordships' opinion, satisfactorily explained. The hearing of the case was not continuous. There was other pressing work to be attended to by the Court of the Subordinate Judge, which necessitated several adjournments in the taking of the evidence. The recording of the evidence began before one Subordinate Judge and was concluded by the Subordinate Judge who decreed the grant of probate. Most of the attesting witnesses who were not examined appear to have been present to give their evidence on one or more of the dates fixed for the recording of evidence, but owing to the pressure of work in the Court they were not examined. It does not appear that any of them lived near the Court, and there is nothing to suggest to their Lordships that any of them were intentionally kept out of the witness box by the appellant.

The attesting witnesses to the execution of the will by Shiba Prashad, whose evidence has been recorded, obviously considered that he was of testamentary capacity and understood

what he was doing. There are some discrepancies in their evidence, but such discrepancies are in small matters and are only such as might be expected in evidence given months after the 4th December, 1909. They all were cross-examined at length, but nothing was elicited which causes the Board to doubt the substantial accuracy of their evidence.

There is other evidence in the case which cannot be doubted, and which proves that the will which was produced for probate was in fact executed by Shiba Prashad as his will on the 4th December, 1909, and that his relations who were at his house and his wife believed that he was of testamentary capacity when he executed it. There is evidence that he wished that the will should be registered. On Sunday, the 5th December, Shiba Prashad's condition was worse, and he had intervals of unconsciousness. Early on Sunday, the 5th December, Biswa Nath Maiti was sent to the office of the Sub-Registrar at Khajuri, which is about 8 miles distant from Shiba Prashad's village, to bring the Sub-Registrar to Shiba Prashad to register the will. He arrived at the office of the Sub-Registrar before 9 o'clock on the Sunday morning. The Sub-Registrar would not accept any fee on Sunday, and Biswa Nath Maiti inquired as to what he should do to secure the attendance of the Sub-Registrar. One Dinabundha Sahu, a mohurir of the office of the Sub-Registrar, dictated to Biswa Nath Maiti a petition which Biswa Nath Maiti wrote and presented to the Sub-Registrar. It was presented to the Sub-Registrar on Sunday the 5th December, but in his evidence he said that he did not take the petition on the Sunday "as there is no rule for taking such petitions on Sundays." In his cross-examination the Sub-Registrar said :—

"When I did not take the petition on Sunday, Biswanath asked me as to when I would go for the registration of the document, for the testator will ill. I said, 'I will go on Monday if your case be urgent.' On this Biswanath said, 'I will file the petition to-morrow and you will have to go to-morrow.'"

The petition which was presented to the Sub-Registrar was as follows :—

"To the Sub-Registrar of Khajuri,

"The petition of Biswanath Maiti, Am-mukhtar on behalf of Shiba Prashad Maiti, now residing at Sontan Chuck, pergunnah Keoramal, taraf Brancha.

"SHEWETH :—

"That my master Babu Shiba Prashad Maiti has executed a will to-day and he has made up his mind to get it registered. But my said master is laid up being attacked with cough, asthma and fever; and the said disease having increased last night he was about to die. He is now a little well by various modes of medical treatment. There is no hope of his life. There is no knowing what may happen and when. Now, under his direction I file this application and pray that you will be pleased to receive from me 'visit commission fee' Rs. 10 and travelling allowance, etc., and to come to the house of my said master in village Sontan Chuck, pergunnah

Keoramal, within the jurisdiction of this office, and to register the will executed by him, after having received the will to be presented, and the registration fee, etc., to be put in, by him.

“The 6th December, 1909.”

The petition bears the following endorsement signed by the Sub-Registrar :—

“The 6th December, 1909.

“Conveyance supplied by the party. The will was not presented as the testator was unconscious owing to his severe illness and who subsequently died.

“ S. RAI,
“ S.R.

“The 7th December, 1909.”

The only reasonable conclusion to be drawn from the wording of that petition and from the fact, which is beyond doubt, that Biswa Nath Maiti had been sent to Khajuri on the Sunday morning to bring the Sub-Registrar to Shiba Prashad to register his will, is that Shiba Prashad had in fact executed a will and that he was in a condition to answer any questions which the Sub-Registrar might put to him about it. The Sub-Registrar, before accepting the will for registration, would in the ordinary course of his duty have read out the will to Shiba Prashad, would have explained the effect of the will to Shiba Prashad, and would have ascertained from him that he had executed the will and wished it to be registered as his will. There cannot be a doubt that the will which the Sub-Registrar was sent for to register was the will which the appellant has propounded. Shiba Prashad died on Monday, the 6th December, 1909, and the will was in fact registered by the Sub-Registrar on the 20th January, 1910. It was presented to the Sub-Registrar at his office on the 19th January by Bankim Bihari Maiti, the appellant. The Sub-Registrar went to the house of Shiba Prashad on the 20th January, 1910. In his evidence as to what occurred in January, 1910, he stated :—

“The will by Shiba Prashad Maiti was presented to me in my office on the 19th January, 1910, by Bankim Bihari Maiti. On going to the house of Shiba Prashad Maiti on the 20th January I took down the depositions of Shiba Prashad's widow Barada Sundari Dasi and of a witness Tarak Nath Maiti. After taking down their depositions I registered the will. The widow admitted the execution of the will by Shiba Prashad Maiti. Before I registered the will I was satisfied about the execution of the will. I took the signature of Barada Sundari Dasi when she admitted the execution of the will, underneath her deposition and also on the will. Barada Sundari signed her name on the will and under her deposition from behind a screen. I did not actually see her sign her name, but she said from behind the screen that she signed her name on the will and to her deposition. I took her left hand thumb impression also on the will. The impression was made behind the screen. The identifier took the will to her behind the screen, and there she affixed the thumb impression. Looking at the will states that the identifier was Rajani Kanta Maiti. I have brought the depositions taken by me of Barada Sundari and Tarak Maiti.”

And the Sub-Registrar identified the will which he produced, and which was propounded, as the will which he had registered.

To revert to what took place on the 6th December, it is proved by the evidence of the Sub-Registrar that he was detained by work in his office on Monday, the 6th December, 1909, and that he arrived at Shiba Prashad's house after 5 o'clock p.m. that day, and that Shiba Prashad tried to speak once or twice but could not utter anything. Shiba Prashad was then lying on his bed breathing hard, and a document which was beside him was pointed out to the Sub-Registrar as the will. The Sub-Registrar was informed that Shiba Prashad had become unconscious at about 4 o'clock that afternoon. As it was represented to the Sub-Registrar that Shiba Prashad became unconscious when fits of his asthma came on and after the fits had passed recovered consciousness, the Sub-Registrar remained at the house until after Shiba Prashad died at 11 o'clock that night.

The case for the respondent here, Matangini Dasi, the only surviving child of Shiba Prashad, is that the will which has been propounded was a forgery; that the draft which it is said Shiba Prashad had had by him was a draft prepared subsequently to Shiba Prashad's death from the forged will; and that Shiba Prashad was unconscious on Friday, the 3rd December, 1909, and incapable of executing a will, and remained unconscious until he died. Matangini Dasi, who was married and at the time of her father's death advanced in pregnancy, swore:—

"I was there at my father's house eight or ten days. My father did not execute any will within eight or ten days before his death. . . . I and my mother (Barada Sundari Dasi) used to minister to my father's comforts during his illness. My mother having been attacked with fever four or five days before my father's death, I alone used to attend him. My father had an attack of fever, cough and asthma. . . . He could not rise and sit down from Friday—he became senseless (unconscious). He could not speak with anybody."

She also swore that no kinsman or relation came to see her father during his illness; that she did not know of the Sub-Registrar having come to her father's house and did not see the Sub-Registrar in the house; and that she first heard of the will about one month after her father died. Her stepmother, Barada Sundari Dasi, who was the greatest sufferer by the will, proved the execution of the will, and swore that at the time her husband signed and sealed the will his mental condition was good, and that the will had been read over to him; that she got the will registered in January; and further that Matangini Dasi came to Shiba Prashad's house on the Monday morning, the 6th December, and "went away that very evening because she was in an advanced state of pregnancy." It is impossible to believe that Matangini Dasi did not know that the Sub-Registrar had been sent for to register the will. Barada Sundari Dasi had no interest to serve in upholding the will except a wish that her husband's intentions should be carried out. If the will had been proved to be a forgery she would have been entitled as Shiba Prashad's widow to all the property of which he died possessed; there is nothing to suggest that she had been induced by anyone to give false evidence.

Their Lordships believe her evidence, and do not believe the evidence of Matangini Dasi, the respondent.

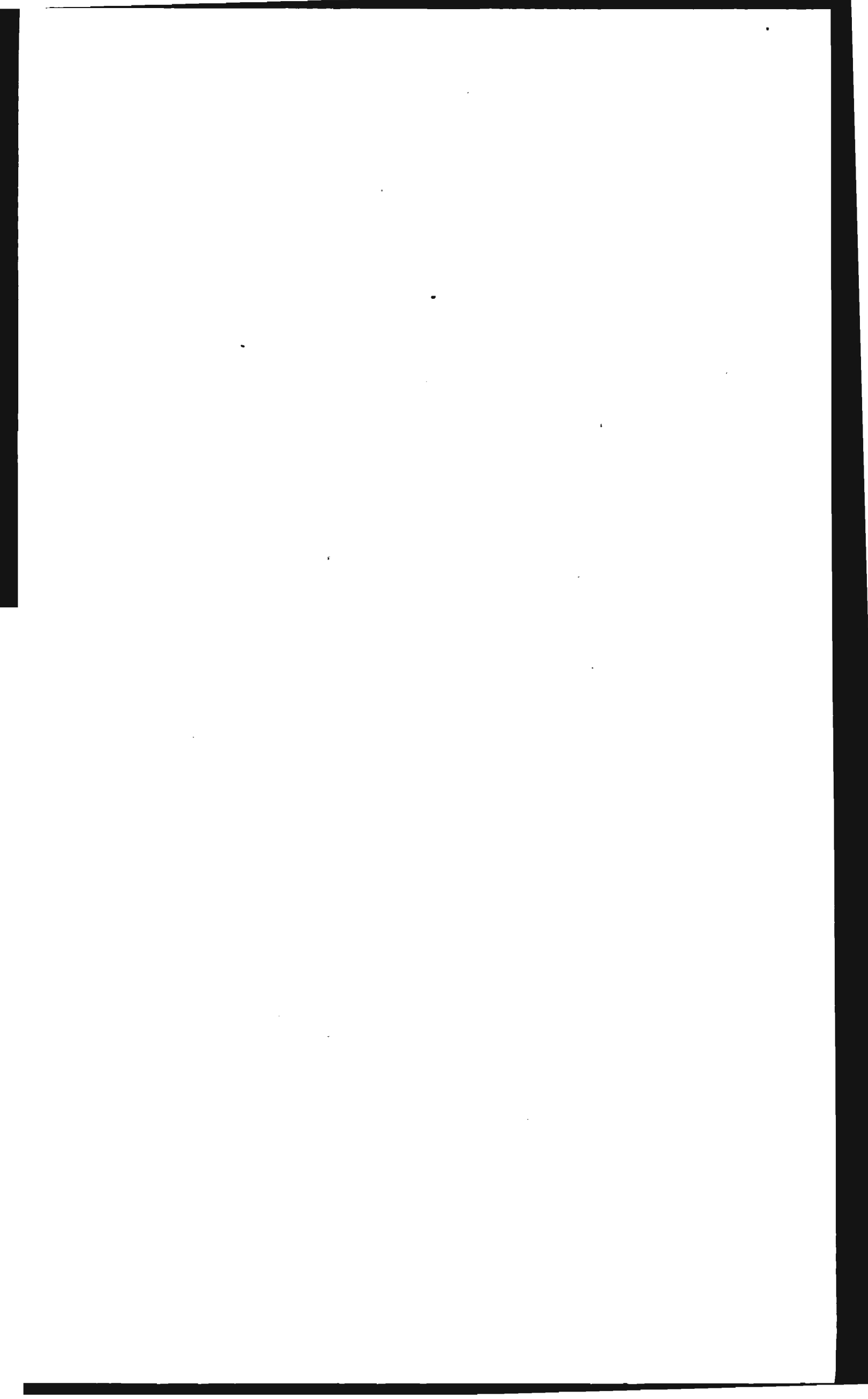
The learned judges of the High Court regarded with grave suspicion the evidence as to the draft of the will, and considered that the draft so far from having been prepared beforehand had been made from the will itself. No doubt there are grave suspicions as to the preparation of the draft, but as already observed a good case in India is sometimes backed up by false evidence; and the suspicious character of this story does not in their Lordships' opinion destroy the evidence as to the execution of the will.

Those learned judges of the High Court in their judgment further say :—

“Indeed, the most serious blot on the petitioner's case is the entire absence of any medical evidence. It is in evidence on one side or the other that Shiba Prashad was attended by no less than five Kavirajs during his last illness, not all, it is true, up to the time of his death, but at one time or another. The petitioner has not thought fit to put any one of these into the witness-box. For the caveatrix, three of them have given evidence, and their evidence is distinctly unfavourable to the petitioner's case. It was all important to show what was the mental and physical condition of Shiba Prashad Maiti on the Saturday, 4th December.”

The learned judges might have known what is the value which should be allowed to the evidence as to the mental and physical condition of persons given by ordinary Kavirajs. Of the so-called medical men who gave evidence Khirode Nath Das was the only one who is vouched, even by himself, as having passed any examination in medicine, and Khirode Nath Das had not seen Shiba Prashad after 11 o'clock on the night of Thursday, the 2nd December, and then according to him Shiba Prashad had not lost consciousness. It is very doubtful whether any of the so-called medical men who were called saw Shiba Prashad on Saturday, the 4th December, which was the material day. Their evidence was in their Lordships' opinion worthless. The judges in the High Court considered that the fact that Shashi Bhusan Maiti, who was the medical attendant of the family and was an attesting witness of the will, was not called threw the gravest doubt on the appellant's case. But it appears from the appellant's application to summon witnesses that Shashi Bhusan Maiti, “Kaviraj,” or “physician,” lived at a distance of 60 miles from the Court, and that to get to the Court he would have to travel on foot, by railway, and by camel cart. As he was an attesting witness of the will it may be safely assumed that if he had been called he would not have said that Shiba Prashad was unconscious when he executed the will.

After a careful consideration of the case their Lordships are of opinion that the decree of the Subordinate Judge granting probate was right, and that this appeal should be allowed and the decree of the High Court should be set aside with costs, and the decree of the Subordinate Judge should be affirmed and restored with costs, and they will so humbly advise His Majesty. The respondent must pay the costs of this appeal.



In the Privy Council.

BANKIM BIHARI MAITI

o.

SRIMATI MATANGINI DAS.

DELIVERED BY SIR JOHN EDGE.

Printed by Harrison & Sons, St. Martin's Lane, W.C.
1919.