Privy Council Appeal No. 48 of 1912. Oudh Appeal No. 5 of 1909.

Musammat Jagrani Koer and others - - *Appellants.*

v.

Kuar Durga Parshad - - - - - *Respondent.*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD DECEMBER 1913.

Present at the Hearing.

LORD SHAW. SIR JOHN EDGE.
LORD MOULTON. MR. AMEER ALI.

[*Delivered by* LORD SHAW.]

This is an Appeal from a Judgment and Decree of the Court of the Judicial Commissioner of Oudh, dated the 11th January 1909. This partly affirmed and partly reversed a Judgment and Decree dated the 4th February 1908 of the Court of the Subordinate Judge of Hardoi.

The only question raised at the Bar of the Board was whether a will executed on the 21st October 1904 by one Kuar Narindra Bahadur is or is not a genuine will.

Its provisions are substantially these: That after his death his widow should be proprietor of his estate in the Kheri District, and should have absolute power over the estate in the Hardoi District and hold proprietary possession over all his estate. By the third clause of the will it was provided that after her death "Raj "Bahadur, my sister's son, shall be the absolute "owner of all my property, movable and

"immovable, of every description." Other provisions, including certain annuities to the testator's brother-in-law, occur in the will.

Ex facie it was duly executed and properly attested, and the witnesses are, first, his diwan, or general agent; secondly, a servant, who appears to have had charge of the wardrobe and a certain power of supervision, including that of making purchases; and lastly, his treasurer, or confidential clerk. In the words of the Subordinate Judge,—

"The scribe of the will is the mukhtar, and the three "attesting witnesses are the diwan, the treasurer, and the "daroga of late Kuar Narindra Bahadur, who were his "respectable private servants, and used to be always in the "house, as is the case with Indian gentlemen in the position "of the Kuar."

The domestic position of the testator and the parties was this: Durga Pershad, the Respondent, was remotely related to the testator Narindra, and for years had been on terms of enmity with him. Details of this are given, as, for instance, that they had not been on "eating "and visiting terms," and that there "used to "be no exchange of presents during marriages." Both the Courts below are clear upon the subject, the Judicial Commissioner's opinion being so strong as this, that "the ill-feeling, however, "which existed between the two men was quite "sufficient to cause Narindra Bahadur to desire "that his property should not go to the Plaintiff "or his branch of the family."

On the other hand, the Appellant, the testator's sister's son, was treated with regard and affection by the testator, and upon this subject also both Courts have no doubt. In the language of the Judgment of the Judicial Commissioner:—

"In respect of the feelings which existed in Narindra "Bahadur's mind towards the Defendant, Raj Bahadur, "there can also be but little doubt . . . . Narindra

"Bahadur treated his sister's son as if he were his own son "in every way . . . . . This feeling of affection "towards his sister's son by a childless Hindu is fairly "common; and, after full consideration of the evidence on "the point, I have no hesitation in holding that Narindra "Bahadur did look upon Defendant No. 2 more or less in "the light of a son. It would, therefore, not have been a "matter for surprise if he had made a will benefiting the "latter."

This being the state of the relations of the parties to the testator, it stands conceded that the will now challenged was in every respect a natural will, and in accord with his feelings and tenour of life. Granted, therefore, that its execution is proved by anything like reasonable evidence, the presumptions of law are in favour of its being maintained. The Subordinate Judge, after a close analysis of all the evidence, affirms its validity, and that without hesitation. Every kind of challenge was made of it,—of its execution, of the status of the witnesses, of the health of the testator, and so on. But at the end of a long litigation upon the subject it was admitted by Mr. Ross, the learned Counsel for the Respondent, in his clear and candid argument at their Lordships' Bar, that the signature was genuine, nor could he venture to disturb what he admitted were concurrent findings on the subject of the Appellant's position in the testator's household being equal to that of a son, nor upon the point of the estrangement between the testator and the Respondent.

This makes an end of a considerable portion of the Judgment of the Judicial Commissioner, which treats the signature as suspect. The grounds of suspicion which that Court, notwithstanding its view as to the complete propriety and naturalness of the will itself, nevertheless attaches to the execution, are three-fold.

1. In the first place, it is maintained that the witnesses might have been of a better class. Perhaps they might; but they were just those

witnesses that the testator had about him; and a comment of this character has no force except upon something on a much higher level than mere suspicion, viz., proof which would thoroughly satisfy the mind of a Court that these persons had committed both forgery and perjury. In the case of a will reasonable, natural, and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demand a rigorous scrutiny of documents of which the opposite can be said, namely, that they are unnatural, unreasonable, or tinged with impropriety. Their Lordships venture to repeat the Judgment of Lord Watson in *Choteynarain Singh* v. *Mussamat Ratan Koer* (22 Ind. Ap. 12) bearing upon the point of an attestation by a person's own servants and dependants. As has been shown, the execution of this will was not only not improbable, but was in fact probable. The words of Lord Watson apply to this case, therefore, *a fortiori*:—

"The theory of improbability remains to be considered; "and the first observation which their Lordships have to "make is, that, in order to prevail against such evidence as "has been adduced by the Respondent in this case, an "improbability must be clear and cogent. It must approach "very nearly to, if it does not altogether constitute, an "impossibility. To give effect to the argument pressed "upon this Board by the Appellants, which seems to have "found favour in the Court of First Instance, would be "equivalent to holding that the will of a Hindu gentleman, "attested by his own servants and dependants, must be "held to be invalid, unless it is shown that the testator, at "the time assigned for its execution, was placed in such "circumstances that he could not secure the attendance of "persons of a higher rank. That is a proposition which "verges too closely on the absurd to be seriously enter-"tained. There may be cases in which attestation by "servants only is an important element to be taken into "account in considering whether a will has been validly "executed—cases, for example, in which there is reasonable "ground for suspicion that the will is not the voluntary act

" of the testator, but has been procured by the undue " influence of members of his household. This case does " not, in the opinion of their Lordships, belong to that " class."

This point, however, is at an end because the execution and attestation are proved.

2. The second ground of suspicion in the minds of the Judicial Commissioners was that the paper upon which the will was written appeared to be old instead of fresh, and proof was given that the paper was official paper in general use, together with evidence that some other people had been in the habit of having forms or sheets which they signed in blank. In the language of the Judgment of the Judicial Commissioner :—

" That men of the deceased's position in life do sign " blank forms and blank sheets, especially for the purpose " of Valakatnamas being drawn up thereon for use in cases " in the subordinate district courts, is not an unheard-of " thing."

Various forms were produced, signed by people other than the testator, and with none of which the testator had anything to do. In their Lordships' opinion, such evidence should not have been allowed to influence the mind of a Court. It should not have been admitted, as it was not relevant to the present cause.

3. The third matter appears, however, to their Lordships to be more serious. By Section 568 of the Code of Civil Procedure it is provided that if " the Appellate Court requires any " document to be produced, or any witness to be " examined, to enable it to pronounce judgment, " or for any other substantial cause, the Appellate " Court may allow such evidence to be produced " or document to be received or witness to be " examined." In the course of the hearing of this Appeal by the Judicial Commissioners, a question was asked as to the additional attestation of the will, which bore to have been made on the 20th April 1905 (that is, on a date about six months after execution) by Mohammed Nusrat Ali. This

gentleman appears from the Record to be a person of standing, the Judgment mentioning that he is the Honorary Secretary or Assistant Secretary of the British Indian Association. He is also a member of the Municipal Board of Lucknow, Lucknow being thirty miles by train from Sandila, where the will was ordered to be registered. On this date, 20th April, a meeting of the Municipal Board had been held, followed by a special meeting, both meetings being early in the day and being of some duration. Enquiry was made, and it was proved before the Judicial Commissioners that Nusrat Ali was present at these meetings. If this was so, then, it was argued, he could not at the same hours of the 20th April have been in Sandila.

Nusrat Ali had been examined before the Subordinate Judge, but nothing had been asked of him on the point, and he was not examined by or before the Judicial Commissioners. Their Lordships disapprove of the procedure which has permitted doubt to be thrown upon his evidence in the course of procedure taken on appeal by the Judicial Commissioners, "to enable them to "pronounce judgment," without the witness whose testimony is impugned having been afforded the opportunity of clearing up the mistake and having been convened for that purpose. No witness, whatever his standing, would be safe from adverse judicial comment under such procedure. It may quite well be that Nusrat Ali could have clearly explained the whole point of difficulty, and their Lordships would be slow to conclude, in the absence of his own evidence on the point, that the rest of his testimony, otherwise quite unimpeachable, was perjury.

Fortunately, there is no necessity for further procedure or expense in regard to the matter, for the case that the Board is now dealing

with is a case in which the signature of the will, whether the deed was additionally attested on the date stated or not, is proved and is properly attested. In these circumstances their Lordships do not doubt that the Judgment of the Subordinate Judge should be restored.

They will accordingly humbly advise His Majesty to that effect. The Respondent will pay to the Appellant the costs of this Appeal, and in the Courts below.

In the Privy Council.

MUSAMMAT JAGRANI KOER AND OTHERS;

v.

KUAR DURGA PARSHAD.

DELIVERED BY LORD SHAW.

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