

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rash Mohini Dasi v. Umesh Chunder Biswas, from the High Court of Judicature at Fort William in Bengal; delivered 5th March 1898.

Present:

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

In this case the Appellant Rash Mohini Dasi propounded a document as the will of her late husband Mohim Chunder Biswas who died on the 18th of March 1891. The District Judge of Nuddea admitted the document to probate. The High Court on appeal reversed his decision and dismissed the Appellant's petition with costs.

The sole question in issue before the High Court was the testamentary capacity of the alleged testator.

After a very careful review of the evidence from which nothing is omitted and in which nothing seems to have been unduly pressed the learned Judges of the High Court state the result of their opinion as follows:—"We think that the evidence of Dr. Bepin"—Dr. Bepin was a duly qualified Doctor who attended Mohim during the latter part of his illness—"aided by the admissions of "the Plaintiff's witnesses the history of the "illness and the circumstances of suspicion which "arise in the case lead to the conclusion first "that Mohim is not shown to have had due "testamentary capacity secondly that the

“ balance of evidence in this difficult case is on
 “ on the whole to the effect that he had not
 “ testamentary capacity and that there is no
 “ adequate proof whatever that he knew or
 “ approved of the contents of the will.”

Their Lordships agree so entirely with the conclusions at which the learned Judges have arrived and with their estimate of the evidence that it will not be necessary for them to go through the facts in any detail.

Mohim died at the age of 29. Besides his widow he left an infant daughter and two uncles the younger of whom Umesh Chunder Biswas the present Respondent opposed the grant of probate. Mohim had a paralytic stroke on the 24th of January 1891. A native doctor named Rakhal was called in and attended him for about five or six days. Then he was treated by a Kobiraj or native practitioner whose name does not appear. On the 2nd of March he had another seizure. Two doctors were then called in Dr. Bepin and a native practitioner called Jasoda. They attended him constantly until his death. It seems to have been determined rather against the advice of the doctors that if possible Mohim should be moved to Calcutta on the 9th. However as preparations were being made for his removal and as he was being carried through the house he had another seizure which after a few days proved fatal.

The story of the preparation of the will is told by Khetter Chowdry Khan a cousin of Mohim and his manager and trusted adviser. He was the principal if not the sole actor in the drama.

It seems that Dr. Bepin either on the first day of his attendance or a day or two afterwards said something about a will. It is not very clear what was said. Khetter

states that the Doctor said that considering Mohim's estate there should be a will made. Dr. Bepin himself asserts that what he said was that "considering Mohim's condition they should " be ready to get a will executed in case he " became at all better." Whatever it was that Dr. Bepin said Khetter acted on the hint and set about getting a will made at once. He says he told the patient "Bepin Babu is saying that " you should make a will. . . . Mohim said " 'Let a will be made and then I shall go to " 'Calcutta.' . . . I and Mohim consulted " together that night. I drew out a list of the " properties which were to be included in the " will. No one was present there at that time. " Neither his wife nor his mother-in-law was " asked at the time about it. I did not tell him " to ask either his wife or mother-in-law about " it. He did not forbid me to speak of it to " anyone except his uncle and his enemies. I " did not speak of it to Mohim's sister and one " of his aunts. I did not also tell his wife. I " did not speak of it to Mohim's wife and family " or anyone else but Mohim spoke of it to his " sister and wife on the 24th and 25th Phalgun " (7th and 8th of March). There were five " executors. I did not let them know before " the will. I did not tell Umesh or his sons. " They do not speak to me. I made a draft " from the note. This was on the 21st or 22nd " (4th or 5th of March). I have a draft. I " handed over the list to Bhusan to keep it with " the miscellaneous papers. I made the draft " sitting in a corner of the cutchery. Mohim " saw the draft on the morning of the 23rd (6th " of March) after washing his mouth and his " hands. No one was present at the time. The " Doctor went daily from the 20th to the 25th. " Jasoda and Bepin used not to go together. I " did not tell Bepin Babu because Mohim forbid

“ me. He forbad me from the 20th. He forbad
 “ me saying ‘Let no one know.’ On one oc-
 “ casion he named the Doctors and told me not
 “ to tell them. He said to me ‘I do not know
 “ ‘whether what you have done will be according
 “ ‘to laws go and get it revised by the Pleader
 “ ‘of Meherpur.’ I sent it on the 24th through
 “ Taruck Biswas. . . . The draft came from
 “ Meherpur on the night of the 24th Phalgun.
 “ It contained just an alteration here and there.
 “ What I wrote was there but two conditions
 “ were added. Besides Abinash Babu I tried to
 “ get a draft drawn up by Narahurri Babu also
 “ I tried to do so by means of a letter purporting
 “ to have been written by Mohim Babu on the
 “ 21st or 22nd. In it I put down paragraphs of
 “ the will. Narahurri Babu’s draft came by
 “ post a day or two after Mohim’s will had been
 “ executed. It is with Bhusan. Narahurri
 “ Babu sent a letter. It is in the Serishta. . . .
 “ After Mohim had determined who should be
 “ executors and said ‘These persons are to be
 “ the executors’ I did not say anything. He
 “ said that on the night of the 20th when we
 “ consulted together. Bepin Doctor came that
 “ day. I do not remember whether I or Mohim
 “ spoke about the terms of the will. Mohim
 “ spoke about the terms. I gave my opinion. I
 “ did not myself suggest any of the terms. . . .
 “ It took ten or twelve minutes to read Mohim’s
 “ will that was on the night of the 24th. He
 “ read it to himself. He read it in a low voice.”
 The story told on behalf of the petitioner further
 was that Khetter’s draft was sent to Abinash the
 pleader at Meherpur on the morning of the 7th
 of March by the hand of Taruck a gumashta in
 Mohim’s employ. Taruck says that Khetter gave
 him a letter along with it addressed to Abinash.
 Then he adds “ Mohim said ‘Take this letter and
 “ ‘get the draft corrected by Abinash Babu and

“ ‘bring it back.’ He said ‘There are four
 “ ‘executors and my wife will also be an exe-
 “ ‘cutrix.’ He further said ‘Rs. 300 is set apart
 “ ‘for my wife’s pilgrimage it has to be made
 “ ‘Rs. 600.’ He further told me to ask Abinash
 “ ‘to keep this a secret that there may be no
 “ ‘row.’”

Putting aside for the moment this alleged conversation with Taruck and Khetter’s statement that Mohim spoke of the will to his wife and sister on the 7th and 8th of March it will be observed that up to this point no one was in the secret but Khetter. Everything took place between Khetter and Mohim alone. It is not very clear whether Taruck intended to represent that he had a conversation with Mohim in person or whether he was only repeating what Khetter told him. Either way the story is incredible. When Khetter was sending written instructions to Abinash why should he have entrusted part of the testator’s wishes verbally to a messenger? If we are to take it that Taruck had a conversation with Mohim about the will in Khetter’s presence how is it that Khetter says nothing about it?

The will is said to have been executed on the following day the 8th of March between 4 and 5 p.m. There seems to be no doubt that on that day there was an assemblage of persons hastily collected by Khetter. All were servants of Mohim except Shama Churn who was Khetter’s brother-in-law and Rakhal the doctor who attended Mohim on the first attack. A person was stationed at the door to keep out “enemies” or to give warning of their approach. Mohim was propped up in bed. The will which had been copied out by one Troilokya was put into his left hand over which he still had some power. Troilokya signed for him. He touched the pen. Then Shama Churn signed and read the will aloud. The other witnesses signed and the

ceremony was over. Khetter put the will in his own box. After Mohim's death "he made known the fact of the will having been made." He handed over the will to the Appellant. The Appellant and Mohim applied jointly for probate. But Khetter afterwards withdrew his application at the instance apparently of the Appellant's maternal uncle. There were other reasons he said. He was forbidden to act by Umesh the Respondent.

The will itself is fairly simple and not very long. The testator begins by stating that Umesh and his son had not behaved well to him: they were behaving so that if he did not appoint any executor in respect of his estate his family would suffer for want of food. Then he gives his wife permission to adopt. He appoints five executors but no work was to be done otherwise than in accordance with the views of two of them. Then the testator directs that if a son is adopted his infant daughter and the adopted son should share his property between them but until he or she came of age the estate was to remain in the hands of the executors. In default of an adoption the daughter was to take all. In the event of the daughter's death the entire estate was to go to the adopted son. In the absence of both adopted son and daughter the entire estate was to vest in his widow and failing her in the testator's nephew or any full brother that he might have. Then there were provisions for poor relatives of the testator and of his widow.

It is only fair to observe that under the will Khetter took no benefit directly. He had no interest except as executor. What his motive was it is difficult to see unless he hoped to secure his position as manager of the estate by becoming an executor. And it may be that he was anxious to exclude Umesh from all hope of

succession. He and Umesh seem to have been on much worse terms than Mohim and Umesh. Umesh and his son did not even speak with Khetter.* Umesh constantly visited Mohim during his illness and Mohim according to Khetter was very anxious that his visits should not be discontinued.

The oral evidence as to Mohim's testamentary capacity may be summed up shortly. Putting aside the statements of Khetter and Taruck to which attention has already been called the witnesses for the Appellant state generally that the testator was in full possession of his senses. "That" as the learned Judges of the High Court say "is very unsatisfactory evidence of the "patient's condition." "The question" they add "as to what mental state he was in in "reference to the making of a will his capacity "for which is challenged by the Defendant's "evidence and is rendered at least a matter for "careful inquiry from the facts of his illness in "the Plaintiff's evidence itself—paralysis on 24th "January an increase of illness on 23rd February "another and severe fit on the 2nd March in- "distinct speech as stated by all the witnesses "concerned increased by the 8th March according "to Shama Churn so great that according to "Rakhal Kobiraj he had to be asked two or "three times before his words could be under- "stood. . . . The evidence of some of the "Plaintiffs just referred to would if read by "itself convey the impression that Mohim's mind "was quite alert and his speech practically free "although a little indistinct and although he "was physically weak and paralysed. If any- "thing approaching this was the truth some "proof of this might have been adduced apart "from the story common to all those witnesses "in which almost the same things are represented "as said about the execution and about going to

“ Calcutta and nothing else whatever. The
 “ obvious comment on it is that they did not
 “ venture to leave this common ground because
 “ they were not stating what they remembered
 “ but what it had been agreed should be said ;
 “ a short story containing some easily remembered
 “ incident of a kind which if not closely inquired
 “ into by the Defendant would lead to a belief
 “ on the part of the Court trying the case in
 “ Mohim’s capacity.”

On the other hand the witnesses on behalf of the Respondent deposed clearly and positively to Mohim’s incapacity. The most important witness of course is Dr. Bepin. He seems to be a person of some position. Khetter himself says “ Bepin is regarded as a good doctor.” He is positive that at no time during his attendance could Mohim have made a will. He says “ I used to go
 “ and visit him daily for 15 or 16 days. Before
 “ I went there Mohim was under the treatment
 “ of a Kobiraj of Mankar. I sometimes used to
 “ stop at Mohim’s house for 24 hours. When I
 “ went on the first day Mohim had but little
 “ consciousness. For the first day or two he
 “ replied to questions with great difficulty. After
 “ that he could not speak at all but used to try
 “ and make sounds. He did not always try to
 “ do even this. After I had repeatedly shouted
 “ to him he used to try and make a sound. I
 “ saw Mohim on the morning of the day before
 “ that on which it was proposed to take him to
 “ Calcutta. I went in the morning of the day
 “ before that on which it was proposed to take
 “ him to Calcutta. As regards Mohim’s senses
 “ on that day I only say this that he could taste
 “ food and he used to weep and again to wipe
 “ the tears from his eyes as he looked at people.
 “ He could take down the first part of each
 “ spoonful and the latter part of it had to be
 “ withdrawn. I did not hear him speak and he

“ did not speak to me. He used to be made to
 “ sit up in order to be fed. I came away at
 “ 10 or 11 that day. I was against his being
 “ taken to Calcutta. The reason was that the
 “ whole of the brain had become diseased and
 “ if he received any shock the probability was
 “ that he would get apoplexy. The next day at
 “ 9 or 9½ in the morning I found the patient
 “ almost in a moribund condition.”

As regards the testamentary capacity of the alleged testator their Lordships agree with the High Court in thinking that the oral evidence on behalf of the Respondent outweighs the evidence on behalf of the Appellant. And in this connection it must be borne in mind that Mohim does not seem to have had any intention of making a will before his illness. It is not like a case in which a testator executes a disposition of his property for which instructions have been given or preparations made while the mind was in vigour.

Apart however from the oral evidence there are several matters which in their Lordships' opinion tell heavily against the Appellant. What reason was there for keeping in the dark the two doctors who were in daily attendance on the patient? If it be true as Khetter says that Dr. Bepin suggested that a will should be made by Mohim in the state in which he was when he paid his first visit it would only have been natural that he should have been consulted. No doubt Khetter says that Mohim forbid him to tell the doctors. He looked upon them as 'people of the other party' because they were friends with Umesh and attended his family. But then Shama Churn was on good terms with Umesh and yet Khetter called him in to witness the will and he was permitted to read it aloud. It is suggested that Mohim was afraid that something would happen if Umesh were told.

But what is it that the testator is said to have been afraid of if Umesh had known of the will? Not that there would have been a row as some of the witnesses said but according to Khetter's evidence only this that Umesh would discontinue his visits. Then again why were not the wife and sister called to speak to Mohim's mental condition at the time the will was made? Khetter says that the testator himself told them about the will on the 7th and 8th of March. It is true that when the Plaintiff's evidence was closed the District Judge was asked to let them be examined but then it was too late. Lastly it is a very important fact that Khetter does not produce the draft which he says was sent to Abinash and returned by him nor was Abinash himself called though he might have thrown some light upon the case.

On the whole their Lordships are of opinion that the High Court came to a right conclusion. The making of the will from first to last was Khetter's doing and there is no satisfactory evidence to show that the alleged testator understood the business in which Khetter engaged him. The burden of proof rests on the Appellant and she has not discharged it.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The Appellants will pay the costs of this appeal.
