Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kali Das Chuckerbutty and Another v. *Ishan Chunder Chuckerbutty and Another, from the High Court of Judicature at Fort William in Bengal, delivered the 7th June* 1904.

Present at the Hearing:

LORD MACNAGHTEN.
LORD LINDLEY.
SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

The proceedings out of which this Appeal has arisen relate to the alleged Will of one Khetter Nath Chuckerbutty, who died on the 29th May 1878. Probate of the Will was obtained in common form, and without issue of citations, on the 22nd February 1884, from the then District Judge of Rajshahye.

On the 25th November 1896, the now Appellants presented a petition in the Court of the successor of the learned Judge by whom the probate had been granted, praying for revocation of that probate on the ground, amongst others, that the alleged Will was not the genuine Will of the testator but a fictitious document. The learned Judge, whose judgment is dated the 3rd June 1897, considered that there were strong grounds for disbelieving the evidence in support of the Will, held that its execution had not been sufficiently proved, and accordingly made an Order for revocation of probate. That Order was set aside by the High Court on Appeal,

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and against that decision the present Appeal has been brought.

The alleged testator, Khetter Nath Chuckerbutty, at his death, on the 29th May 1878, left surviving him a widow Mrinmoyi, an infant son Shib Nath, and an infant daughter Bhubanmoyi. The property of Khetter Nath was under Rs. 300 in annual value; but his infant son Shib Nath claimed to be heir, through his mother, to a large estate known as Elanga, which claim was obviously a matter of great interest to the father before his death.

The Will refers to Shib Nath's title to Elanga, and plainly purports to be made with reference to it. It gives the testator's estate to the son, except a half share in certain property given to the daughter when she should marry. It gives to the executors (who were also to be guardians of the son) power to raise money on the whole estate for the prosecution of the Elanga claim. The executors were to be the testator's brother, the brother's son-in-law Ishan Chunder Chuckerbutty, and the widow Mrinmoyi. If Shib Nath should die unmarried, Mrinmoyi was to have power to adopt successive sons, a preference to be given to the brother's sons. Such a Will was a natural one to have made under the existing circumstances. And the learned District Judge, though he was not satisfied as to the execution of the Will, considered that it was in accordance with the wishes of the deceased.

Shib Nath's title to Elanga was finally established in 1882, and almost immediately afterwards he died, still a minor and unmarried. In 1883 Mrinmoyi, the widow, adopted Surendra Nath Chuckerbutty, a son of her late husband's brother, and in January 1884 Mrinmoyi and Ishan Chunder, as the surviving executors of the Will, applied for the probate now in dispute, and it was granted. This application for probate was the first

occasion on which the alleged Will is shown to have been publicly relied upon; up to that time it appears from the evidence, documentary and otherwise, to have been ignored, that is for a period of about six years.

Late in the same year (1884) Bhubanmoyi, the daughter of the deceased, was married to Kali Das Chuckerbutty, and two sons have been the issue of the marriage, Bhabani Das, and another now deceased. Mrinmoyi died in 1896.

The petition of the 25th November 1896 for revocation of the probate of 1884 was presented by the present Appellants, namely Kali Das Chuckerbutty in his own right as heir of his deceased son, and by his surviving minor son, Bhabani, through Kali Das as his next friend and father. The objectors were the present Respondents, namely, Ishan Chunder Chuckerbutty, the surviving executor, and Surendra Nath Chuckerbutty, the adopted son.

The evidence given at the hearing to prove the execution of the Will is quite sufficient to establish it, if that evidence can be believed; and the learned Judges of the High Court have believed it.

The grounds upon which their Lordships have been asked to differ from the High Court are substantially three. First, it was pointed out that the alleged Will was not proved for six years after Khetter Nath's death, during which interval it was practically ignored. It was further contended that the explanation which Ishan Chunder gave of that delay was unsatisfactory. The District Judge rejected that explanation, and he was probably right in doing so. But, on the other hand, the estate was of very trifling value, and until Shib Nath died and Surendra Nath was adopted in his place, it does not appear that there was any very urgent necessity, in anybody's interest, for relying upon the Will.

Secondly, it was contended that the evidence in support of the Will was scanty in amount and open to exception in quality. But their Lordships think the learned Judges of the High Court were right in laying stress upon "the "difficulty of proving, in 1896, a Will which "purports to have been executed in 1878, and "of which probate was obtained in common "form in 1884." And their Lordships see no reason for dissenting from the view taken by the High Court of this evidence generally.

Thirdly, a specific point was relied upon. It was alleged by the witnesses for the Will that during the night in which the Will was executed, the night before Khetter Nath's death, Doctor Doorga Sunker Gupta, who is said to be a gentleman of good position, was called in to attend the sick man, and was present when the Will was read over. But the doctor when called could recollect no such occurrence. The District Judge attached great importance to this discrepancy. The High Court thought it not unnatural that this gentleman might have forgotten a single visit to a patient, after the lapse of so many years; a view in which their Lordships concur.

Their Lordships see no sufficient reason for dissenting from the conclusion arrived at by the learned Judges of the High Court. They will humbly advise His Majesty that the Appeal should be dismissed. The Appellants will pay the costs.