

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Jagarnath Pershad v. Hanuman Pershad, deceased (now represented by Sukhdei Koer) and others, from the High Court of Judicature at Fort William in Bengal; delivered the 11th May, 1909.*

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Present at the Hearing :

LORD ATKINSON.

LORD COLLINS.

LORD SHAW.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

This is an appeal from a Judgment and Decree of the High Court of Bengal dated the 3rd of March, 1904, which reversed those of the District Judge of Gaya of the 6th of August, 1901.

The main question raised on the appeal is as to the genuineness of the Will, purporting to have been made by one Chhote Narayan Pershad, and dated the 21st of December, 1900. Chhote Narayan died on the morning of the next day to that on which the Will bears date, and left a widow, the Respondent Manna Koer, and a daughter, Lakshmi Koer. Chhote Narayan was the adopted son of one Jokhi Lal. After Jokhi Lal's death one of his widows adopted the Respondent Hanuman Pershad. The Appellant is the brother by birth of Chhote Narayan Pershad, their father being one Ram Rekha Lal.

The Will purported to make various provisions for the testator's wife and daughter, and appointed the now Appellant, the testator's brother by birth, as residuary legatee and executor.

The Appellant applied for probate of the Will in the Court of the District Judge of Gaya. Caveats and written statements were filed in answer, and the case was heard before the District Judge. Three of those who appear as attesting witnesses to the Will were called at the hearing. The other two attesting witnesses, and the Appellant himself, were not examined by the applicant; they were tendered for cross-examination but not cross-examined. Evidence was called on the other side. The District Judge was satisfied that the testimony to the genuineness of the Will, and the competency and *animus testandi* of the testator, was overwhelming, and the evidence on the other side altogether untrustworthy; and he granted probate accordingly.

The Respondents appealed to the High Court of Bengal. That Court made an order at the hearing of the appeal for the examination, as witnesses, of the Appellant himself and the two witnesses to the Will who had not been examined in the first Court. Those persons were accordingly examined. The High Court also admitted certain extracts from books of account alleged to have been kept by the testator. In the result the High Court held that the circumstances connected with the alleged execution of the Will were involved in suspicion, and that the Will was not sufficiently proved; and accordingly a Decree was passed which set aside that of the District Judge, and dismissed the application for probate with costs. Against that Decree the present Appeal has been brought.

On the argument of the Appeal it was objected that the examination of the three witnesses by the

Court of Appeal was irregular ; but it appears that that examination was taken with the assent of both sides. It is not open, therefore, to anybody to complain of it now.

It is objected, secondly, that the admission of the account books on appeal was irregular. But there is nothing to show that that admission was objected to at the time.

Their Lordships thus have to face the position that, on a pure question of fact, the two Courts in India have differed, and the materials before those two Courts have not been entirely the same.

The question their Lordships have to answer is, whether they shall advise His Majesty that the Decree of the High Court should be reversed. That they cannot do, unless they are satisfied that the Decree appealed against was wrong, and they are not so satisfied.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed. The Appellant will pay the costs of the Respondent Mussummat Manna Koer, who alone defended the Appeal.

