

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Nogendra Nath Mitter v. Kumudini Dasi
and another, from the High Court of
Judicature at Fort William in Bengal;
delivered the 18th March, 1909.*

Present at the Hearing :

LORD ATKINSON.

LORD COLLINS.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Lord Collins.*]

This is an Appeal from the decision of a Division Bench of the High Court of Bengal refusing to admit to Probate a certain document propounded as the Will of one Gopal Lal Seal, who died on the 25th May, 1902. The alleged Will purported to have been executed on the 13th April, 1900. The Court came to the conclusion that the Will propounded was a forgery and dismissed the application for Probate with costs.

The case was heard during about 27 days in Calcutta and six days in this Committee. The question is purely one of fact, and the Appellant has to face the difficulty of inviting Judges who have not heard or seen the witnesses to overrule the decision of Judges who, after a prolonged and elaborate inquiry, have arrived at the conclusion that they could not believe the evidence of the principal witnesses called in support of the Will. Though therefore it might suffice to say that the

Appellant, on whom the onus lies, has not, in their Lordships' opinion, succeeded in discharging it, yet, having regard to the intricacy of the case and the elaborate arguments presented, their Lordships have thought it desirable to state in outline the salient features and the reasons which have led them to their conclusion.

The executors named in the alleged will were :

1. Kadumbini Dasi, the mother of Gopal Lal Seal; 2. Kumudini Dasi, the first Respondent, his senior widow; 3. Babu Syama Madhab Roy, a friend, since deceased; and 4. Nogendra Nath Mitter, a pleader, the surviving Plaintiff and present Appellant, Kadumbini Dasi, who had originally joined in the application for Probate, having died since the commencement of the suit.

The attesting witnesses purported to be :

1. Trailokya Nath Sen; 2. Deno Nath Dutt; 3. Cheru Sasi Som; 4. Satis Chandra Mukerjee; and 5. Juggeswar Bhattacharyya. Of these Deno Nath Dutt died before suit; Trailokya Nath Sen, though he had made an affidavit in support of the application for Probate, and had been present in Court at the outset, subsequently disappeared, and though a warrant was issued for his arrest, the proceedings taken under it seem to have been of a "somewhat perfunctory character," and he did not re-appear to give evidence, a fact on which the High Court lay much stress in their judgment. Satis Chandra Mukerjee also was not called by the Plaintiffs, their excuse for not doing so being that he was alleged to have made an admission that the Will propounded was a forgery to which he had himself been a party. The Court attached much importance to the absence of this witness also. Thus of the alleged attesting witnesses two only gave evidence, viz. : Cheru Sasi Som and Juggeswar Bhattacharyya.

As to the first of these, the Court were very unfavourably impressed by his evidence, and indeed seem to have had grave doubts whether he had in fact been present at the signing at all. They add "other parts . . . of Charu Shosi's evidence are not satisfactory." Later on they say of him :

" We find it difficult to accept his explanation of " how he came to be present when he says the Will " was executed. His evidence cannot at any point be " tested by comparison with that of the Defendants' " witnesses. But during his cross-examination on " various minor matters . . . we believe that he " lied frequently, adroitly, and without the slightest " hesitation."

With regard to Juggeswar, he described himself as a "Suddar Am-muktear" in the service of Gopal Lal, and had to work in the "sheristah," or legal department, of the estate office. His story was that, when Satis Chandra Mukerjee had written out the draft Will, Juggeswar was told to make a fair copy, which, according to the evidence, he took later in the day to Gopal Lal at his garden house at Cossipore, where it was signed by Gopal, the other witnesses, and himself. The draft, he says, remained in his custody till about ten days before the trial, though he had been dismissed from Gopal's service and ordered to give up his papers upon the death of the latter. He says that it had escaped his memory that he had retained the draft in his custody until after the death of Gopal and after he had been subpoenaed to give evidence in this case by Bose, the Plaintiffs' attorney, and that it was not till later on that he thought of searching for it, and found it in his house. Immediately after the death of Gopal and when the estate was in the custody of the Court of Wards, an enquiry was made by the manager, Sreenath Dutt, of all the servants of the estate, including Juggeswar, as to whether anything was known of any Will made by Gopal, to which

Juggeswar swears that he replied in the affirmative. But Sreenath Dutt flatly contradicts him, and no one, though many were present on the occasion, was called to confirm him. Immediately after this he took part in applying for a mutation of names as upon an intestacy, describing, in letters written by himself, the widows as "widows and heiresses" of the deceased.

One other witness, though not one of those who attested the Will, gave evidence that the draft had been submitted to him for revision and approval. This was Preo Nath Mallick, a pleader. His evidence to some extent confirmed the evidence of Juggeswar, but the Court attached slight importance to it, as his testimony, such as it was, related directly not to the Will, but to the draft only, and was in itself open to unfavourable comment. They refer to it in these terms in their judgment:—

"This completes the evidence relating to the first part of the Plaintiffs' case—namely, the preparation of the draft. In itself we consider it of no value—that is to say, that it does not suffice to clear up any doubts we may entertain as to the truth of the rest of the story. No one except Preo Nath Mullick and Juggeswar Bhattacharjee speaks to the draft produced, and there is a complete absence of corroboration of any of their evidence as to its preparation and its subsequent history. The silence maintained by both witnesses as to its existence at a time when the questions, first of the existence of any Will, and then of the genuineness of the propounded Will, were urgent, and Juggeswar's alleged retention of the draft after he had first spoken to Mr. Bose on the subject of the Will, seem to us most suspicious. Both witnesses are contradicted on certain not very material points. We shall have to consider Juggeswar's general credibility further hereafter. At present we need only say that neither he nor Preo Nath Mullick impressed us favourably as witnesses of the truth."

Preo Nath Mullick's intervention in the matter is in itself a curious incident. His story

is that the draft was brought to him to peruse and settle before it was given to Juggeswar to copy. His experience in such matters was of the slightest. He had had a few years' practice as a pleader, almost exclusively in criminal cases, and the corrections which he made in the draft seem to be of no significance. This exhausts the evidence called to prove the making of the Will.

The story of how later on the propounded Will was searched for and ultimately found in a tin box, formerly in the possession of Deno Nath Dutt, said to have been the custodian of the Will in his lifetime, rested mainly on the evidence of one Akhoy Kumar Dutt, his son, whose evidence was such that the Court declared of him that their opinion of his credit was too low for them "to attach any weight to it." With regard to Norendro Nath Mitter, who took a very leading part in this transaction, and another prominent actor therein, Kanto Mohun Mullick, one of the nephews, who was to have a share under the propounded Will, the Court say :

"We hold that fraud and deceit were practised
"at the finding of the Will, and that they were prac-
"tised by Norendro Nath Mitter and Kanto Mohun
"Mullick."

Kanto was not called at the trial, though there was assuredly a great deal calling for explanation on his part. His share in the search for and discovery of the Will was certainly a very mysterious part of the transaction, and, on the evidence given, he seems to have been left alone for several hours in joint possession with Norendro Nath Mitter of the box from which the Will was ultimately produced, and no satisfactory account has been given of how that interval of time was spent. Moreover, it is clear from the conversation with him deposed to by Gonesh Chunder, that

the idea of forging a Will to meet the occasion was not altogether strange to his mind, though he professed to deprecate such a course. There was some slight evidence of an attempt to which he was a party to corrupt the Notary at Chundernagore with that object, and he certainly seems to have played an ambiguous part in assisting Kadumbini in filing a petition, on the 27 June 1902, to have Gopal Lal's estate administered as upon an intestacy, and a Receiver appointed, if he knew of, and believed genuine, the Will afterwards propounded, of which Juggeswar swears he told him immediately after Gopal Lal's death. In addition to the witnesses already named whose evidence should have been material, but who were not called, there were several other persons who were sworn to have played a part in the history of the propounded Will. Taking the whole case together, therefore, and having regard to the witnesses called and not called, their Lordships cannot doubt that the Court below arrived at a perfectly just conclusion.

Their Lordships will, therefore, humbly advise his Majesty that the Appeal be dismissed. The Appellant will pay the costs of it.