

Privy Council Appeal No. 5 of 1915.

Bengal Appeal No. 78 of 1913.

Dulhin Genda Kunwar - - - - *Appellant,*

v.

Harnandan Prashad Singh and others - *Respondents.*

FROM

**THE HIGH COURT OF JUDICATURE AT FORT WILLIAM,
IN BENGAL.**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 21ST FEBRUARY, 1916.

Present at the Hearing:

VISCOUNT HALDANE.

LORD SHAW.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* SIR JOHN EDGE.]

This is an appeal from a decree, dated the 29th August, 1913, of the High Court at Calcutta, which set aside a decree dated the 28th July, 1909, of the District Judge of Mozufferpur granting probate of the will of one Kishun Kishore Narayan Singh, of Sursand, who died in November 1905. The only question in this appeal is as to whether the will, of which the appellant has sought to obtain probate, was executed by Kishun Kishore Narayan Singh or is a forgery. The appellant who propounded the will is the senior of the two widows of Kishun Kishore. The will which she propounded is dated the 15th November, 1905.

Kishun Kishore was a zamindar living at Sursand, in the district of Mozufferpur. He was an elderly man, and had been twice married, but he had no issue by either of his wives, and he had no near agnatic relations. The caveators, who objected to probate of his alleged will being granted, were distant cousins of his, with none of whom it proved that Kishun Kishore had ever been on terms of intimate friendship.

Kishun Kishore had been originally a comparatively poor man, but at the time of his death the income of his estate

exceeded 60,000 rupees a year, and it is stated that, contingently on his surviving certain widows, he was the heir to a still larger estate.

On the 10th November, 1905, Kishun Kishore, accompanied by his two wives and certain of his servants and dependants, went from Sursand to Sonapur to attend the bathing fair there. He was suffering from dysentery, and cholera having broken out at the bathing fair, he became nervous as to the state of his health, and in the afternoon of the 13th November he sent a man in his employment, named Mahbub Hossein, with a carriage for Major Gwyther, of the Indian Medical Service, who was the civil surgeon in medical charge of the bathing fair at Sonapur. Major Gwyther found that Kishun Kishore was suffering from dysentery, and was weak and much afraid of the disease and its consequences. Major Gwyther saw Kishun Kishore again at 9 A.M. and at 5 P.M. on the 14th November, and between 10 and 11 o'clock of the forenoon of the 15th November. When Major Gwyther saw Kishun Kishore on the morning of the 15th, Kishun Kishore, in Major Gwyther's opinion, was not very weak, his condition was a good deal improved, and he was in a fit state of mind to execute any document. Major Gwyther did not notice any choleraic symptoms in the condition of Kishun Kishore. Major Gwyther did not again visit Kishun Kishore. He promised Kishun Kishore to call again in the evening of the 15th if he were sent for. Major Gwyther has stated in his evidence that Kishun Kishore's carriage did not call for him that evening at the time when he expected it, and, consequently, thinking that he was not required, he went to attend to another call, leaving instructions with his native servant that he should be sent for should his services be urgently required. Later in the evening Major Gwyther went to a ball, from which he was not summoned to attend to Kishun Kishore. Their Lordships accept Major Gwyther's statement as correct. There is evidence, which their Lordships see no reason to doubt, that a servant of Kishun Kishore was sent in the evening of the 15th to bring Major Gwyther to see Kishun Kishore, and found that Major Gwyther was out, and that later, at about 1 o'clock in the morning of the 16th, when Major Gwyther was at the ball, Sham Behari Singh was sent to call Major Gwyther to Kishun Kishore's tent, and Kishun Kishore was then conscious. Major Gwyther's servant, probably considering that Major Gwyther's services were not urgently required by Kishun Kishore, did not inform Major Gwyther that he had been sent for. The bathing fair having been broken up on account of the outbreak of cholera, Major Gwyther left Sonapur at 10 A.M. of the 16th November.

Kishun Kishore died, according to the evidence on behalf of his widow, the appellant, of dysentery at about 3 A.M. of the 16th November. According to the case of the caveator respondents, Kishun Kishore was suffering from cholera in the forenoon of the 15th November, and by midday of the 15th was

unconscious and died of cholera at about 5 o'clock in the afternoon of that day. If it be true that Kishun Kishore was unconscious by midday of the 15th November and died that afternoon, the case for the appellant is a false case and the will which has been propounded was not executed by Kishun Kishore.

As translated, the will which has been propounded is as follows :—

“ I am Babu Kishun Kishore Narayan Singh, son of Babu Bhagwat Narayan Singh, deceased, by caste a Pachhmia Babhan, by occupation a zamindar, inhabitant and part-proprietor of mouzah Sursand, pergunnah Basautar, thana Pupri, Sub-Registry Parihar, district Mozufferpur.

“ I, the declarant, have, at present, two wives, viz., Dulhin Genda Kunwar and Dulhin Dhanwanti Kunwar, and a Dattak son Babu Chandreshwar Prashad Narayan Singh, *alias* Paramhansji, living. For sometime past I kept the said adopted son with me and brought him up and maintained him, and, in consultation with and with the consent of the two wives, I, with my first wife, took him in adoption in the Dattak form on the 24th Jeth, 1312, F.S., from Babu Sarju Prashad Narayan Singh, father of Babu Chandreshwar Prashad Narayan Singh, *alias* Paramhansji, aforesaid, according to the Shastars after performance of the Dattak Home, &c., with all attendant rites, and I with my two wives have come to the Harihar Chhatar fair at Sonapur for the performance of Kartik Ashnan, and I am now unwell, and therefore I consider it proper to make in my lifetime some provision regarding my properties as per details given below. I also had a mind from before to execute a will. Therefore I, while in a sound state of body and mind, without being pressed and induced by anyone, make this will according to the details given below. But be it known that I, the declarant, myself shall remain in possession of all the properties during my lifetime, and after my death the management of my properties shall be made and the possession thereof shall be held according to the directions given below.

“ 1. Whatever properties I have at present are not my ancestral properties, I have inherited them as an heir from other gotias, and so they are considered as my self-acquired properties. I am fully competent to make arrangement, therefore, in any manner I think proper. I therefore appoint my first wife, Dulhin Genda Kunwar, as executrix. The said executrix shall manage all works according to the directions given below.

“ 2. I have ancestral Thakurji in my house. His Sewa, Puja, Sameya, and Bhograg shall continue to be performed in the same way as have continued to be done at a cost of 1,200 rupees annually from the income of the estate.

“ 3. All the expenses required for maintenance, education, Janeo, marriage, &c., of Babu Chandreshwar Prashad Narayan Singh, *alias* Paramhansji, aforesaid, shall be defrayed from the income of my estate. After his marriage, the said Babu Chandreshwar Prashad Narayan Singh, *alias* Paramhansji, shall, during the lifetime of my (last surviving wife), continue to receive 400 rupees per month from my estate to meet his necessary personal expenses.

“ 4. My two wives shall, in equal shares and in life-interest, be maliks of, and be entitled to, the income of the estate left after deduction of the above-mentioned expenses and the Government demands. But they shall have no right whatever to make any alienation. They shall get their respective names recorded in equal shares as their life-interest in the Government and the zamindari serishtas. If there be any misunderstanding between the two wives, they shall have no right to divide my

estate between themselves. On the contrary, my second wife shall in that case be competent to take and appropriate the income in proportion to her share from the said executrix after deduction of the aforesaid expenses, and after the death of the said executrix, Dulhin Dhanwanti Kunwar, my second wife, shall be competent to take annually her moiety share of the fixed income from the person managing my estate after deduction of the expenses mentioned above. After the death of any of my wives, Babu Chandreshwar Prashad Narayan Singh, *alias* Paramhansji, aforesaid, shall be absolute proprietor of the moiety share of my wife who dies first, and after the death of my two wives, the said Babu, *i.e.*, Babu Chandreshwar Prashad Narayan Singh, *alias* Paramhansji, shall be absolute proprietor of the entire estate.

" 5. Babu Chandreshwar Prashad Narayan Singh, *alias* Paramhansji, aforesaid, is now about 5 years old. He shall remain during his minority under the protection of my first wife, who shall be his guardian. If my first wife dies during the minority of the said Babu Chandreshwar Prashad Narayan Singh, *alias* Paramhansji, then my second wife, Dulhin Dhanwanti Kunwar, shall be the guardian, and the management of all the properties shall remain in the hands of my second wife till the said Babu Chandreshwar Prashad Narayan Singh, *alias* Paramhansji, comes of age, and she, my said second wife, shall manage the properties with the advice of Babu Sarju Prashad Narayan Singh, who is my relative, and shall not unnecessarily contract any debt on the properties of the said minor.

" 6. Should the said Babu Chandreshwar Prashad Narayan Singh, *alias* Paramhansji, die childless within seventy-five years after my death, then the other sons of the said Babu Sarju Prashad Narayan Singh, who are now in existence and may remain alive till that time, shall have possession of the entire properties as absolute proprietors and legal heirs. But from the date of the death of the said Babu Chandreshwar Prashad Narayan Singh, *alias* Parmahansji, the expenses for the maintenance, education, marriage, &c., of the sons who may be living at that time shall be defrayed by the said executrix from my estate.

" 7. My both wives have all along been faithful and obedient to me, and they are still so. I have sometime ago already given some properties to my first wife, Dulhin Genda Kunwar, in absolute proprietary right under a deed of gift, and as to Dulhin Dhanwanti Kunwar, my second wife, I had a mind to give her also some properties of the annual income of 5,000 rupees in absolute proprietary right, but I could not till now execute any deed in that respect. If my life is spared I shall myself execute any deed, and in case of non-execution of the same during my lifetime, I hereby direct, permit, and authorise my first wife, Dulhin Genda Kunwar, to give to my second wife properties of the annual income of 5,000 rupees, in absolute proprietary right, in such mouzahs and such places as she may think proper, and to execute some deed in that behalf.

" 8. As to Babu Ram Bahadur Singh Mokhtar, son of Babu Ajodhya Singh, inhabitant of Chapra, pergunnah Tariani, who is my well-wisher, and devoted and faithful to me, my earnest desire is to give him some properties in absolute right in lieu of his aforesaid services, but up to this time I have not concluded any such transaction (executed any deed). If I survive I shall myself execute (a deed), and if I cannot do so in my lifetime, I hereby direct, permit, and authorise the said executrix of my estate to give, according to my direction and permission to the said Babu Ram Bahadur Singh any mouzah of the annual income of 300 or 400 rupees in absolute proprietary right, and to execute any document in that behalf.

" 9. There are several persons who are my well-wishers and sympathisers whom I wished and promised to give some money as reward in the probate case of Dulhin Jagatrup Kunwar, petitioner, against myself,

objector—a fact which is known to the said Babu Sarju Prashad Narayan Singh. Up to this time I have not paid them anything. The said executrix shall also pay them from my estate. Therefore, I execute this last will so that it may be of use when required.

“ Dated the 15th November, 1905.

“ The will executed by me is correct.

“ BABU KISHUN KISHORE NARAYAN SINGH.

“ By my own pen.

“ *Witnesses :—*

“ Khakhan Jha, Purohit, inhabitant of mouzah Kalyanpatti, otherwise called Korlahi, pergunnah Basautar. By my own pen.

“ Sham Behari Singh, inhabitant of mouzah Basantpur, pergunnah Rati. By my own pen.

“ Mewa Lal Das, inhabitant of mouzah Basantpur Pakri, pergunnah Mahila. By my own pen.

“ Mukti Parilast, inhabitant of mouzah Buthra Khutauna, pergunnah Bhala. By my own pen.

“ Mahabir Prashad Pandey, inhabitant of mouzah Sursand Basautar. By my own pen.

“ Syed Tajammul Hussain, pleader of Munsiff's Court, Hajipur. By my own pen.

“ Udit Singh, inhabitant of mouzah Ghataro Toke Megha Dih, pergunnah Bisara. By my own pen.

“ Lalji Pattak, inhabitant of Masuria, pergunnah Madhal, district Saran. By my own pen.

“ *Writer of the Will :—*

“ Mahbub Hossein, inhabitant of mouzah Bakhri Subain, Chakla Garjaul, pergunnah Bisara.

“ Read over and explained by me to the executant.”

On behalf of the caveators, respondents, it is alleged that the witnesses who were called to prove the execution of the will which has been propounded have given false evidence, and that Kishun Kishore did not in fact execute the will. On behalf of the caveators, it has also been contended that Chandreshwar Prashad never was in fact adopted by Kishun Kishore, and that it is to be inferred that the alleged will is not a genuine will, as it, according to the caveators, contains a false statement that Chandreshwar Prashad had been adopted, which a pious Hindu, such as Kishun Kishore was, would not have made; also it has been the case of the caveators that the will should not be accepted as a genuine will of Kishun Kishore, as it had not been prepared by a lawyer of position, had not been witnessed by any independent person of position, such as the owner of a considerable zamindari or a Government official, had not been registered, and had not been publicly put forward until the 22nd December, 1905. It was also contended on behalf of the caveators that a pious Hindu would not have made such a disposition of his property as that contained in the sixth clause of the will.

All the attesting witnesses except two, one of whom had died and the other of whom was too ill to appear, were called on behalf of the appellant, and spoke to the due execution of

the will. Of the witnesses who gave evidence as to the execution of the will one was Tajammul Hussain, a pleader, of Hajipur, and another was Mahbub Hossein, who assisted Tajammul Hussain in drafting the will. Tajammul Hussain apparently knew little about the drafting of wills and less about Hindu law; he was an old Mohammedan pleader with a character as an honest man, which, so far as their Lordships can see from the record, was above suspicion. Mahbub Hossein, part of whose duty in the employment of Kishun Kishore was to attend to the litigation in which Kishun Kishore was from time to time concerned, apparently took the leading part in drafting the will. Neither Tajammul Hussain nor Mahbub Hossein could be regarded as a lawyer skilled in the drafting of Hindu wills. But regard must be had to the circumstances under which they were employed to draft the will for Kishun Kishore. On the 14th November Kishun Kishore was in a nervous condition as to the state of his health, and, fearing that he was suffering from cholera, tried to obtain the assistance of Jogendar Mookerji, a pleader, of Mozufferpur, whom he regularly employed, but the services of Jogendar Mookerji could not be obtained, as he was in Calcutta, and Kishun Kishore then directed Mahbub Hossein to send for Tajammul Hussain. It is said that there were other pleaders of position who might have been called in. Whether there were any pleaders of position whose services were then available their Lordships do not know, but men who believe that they are suffering from cholera and are anxious to make their wills are more likely to send for a pleader whom they do know than to send in quest of other pleaders whose services may or may not be available. However that may be, Kishun Kishore sent for Tajammul Hussain, and at 7 o'clock of the morning of the 15th November Tajammul Hussain was brought to Kishun Kishore.

An attempt was made on behalf of the caveators to prove that Mahbub Hossein was at Mozufferpur, and not at Sonapur on the 15th November, and thus to discredit all the evidence as to the preparation and the execution of the will. The attempt failed in the Court of the District Judge, but it succeeded in the High Court, where the learned judges who heard the appeal came to the conclusion that it was probable that Mahbub Hossein was not at Sonapur at all on the 15th November. Major Gwyther was an absolutely independent witness, and his evidence puts it beyond a doubt that when he saw Kishun Kishore after 10 A.M. on the 15th November, Mahbub Hossein was writing in the tent in which Kishun Kishore was. Major Gwyther knew Mahbub Hossein, as it was Mahbub Hossein who had brought him in Kishun Kishore's carriage to his tent in the afternoon of the 13th November. Mahbub Hossein left Sonapur for Mozufferpur in the evening of the 15th November.

An attempt was made on behalf of the caveators to have the question as to the adoption of Chandreshwar Prashad

formally raised and decided in this case. Although the question as to the alleged adoption is not one which could be excluded from consideration by a Court when considering whether it is probable that the will is a genuine will or a fabrication, it could not be tried as a material and vital issue on an application for a grant of probate, the necessary parties to such an issue not being before the Court. Further, a finding either for or against the adoption would not be decisive as to whether the will which was propounded was a genuine will or a fabrication. The District Judge before whom the application for the grant of probate first came rightly declined to frame an issue as to the alleged adoption. The caveators were, however, not precluded from questioning the adoption of Chandreshwar Prashad. They cross-examined at great length and very fully some of the appellant's witnesses on the subject, and they called evidence in an attempt to disprove the alleged adoption. Their Lordships have been pressed to take into their consideration, on the question as to whether the will is a genuine will or a forgery, the evidence as to the adoption, all that their Lordships need say is that, having regard to the evidence brought out by the cross-examination of witnesses for the appellant, and having regard to the evidence of the witnesses who were called by the caveators to prove that Chandreshwar Prashad was not adopted, they see no reason to doubt that Chandreshwar Prashad was adopted by Kishun Kishore.

The provision made by the will for the wives of Kishun Kishore, and the provision made for Chandreshwar Prashad do not appear to their Lordships to be unreasonable, or such as a Hindoo gentleman situated as Kishun Kishore was might not reasonably and naturally have made. He was apparently an affectionate husband, and he desired that Chandreshwar Prashad should enjoy the advantages of having been taken by him in adoption as his son. The provision in the 6th clause of the will to take effect in the event of Chandreshwar Prashad dying childless within seventy-five years after Kishun Kishore's death was doubtless unusual, as by the 6th clause Kishun Kishore intended that, in the event mentioned in that clause occurring, the property should pass to a family which does not appear to have been related in blood to him, but it must be remembered that he had no near relatives in blood, and he may reasonably have desired to confer a benefit on blood relations of his senior wife in the event of his adopted son dying without issue within 75 years of his own death. It is not necessary in these probate proceedings to decide what is the effect in law of the provisions in the will to which their Lordships have referred, but they fail to see that the will was not a will which a Hindoo gentleman situated as Kishun Kishore was might not reasonably and naturally have made. Under these circumstances, and there being nothing in the case to suggest that the will had been forged or that the

witnesses who gave evidence as to the preparation, and as to the due execution, of the will had committed perjury, the contention that the will should not be accepted as the genuine will of Kishun Kishore because the witnesses to its execution were not of a superior position is not sound and is contrary to the view of the law as expressed by this Board in *Chotey Narain Singh v. Mussamat Ratan Koer* (22 I.A. at page 24), and more recently in *Gagrani Koer v. Kuar Durga Prasad* (41 I.A. at page 80). Something more than mere suspicion is necessary in such a case to make convincing an argument based on the social position of the witnesses. If the will had been executed at Sursand, where Kishun Kishore's home was, it is possible that he might, by way of precaution, have obtained as witnesses to his will some neighbours of a superior class, but this will was executed at Sonapur in the confusion which must have resulted from the outbreak of a severe epidemic of cholera, and the breaking up of the bathing fair by the Government's orders in consequence of the cholera. The attesting witnesses were such as one would reasonably expect to be available on the occasion. It had been intended to get Major Gwyther to attest the will in the afternoon of the 15th November, but owing to some delay in sending Kishun Kishore's carriage for Major Gwyther, that officer did not know that his attendance at Kishun Kishore's tent was required that afternoon, and he did not attend.

Having regard to the circumstances that Kishun Kishore died at Sonapur and to the grief of his widows caused by his death, their Lordships attach no importance to the fact that the will was not registered, or to the fact that the will was not presented to the Court until the 22nd December. If there was any reasonable cause for doubting the evidence as to the execution of the will the delay in presenting the will to the Court might possibly raise some suspicion as to the genuineness of the will, but their Lordships are satisfied on the evidence that the will which has been propounded is the genuine will of Kishun Kishore.

The District Judge, after a careful consideration of the evidence and of the probabilities of the case, granted probate of the will. The learned Judges of the High Court in appeal set aside the decree of the District Judge on what appears to their Lordships to have been mere grounds of suspicion, which were not justified by the evidence before them. The learned Judges apparently allowed their minds to be influenced in considering the evidence by the fact that a note of the evidence which Major Gwyther could give was not produced in Court for the information of the caveators. That note was obtained from Major Gwyther in 1906 by Mahbub Hossein, acting on behalf of the appellant, and for the purposes of the appellant's brief in this litigation as to the grant of probate of the will. It was a note which was privileged from production, and which the caveators were not entitled to see.

The material facts, as their Lordships on the evidence find them, are as follows :—

Kishun Kishore, after his arrival at Sonapur, having become nervous as to the state of his health, decided to make a will as soon as possible, and with that object sent a messenger, Sirdar Singh, on the 14th November to Mozufferpur to bring to him at Sonapur, Jogendar Mookerji, the pleader of Mozufferpur. The messenger returned to Sonapur about midnight with the information that Jogendar Mookerji was at Calcutta. Kishun Kishore, on being informed that Jogendar Mookerji was absent from Mozufferpur, directed that a telegram should be sent to him, and that in the meantime Tajammul Hussain, whom he knew, should be sent for. Tajammul Hussain lived at Hajipur, not far from Sonapur. Mahbub Hossein thereupon sent Udit Singh for Tajammul Hussain, who was brought to Kishun Kishore early on the morning of the 15th November. After the arrival of Tajammul Hussain, Kishun Kishore gave to him his instructions for the preparation of his will, and Tajammul Hussain, with the assistance of Mahbub Hossein, who acted as the scribe, prepared a draft will. Mahbub Hossein was making a fair copy of the draft in Kishun Kishore's tent when Major Gwyther called on the morning of the 15th. That fair copy was read out to Kishun Kishore, and, having been approved by him, he at about 1 o'clock in the afternoon of the 15th November executed it as his will in the presence of several persons, who signed the will as witnesses. The will which was so executed by Kishun Kishore is the will which has been propounded. Kishun Kishore was, although physically weak, quite capable mentally and physically of making the will. His testamentary capacity is not now disputed. Kishun Kishore died about 3 A.M. on the 16th November.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the decree of the High Court should be set aside with costs, and the decree of the District Court should be restored.

The respondents must pay the costs of this appeal.

In the Privy Council.

DULHIN GENDA KUNWAR

o.

HARNANDAN PRASHAD SINGH
AND OTHERS.

DELIVERED BY SIR JOHN EDGE.