Privy Council Appeal No. 61 *of* 1926.

Patna Appeal No. 13 *of* 1923.

Musammat Ramanandi Kuer - - - - - - *Appellant*

v.

Musammat Kalawati Kuer - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH NOVEMBER, 1927.

Present at the Hearing:

LORD SINHA.
LORD BLANESBURGH.
SIR JOHN WALLIS.

[*Delivered by* LORD SINHA.]

Harangi Singh of Bihar, a small town in the District of Patna, had two sons (1) Alak Prakash and (2) Gyan Prakash. Alak Prakash was given in adoption to Angat Singh, a wealthy inhabitant of the same town. On Angat's death, Alak Prakash, still a minor, inherited from him properties of considerable value. Harangi with his family, including Gyan Prakash, thereupon came to live with Alak Prakash in Angat's house and managed the properties as Alak's guardian till the latter attained majority. But even after that Harangi and Gyan continued to live with Alak Prakash in his house.

On the 27th February, 1913, Alak Prakash died of phthisis at Patna, leaving a young widow, Thakurani Kuer, and an infant daughter, Ramanadi Kuer, the appellant. In May following, an anonymous petition, purporting to come from a well-wisher of the minor daughter of Alak Prakash was sent to the Collector of Patna, in which it was stated that Harangi was trying to secure the property for his second son.

That petition was sent for enquiry to the Sub-Divisional officer of Bihar, who, on the 1st June, 1913, called upon Harangi Singh " to state what he has to say to these allegations " in the petition, fixing the 16th June next for hearing. On that date a petition for two weeks' time was filed on the ground that Harangi Singh had gone on a pilgrimage to Jagannathji (Puri). Time was allowed till the 1st July, but on that day the enquiry was not further proceeded with, inasmuch as on the day previous, viz., the 30th June, 1913, application had been made to the District Judge of Patna on behalf of Gyan Prakash Singh for probate of a will alleged to have been executed by Alak Prakash on the 2nd February, 1913. A general citation was affixed to the house of the deceased and another to the Court House in July. Affidavits by two out of the twelve attesting witnesses to the will were filed on the 30th July, 1913. Notices were issued to the widow and daughter of the testator and a report was made by the serving officer showing that service of the notices was acknowledged on behalf of Thakurani Kuer " for self and as guardian of Ramanandi Kuer " by one Awadh Bihari Singh, who described himself as the sister's son of Thakurani Kuer. Thereafter the order for grant of probate was made by the District Judge on the 23rd August, 1913, though questions having arisen as to the amount of probate duty payable, probate was not actually issued till the 26th March, 1914.

By the terms of this will the property was bequeathed to the son of Alak Prakash if any should be born to his wife Thakurani Kuer. In default of such male issue, one village was bequeathed to Thakurani Kuer for life, with remainder to the daughter Ramanandi and her issue with ultimate remainder in default of issue of Ramanandi to Gyan Prakash Singh. Another village was bequeathed in trust to Gyan Prakash Singh for vaguely defined charitable purposes, while the residue, forming the bulk of the property was bequeathed absolutely to Gyan Prakash.

After probate had been granted, the name of Thakurani Kuer was entered in the Collector's Registers in respect of the village bequeathed to her, while Gyan Prakash's name was similarly entered in respect of the remaining properties.

Harangi Singh died in 1916 and Gyan Prakash died on the 23rd November, 1918, leaving a minor widow, the respondent, Kalawati Kuer. So long as Harangi and Gyan Prakash lived, Thakurani, the widow, and Ramanandi, the daughter of Alak Prakash, lived under their care and protection in the house of Alak Prakash, exactly as they would have done if Alak Prakash had not been legally separated by adoption from his natural father and brother but continued to form with them members of a joint Hindu family.

On the death of Gyan Prakash, his widow, Kalawati Kuer (who was then a minor) was entitled to succeed him, but there was an agreement in writing on the 21st December, 1918, purporting to be executed by her and Thakurani Kuer whereby the

estate was to be divided equally between them for life, with remainder to the daughter, Ramanandi. This agreement was probably not legally enforceable as Kalawati was a minor at the time and at any rate it was not acceptable to the father and other relations of Kalawati Kuer, who removed her from the influence of Thakurani Kuer in a manner which led to proceedings in the Criminal Courts. Disputes having thus arisen, proceedings for revocation of the probate were in contemplation when Thakurani died. On the 10th January, 1922, proceedings were actually instituted under section 50 of Act V of 1881 on behalf of the minor Ramanandi Kuer for revocation of the probate, on two grounds principally, viz, (1) that citations were not served either on her or on her mother, Thakurani, before the grant of probate and (2) that the will was a forgery. Objections were filed on behalf of Kalawati Kuer and issues were framed, of which two only are material for present purposes, viz :

> (1) Was no citation served upon the plaintiff, *i.e.*, Ramanandi Kuer ? Had she no knowledge of the probate proceedings ? Was she not properly represented in the probate proceedings ?
>
> (2) Is the will propounded by the opposite party, *i.e.*, Kalawati Kuer, the widow of Gyan Prakash, genuine or otherwise ?

There has been some divergence of opinion in the Courts in India as regard the law and procedure governing cases for revocation of probate, due in part to the introduction into Indian practice of the difference in English law between the grant of probate in common form and probate in solemn form. It is worse than unprofitable to consider how far, if at all, that distinction has been incorporated into Indian law. It has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that Statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law—or of the English law upon which it may be founded.

These observations apply with peculiar force to testamentary cases which are governed by the Indian Succession Act of 1865 or the Probate and Administration Act of 1881 (both now repealed by the Succession Act of 1925). As Sir A. Wilson observed, in delivering the judgment of this Board in the case of *Kurrutulain Bahadur* v. *Nuzbat-ud-Dowla Abbas Hossein Khan* (I.L.R. 33 Cal., p. 116) these Acts while to a large extent embodying the rules of English law on the subject yet departed in many particulars from those rules ; and in the progress of the development of the law and practice in testamentary cases, the ecclesiastical origin of this jurisdiction of the Courts in England has been completely discarded ; and the Indian Legislature has gradually evolved an independent system of its own, largely suggested, no doubt, by English law but also differing much from that law and purporting to be a self-contained system.

Now so far as the present case is concerned, the law is to be found in the Probate and Administration Act of 1881. Section 50 of that Act, so far as it is relevant, runs as follows :—

> "The grant of probate . . . may be revoked or annulled for just cause."

Explanation.—Just cause is :—

1st. That the proceedings to obtain the grant were defective in substance ;

2nd. That the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case.

The relevant *Illustrations* to the Section are :—

(*b*) The grant was made without citing parties who ought to have been cited.

(*c*) The Will of which probate was obtained was forged or revoked.

It is apparent that the plaintiff in this case set up both these grounds for revocation. The first issue as framed comes under Illustration (*b*) and the second issue under Illustration (*c*).

If these issues were tried separately and the plaintiff succeeded on the first issue, that in itself would be sufficient for revoking the probate ; but it would still be open to the defendant to prove the will and, if she succeeded, the probate would stand.

If on the other hand the plaintiff failed on the first issue, that would not preclude her from proceeding to prove her second ground, viz, that the will was forged, and the probate would stand or fall, according to the result.

It is obvious that the question of onus of proof is therefore of great importance in this case, and the District Judge as well as the High Court on appeal rightly lay stress as to the onus on each of these two issues, which might have been tried separately but were not so in fact, as evidence was given by each party in support of their respective cases on both issues together and not separately. Their Lordships agree with the Courts below that in the circumstances of this case neither party was prejudiced by the procedure adopted.

In considering the evidence on each of the two issues set out above, their Lordships bear in mind that the application for revocation was made eight years after the grant, and after the persons principally concerned in the original proceedings, viz., Harangi Singh, Gyan Prakash, Thakurani Kuer and most of the witnesses to the alleged will were dead, and that in accordance with the practice of the Indian Courts, some portion of the original records of the Court in the probate proceedings, including the affidavits of the two attesting witnesses, had been destroyed. These are all circumstances which would make it difficult for the defendant to prove her case.

On the other hand, certain other circumstances have to be considered in favour of the plaintiff. The will, if not absolutely

inofficious, is adverse to the interests of the widow of the alleged testator and his only child. The former was an illiterate pardanashin lady, and the latter a child only two years old when the testator died. Both mother and child were living under the immediate protection of those who were propounding the will and, so far as appears from the evidence, there were no relations of the widow either in her husband's adoptive family or on her father's side who could protect their interests as against those of Harangi Singh and Gyan Prakash. It is true that Thakurani Kuer afterwards more or less acquiesced in the provisions of the will and in any case took no active steps against the will so long as Harangi and Gyan were alive; but having regard to all the circumstances, their Lordships are unable to draw any inference therefrom adverse to the plaintiff. And as against the difficulties in the defendant's way by reason of lapse of time, death of parties and witnesses and the destruction of records, it has to be remembered that much of it might have been avoided by prudent action on the part of the propounder, *e.g.*, by taking proper and necessary steps to have the will proved *per testes* in the presence of an independent guardian for the infant daughter. Their Lordships cannot endorse the view taken by Mr. Justice Das that, if a guardian *ad litem* had been assigned for her, Thakurani Kuer would have been so appointed, if all the circumstances were fully placed before the Court.

On the first issue, the conclusion of the District Judge may be best given in his own words :—

> "I cannot definitely find that the citation was not served upon her (Thakurani Kuer) but I do not consider that it has been proved that she was served or that she had any knowledge of the application for probate."

As regards the daughter, he considered that

> "if the special citation had been properly served upon Thakurani Kuer, Ramanandi would have been properly represented in those proceedings."

On these findings, it is hardly correct to say, as Mr. Justice Das does, that the District Judge was satisfied that citation was properly served on Thakurani. It would be more accurate to say that though the District Judge was doubtful as to the actual service, he did not feel justified in definitely finding that she had not been served with the citation. In other words the District Judge found himself unable to come to any conclusion whether the notice was actually served upon her or not. The High Court considered that the failure on the part of the plaintiff to examine Awadh Behari was fatal to her case that no citation was served on Thakurani.

This renders it necessary to examine the position of Awadh Behari.

Mr. Justice Das was not prepared to hold that Awadh Behari was related either to Thakurani, as defendant's witnesses deposed, or to Harangi Singh, as plaintiff's witnesses said; but he concluded that Awadh Behari was more or less under the control of the plaintiff and should have been called by her as a witness on

her behalf, chiefly for the reason that there was evidence of her own witnesses on two points (1) that at the dates when these proceedings were going on before the District Judge, Awadh Behari was actually in the service of Thakurani's sister as a cook and (2) that Awadh in Thakurani's lifetime signed many documents on her behalf.

Their Lordships think little importance can be attached to the first; nor to the second either, inasmuch as all the documents in question, except one, were signed at a time when Thakurani was still living as a dependent female member of the family of which the actual head was either Harangi or Gyan. The only document referred to in this connection and bearing date subsequent to the death of Gyan Prakash is Ex. P., which Awadh signed on behalf of both Thakurani and Kalawati and in which he described himself as the sister's son of Thakurani and as brother of Kalawati—both statements being equally incorrect.

It would rather appear from the evidence that Awadh Behari, though belonging to the same caste, occupied at the time of the alleged service the position of a servant in the family, and was presumably under the control of the male head thereof and subject to his direction.

Under these circumstances, their Lordships do not consider that the plaintiff could be reasonably required to call Awadh Behari as her witness for the purpose of contradicting his own previous statement.

In their Lordships' opinion, even if some kind of formality was gone through on the occasion when service of notice is said to have been effected, it was not such as would give to the person alleged to have been served an opportunity either to oppose the grant of probate or to require the will to be proved in her presence. In the peculiar circumstances of the case the service, if any, was of no greater effect in law than personal service on an infant of tender years.

The result is that the first issue must be decided in favour of the plaintiff.

With regard to the second issue as to whether the will was forged or genuine, the onus of proof depends upon the finding on the first issue. If citations were not served, *i.e.*, properly and effectively served, on Thakurani, the daughter is entitled to ask that probate which was obtained in her absence should be recalled and the executor or his representative called upon to prove the will in the present proceeding. In other words, the onus of proving that the will was genuine is in view of their Lordships' conclusion upon the first issue upon the defendant. It was candidly admitted by Counsel on the latter's behalf that *if* it was held that the onus was on her to prove the genuineness of the will, he could not contend that she had discharged that onus. He rested her case on the ground that the onus was on the plaintiff to prove that the will was forged, and that the plaintiff's evidence fell short of proving that the will was a forgery even if the circumstances connected with it might appear suspicious.

Their Lordships have, however, come to the conclusion that apart from any question of onus, the plaintiff has succeeded in proving that the will is not a genuine document for the reasons given below.

It is a circumstance which cannot be ignored that though care was taken to obtain as many as 14 attesting witnesses to the will, the simple precaution of getting the will registered at the local registration office was not adopted, even though registration of wills is not compulsory. Nor can it be considered anything but unusual and suspicious that no doctor or lawyer attested this will, specially in view of its provisions practically disinheriting the widow and the only daughter and the serious nature of the illness. Immediately after the testator's death, Harangi Singh purported to act as proprietor of the estate in paying Government Revenue and in granting receipts to tenants of the estate—a position wholly inconsistent with the provisions of the will. Then again the will was not produced or probate applied for until Harangi Singh had been called upon to explain his above-mentioned conduct. There is further the evidence of at least three witnesses, viz., Khan Bahadur Saujid Mahomed Nur of Bihar and Babu Dhanukdhari Tewana, pleader of Bihar, that after the Collector directed enquiry to be made into the allegations made in the anonymous petition mentioned earlier in this judgment, Harangi Singh tried to get these witnesses to attest a will in favour of Gyan Prakash. The District Judge, before whom these witnesses were examined, believed their evidence. Their Lordships do not agree with the High Court that their story is inherently improbable or that any suspicion attaches to it because they did not of their own motion inform the authorities of such contemplated forgery.

There is a total lack of evidence as regards the preparation of the draft and the engrossment of the will and the whole case for the will rests on the bare testimony of two out of the four attesting witnesses, whom the trial Judge did not believe. The two other attesting witnesses admitted their signatures on the will but alleged that their signatures were obtained by Harangi Singh by false representations as to the nature of the document, which they did not read at the time when they put their signatures upon it. The story related by these two latter may not be worthy of credit in all respects, and if it rested by itself would be of little use to the plaintiff's case. The District Judge also rightly refused to attach any importance to such evidence as was given as to the signature on the will not being that of Alak Prakash. It was certainly not expert evidence in any sense.

But the crucial point in the case is—where was Alak Prakash living on the 2nd February 1913 (the date of the alleged will)—at Patna, or in Bihar ?

The plaintiff's case is that at the date of the alleged execution of the will, Alak Prakash was in Patna under the treatment of Dr. Jyotish Chandra Sen, L.M.S. (Calcutta), who practised at

Patna, and also of Dr. Barat, a teacher of the Temple Medical School.

On the defendant's side, a number of witnesses were called to prove that Alak Prakash came to Patna on the 4th or 5th February, that while there he was treated only by hakims and not by any doctors, and that he did not stay in that quarter of Patna which is called Jhauganj but in quite a different quarter called Badshahganj.

Both the District Judge and the High Court have disbelieved these witnesses for the defendant and found that Alak Prakash rented a house in Jhauganj-Patna, and was treated, not by hakims, but by Dr. Sen and Dr. Barat. The District Judge came to the conclusion upon the evidence that Alak Prakash was at Patna before the 2nd February and therefore that the story of his having executed the will at Bihar on that date was false.

The High Court, however, came to a different conclusion, and Mr. Justice Das says with regard to that part of the case :

> " The critical question then is, did Alak Prakash come to Patna before the 2nd February, 1913 ? On this point the petitioner relies on the evidence of Dr. J. C. Sen and Dr. Barat. . . . Dr. Barat is an Assistant Surgeon and is a witness of undoubted position and respectability. His evidence is to the effect that he was called to see a patient of Dr. J. C. Sen at Jhauganj in a house on the bank of the Ganges. He visited the patient in consultation with Dr. J. C. Sen on four or five occasions spread over one or two weeks. He made a report on the urine of the patient on the 13th February 1913. . . . I have no doubt whatever that Dr. Barat actually treated Alak Prakash and made a report on the urine of Alak Prakash. But the report is dated the 13th February 1913, and it is impossible on the evidence of Dr. Barat to say that Alak Prakash came to Patna before the 2nd February 1913. I entirely accept the evidence of Dr. Barat, but in my opinion it does not touch the point which we have to consider in this case. I now come to the evidence of Dr. J. C. Sen."

Then, after quoting the evidence of Dr. Sen, the learned Judge proceeds :

> " Giving his evidence on the 20th December, 1921, and without any documents to support his evidence, Dr. J. C. Sen was able to say that Alak Prakash came to Patna six weeks or two months before his death (in 1913). He admits that he has no documentary record of his treatment of Alak Prakash. It may be that Dr. Sen has a prodigious memory, but in my opinion it would be most unsafe to act on this evidence given nine years after the death of Alak Prakash in support of the case of the Petitioner that Alak Prakash was not residing in Bihar on the day on which he is alleged to have executed the will. In my opinion, it has not been established that Alak Prakash was not actually residing in Bihar on the 2nd February, 1913."

Apart from the fact that there is other evidence to prove that Alak Prakash resided in Patna for nearly two months before his death, it does not appear to their Lordships that in the case of Dr. Sen it was such a prodigious feat of memory as the learned Judge supposed. Alak Prakash was an old patient of Dr. Sen who had treated him three years before his death and had been

to Bihar three or four times to treat him, the last time in December, 1912. When Alak Prakash came on the last occasion to Patna, he rented a house on the banks of the river which Dr. Sen had himself occupied before and which was under half a mile from the house in which Dr. Sen was himself residing. He visited him three or four times daily all the time he remained in Patna. He said that he treated him in Patna for two or three weeks before calling in any consultant and that Dr. Barat came in as consultant during the last two or three weeks of the illness, and that Colonel Sunder also came three or four times, *i.e.*, after the first two or three weeks of Alak Prakash's stay in Patna.

The District Judge who saw and heard Dr. Sen in the witness box believed his evidence on this material point, and their Lordships consider it impossible to reject it without ascribing to a member of an honourable profession deliberate falsehood, for which no ground has been made out.

Taking the whole of the evidence and considering the position of both the doctors concerned, their Lordships agree with the finding of the trial Court that Alak Prakash was in Patna and not in Bihar on the 2nd February, 1913, and that the will bearing date the 2nd February, 1913, of which probate was granted on the 25th March, 1914, is not the will of Alak Prakash Singh and is a fabricated document.

Their Lordships will therefore humbly advise His Majesty that the judgment of the High Court should be set aside and the judgment of the District Judge restored, with costs of the appeal to the High Court and of this appeal.

In the Privy Council.

MUSAMMAT RAMANANDI KUER

v.

MUSAMMAT KALAWATI KUER.

DELIVERED BY LORD SINHA.

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