APPELLATE CIVIL.

Before Costello and Biswas JJ.

KRISTO GOPAL NATH

v.

BAIDYA NATH KHAN.*

1938

Jan. 17, 18, 19.

Will—Probate, Grant of—Citation—Revocation proceedings—Onus—Testamentary case, Correct method of approach by Judge in—Registration, Want of, Effect of—Positive evidence—Speculations, Dangers of—Forgery, Presumption of—Inofficious will.

In an application for revocation of the grant of probate, the applicant takes upon himself the burden of displacing the evidence regarding the execution and attestation of the will.

Where the evidence of three attesting witnesses was so cogent that, if any one was believed, there obviously was an end of the case of the applicant for revocation, but the learned District Judge, instead of applying his mind to a dispassionate consideration of this evidence, started off by making all kinds of speculations as to what he called "circumstances of suspicion," and proceeded to throw aside the whole of this positive evidence as if it did not exist at all,

held that that was not the right way of dealing with the case and it betrayed a lack of appreciation of the correct method of approach applicable in proceedings of that kind.

To prevail against positive evidence of execution and attestation of a will, an improbability must be clear and cogent: it must approach very nearly to, if it does not altogether constitute, an impossibility.

Chotey Narain Singh v. *Ratan Koer* (1) followed.

The *dictum* of Lord Watson should be constantly kept in mind by Courts called upon to deal with testamentary cases, as it lays down the correct line of approach.

There is no presumption, either in fact or in law—as seems to be too commonly supposed,—that a will if propounded must be a forgery.

Suspicion in probate cases must be a suspicion inherent in the transaction itself which is challenged, and cannot be a suspicion arising out of a mere conflict of testimony.

What may be an adequate motive to one man may not be so to another, and it can never be a safe or sound rule to start speculating as to what might have been the motive which impelled the testator to make the alleged will,

*Appeal from Original Decree, No. 171 of 1935, against the decree of S. Sen, District Judge of Hooghly, dated July 18, 1935.

(1) (1894) I. L. R. 22 Cal. 519; L. R. 22 I. A. 12.

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provided there is evidence—and the Court has every right to call for such evidence and must, in fact, call for it—that the will was in point of fact executed as required by law.

The mere fact that a will is not registered does not make it improbable, much less impossible, that the will was executed.

The dangers indicated, which one is apt to fall into, if one is to embark on speculations as against positive evidence.

Where all the attesting witnesses have been examined, the mere non-examination of the writer of the will is not by itself such a circumstance that the Court must hold from that alone that the story told by the attesting witnesses was unworthy of credit.

APPEAL FROM ORIGINAL DECREE by the defendant.

The facts of the case and the arguments advanced at the hearing of the appeal appear fully in the judgment.

Bejoy Kumar Bhattacharjya and *Bhagirath Chandra Das* for the appellant.

Sarat Chandra Basak, Senior Government Pleader, *Siddheswar Chakrabarti*, *Ramani Mohan Banerji*, *Debendra Nath Chatterji* and *Prabhat Kumar Sen Gupta* for the respondent.

BISWAS J. This is an appeal on behalf of one Kristo Gopal Nath, who was the defendant in a proceeding for revocation of the probate of a will alleged to have been executed by a lady of the name of Bhushan Mayee. The will is said to have been executed on January 4, 1928, and the lady died more than a month after, *viz.*, on February 7, 1928. On April 9, 1929, Kristo Gopal, who had been appointed executor of the will, applied for probate and obtained probate in due course. On April 23, 1930, Bansi Lal Nath, the husband of Bhushan Mayee, applied for revocation of the grant, alleging that he had not had any notice of the proceedings for grant of probate and that the proceedings were consequently "defective in substance". It appears that between the date of the death of the lady and the date of the application for probate, Bansi purported to sell one of the properties, which had been disposed of by the will, to one Balai Chand Nath. On August 2, 1930,

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Balai filed an independent application for revocation of the probate. The two revocation cases, which were numbered 26 of 1930 and 29 of 1930 respectively, were heard together and disposed of by the same judgment. The learned District Judge of Hooghly, who heard these cases, disbelieved Bansi's statement as to his not having been served with notice of the probate proceedings. He definitely found upon the evidence that such notice had been served, and in that view, rejected Bansi's application for revocation. As regards Balai's petition, he held that as Balai claimed to be a purchaser from the heir-at-law of the testatrix, he was a person interested in the estate of the deceased, and consequently entitled to citation, and that as no citation had been issued on him, he was entitled to have the will proved again in solemn form in his presence. He, accordingly, allowed the application. Against this order, there was an appeal preferred to this Court, being Appeal from Original Decree No. 70 of 1931. The judgment of this Court will be found at pp. 8 to 11 of the paper book in the present appeal. The learned Judges overruled the decision of the learned District Judge. They were of opinion that Balai was not a person entitled to citation and that the proceedings for the grant of probate could not, therefore, be regarded as defective in substance merely because he had not been cited. The reason for so holding was that it had not been shown that the applicant for probate, Kristo Gopal, knew at the date of the application that Balai had purchased the property. Their Lordships, however, went on to say that there still remained another objection put forward on behalf of Balai Chand, which had not been dealt with by the learned District Judge, namely, that the will was not a genuine document. In that view, their Lordships, while setting aside the judgment of the learned District Judge, remanded the case to him for a finding on the question as to the genuineness of the will. Pursuant to this order, the matter has been investigated by another learned District Judge, and the

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present appeal is directed against his findings on such remand.

A few relevant facts may be first set out. One Peary Mohan Nath died on April 3, 1906, leaving two sons, Shashi and Bansi: Shashi had two wives, Basanta Kumari and Tincarhi. By the first wife, he had five sons, *viz.*, Satish, Bijay, Suren, Naren and Kristo: and, by the second wife, he had one son of the name of Nanda. Bansi, who was married to Bhushan Mayee, the testatrix in the present case, had no issue, male or female. Peary died leaving a will, by which he purported to bequeath among other properties half share of premises No. 2, Rajendra Nath Mallik Street to Bansi, and the other half to the sons of Shashi. Bhushan Mayee, as already stated, was the wife of Bansi, and she had inherited certain properties from her father as her *stridhan*. Now, one of these properties, which Bhushan Mayee purported to dispose of by her will, being the will now in dispute, was also No. 2, Rajendra Nath Mallik Street, Calcutta. In the petition for revocation, which was filed by Balai, the case which he made was that this property was part of the estate of this lady, and that upon her death it was inherited by her husband, Bansi, as her heir-at-law, and that in that right Bansi sold it to him. As we shall see, that case was afterwards changed, and it was alleged that the property really belonged to Peary at first, from whom a half share devolved on Bansi under Peary's will. The importance of this question in the present case lies in this that on it will depend whether or not Balai would have the right to maintain his application for revocation. The learned Judge has correctly pointed out that it is only if Balai claimed as purchaser from Bhushan Mayee's legal heir that he would have *locus standi* in these proceedings. On the other hand, if his case is that the property never belonged to Bhushan Mayee, but had been obtained by Bansi from his father Peary, it would be a claim outside the will, which would at once

put the applicant out of Court. We must consequently hold that, for the purposes of this appeal, Balai must accept the position that the property belonged to Bhushan Mayee, from whom her husband would inherit as her sole surviving heir, if there was no will.

Turning now to the merits of the appeal, we may say at once that the judgment of the learned District Judge seems to us to betray a lack of appreciation of the correct method of approach applicable in proceedings of this kind. The application is one for revocation of the grant of probate. The applicant consequently takes upon himself the burden of displacing the evidence which there is regarding the execution and attestation of the will. The will in this case, Ex. A, was not signed by the testatrix herself, but she put her mark upon it and also her thumb impression, and her name was written out or signed for her by the pen of her husband, Bansi. It was attested by three witnesses, *viz.*, Pulin, Rajani and Dhirendra Nath Ray, the last named being a homeopathic medical practitioner. The will is said to have been written by one Debendra Nath Ghosh. On behalf of the defendant, the present appellant before us, all the three attesting witnesses were examined, and there is nothing in the evidence which they have given to show or suggest that they were not witnesses of truth. In any case, there can be no question that their evidence constitutes direct positive testimony as to execution and attestation. That evidence is in circumstantial detail, and, reading that evidence by itself, one cannot but be struck with its cogency or concurrent character. If any of these witnesses is believed, there is obviously an end of the case of the applicant for revocation. The learned District Judge, however, instead of applying his mind to a dispassionate consideration of this evidence, starts off making all kinds of speculations as to what he calls "circumstances of suspicion", and, in view of the opinions which he has led himself to form regarding such circumstances, proceeds to throw aside the whole

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of this positive evidence as if it did not exist at all. This we do not think was the right way of dealing with the case.

Incidentally, the learned Judge makes one or two observations regarding the witnesses for the purpose of discrediting their testimony, which we might notice at once. Taking first the medical practitioner Dhirendra Nath, all that the learned Judge has to say is that at the time he is alleged to have been called in for the purpose of treating the testatrix, he was only a doctor of four or five years' practice and a comparatively junior man without any reputation. But one fails to see how it follows from this that the doctor could not be telling the truth. He claims to be the family physician of the testatrix and her husband, and there is nothing inherently improbable in that fact. It is admitted that the testatrix in her last illness was also treated by a *kabirâj* and subsequently also by an allopathic practitioner, Dr. Ekendra Ghosh. She was suffering for over two months and ultimately this developed into paralysis of her right limbs. It is not at all surprising, in these circumstances, that her husband should try different systems of treatment, *viz.*, *kabirâji*, homeopathy and allopathy. The respondent's own case is that the *kabirâji* treatment did not produce satisfactory results, which led the husband to call in an allopathic doctor. If that be so, there is no reason to suppose that the husband might not have tried a homeopathic practitioner as well. Against the positive statement of this doctor that he actually treated the lady for several days, we have nothing but a pure conjecture that a doctor of his standing could not have been called in. The witness gives a detailed account of the condition of the patient. He says, "The patient had to be helped for "sitting on the bed. She had to be propped up. "She could not sit up at a stretch for half an hour". This was her condition when he left her. The will in question was executed about ten days earlier. The witness is quite clear in his evidence that the

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lady's faculties were normal when he left her, and his opinion that the illness from which the patient was suffering was not such as would affect her mental faculties remains uncontradicted. If, as Bansi would have us believe, the allopathic doctor, Dr. Ekendra Ghosh, came in immediately after Baranashi *kabirâj* had left, nothing would have been easier than to have put Baranashi into the box. The periods during which Baranashi treated the lady could have been ascertained from him, and it should have been possible by his evidence to give the lie to the story of Kristo Gopal that the will was executed while Dr. Dhirendra Nath was attending. No attempt seems, however, to have been made on behalf of the applicant to examine Baranashi as a witness. It is admitted that Baranashi is still living. Some questions were put to this medical witness in cross-examination regarding his signature. The witness signed his name and thereafter affixed three letters "H. M. B." to denote his professional diploma. A suggestion was made in cross-examination that these three letters were in different ink from the signature itself. This was accepted by the doctor, and he gave the explanation that he had omitted to put these initials at first. He had first signed his name with his fountain pen, and later put these initials using the pen which had been used by the other attesting witnesses. It is not the petitioner's case that the signature of this witness had been forged. One does not see, therefore, the point in this cross-examination, but indirectly, the answer which the witness gives is sufficient to repel the suggestion that the witness was a party to a well-planned scheme of fraud for getting up a false will. If, as a matter of fact, any such scheme was on foot, one should hardly expect that the doctor would not remember to put his initials at the very outset, when he put his signature to the document. The evidence which he has given, in our opinion, shows that he was telling the truth and recounting the actual circumstances as they had taken place and as they

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came back to his mind when he was questioned about the matter.

Turning to the other witnesses, Rajani and Pulin, the comment which the learned Judge makes is that they were not likely persons to have been invited by the husband of the testatrix for the purpose of attesting the will, as it was not shown that they were particularly intimate with the family at the time. It is impossible to treat this argument seriously. Bansi, the husband of the testatrix, admits that Pulin used to call Bhushan Mayee "*khurhimâ*" or aunt. That certainly is an indication of sufficient familiarity. It is also admitted that Pulin, as also Rajani, were often coming to the house of the testatrix. There is, therefore, no improbability in the fact of their being called in as attesting witnesses. There is one curious remark which the learned Judge makes about these three witnesses, and it is this that they were repeating the same story in a "parrot-like manner". How the fact that they were recounting the facts regarding the execution of the will in the same way invites a criticism of this kind, it is difficult to appreciate. If there were discrepancies in their evidence, possibly such discrepancies might have been equally used by the learned District Judge for discrediting their testimony. We have read the evidence of these witnesses, and we do not think that there is such a mechanical similarity in their depositions as to justify the comment made by the learned District Judge. The learned Judge then goes on to say: "It "is remarkable that they adopted an extra dose of "caution with a view to uphold the genuineness of the "document". The "extra dose of caution" is supposed to consist in their statements that the will was read over more than once. Now, if this was such a circumstance of suspicion as would appear on the face of it to tell against the genuineness of the will, nothing would have been easier for any person or persons interested in putting up a forged will than to have avoided making such a story. If, on the other hand, the will was as a matter of fact read over more

than once,—and this by itself is something not so unnatural that one must refuse to believe it,—one would expect all the witnesses to depose to that fact, even at the risk of being characterised as "parrot-like". It is difficult to avoid the conclusion that the learned Judge for some reason or other must have formed the idea that the will was not a genuine document, and that, having formed such an idea, he looked at the evidence of each of the witnesses with a suspicious eye. On no other hypothesis is it possible to explain the criticisms which he has led himself to make.

Let us now look at the circumstances on which the learned Judge relies for the purpose of holding that the will could not possibly have been a genuine will. Before dealing with this point, it will perhaps be useful to recall the observations of Lord Watson in the case of *Chotey Narain Singh* v. *Ratan Koer* (1). The argument which was addressed to their Lordships in that case was upon what is described as the "theory of improbability". In that case, there was a large and consistent body of testimony, as here, evidencing the signing and attestation of the will. But it was argued that there were circumstances which tended to raise a suspicion and made it "improbable" that the will could have been executed. On this point, the observations which their Lordships made were these:—

> The theory of improbability remains to be considered: and the first observation which their Lordships have to make is that, in order to prevail against such evidence as has been adduced by the respondent in this case, an improbability must be clear and cogent. *It must approach very nearly to, if it does not altogether constitute, an impossibility.*

It is very much to be wished that these observations should be constantly kept in mind by Courts called upon to deal with testamentary cases. If one may say so with respect, they lay down the correct line of approach to such cases. There is no presumption either in fact or in law, as seems to be too

(1) (1894) I. L. R. 22 Cal. 519 (531); L. R. 22 I. A. 12 (23).

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commonly supposed, that a will, if propounded, must be a forgery. The party who applies for probate or for letters of administration with a will annexed is no doubt required to prove the will. Such proof is usually furnished by the evidence of persons in whose presence the will was actually executed or who subscribed their names to the document, that is to say, of persons who saw the testator executing it and who put their own names to the document as attesting witnesses. In a case where such attesting witnesses are produced and they give clear and cogent testimony regarding execution, one should require very strong circumstances to repel the effect of such testimony. It will not do to talk airily about circumstances of suspicion. It is no doubt true that a person, who takes it upon himself to dispute the genuineness of a will, cannot be expected to prove a negative in many cases. At the same time, the difficulty in which on his own seeking, he places himself will not relieve him of the burden—it may be a heavy burden—of displacing the positive testimony on the other side. If he rests his case on suspicion, the suspicion must be a suspicion inherent in the transaction itself which is challenged, and cannot be a suspicion arising out of a mere conflict of testimony. We are constrained to say that in dealing with the present case, the learned Judge has altogether failed to apply these principles which are as much principles of law as of sound commonsense. The first circumstance to which he refers is that there was no occasion or adequate motive for making this will. If, as a matter of fact, there is evidence in a case that a will was actually made, one fails to see how it is relevant to inquire whether there was any occasion or motive for making the will. If such a test were to be applied in every case, no will could probably be proved at all. What may be an adequate motive to one man may not be so to another, and it can never be a safe or sound rule to start speculating as to what might have been the motive which impelled

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the testator to make the alleged will, provided there is evidence—and the Court has every right to call for such evidence and must, in fact, call for it—that the will was in point of fact executed as required by law. The reason why the learned Judge in this case thinks that there was no occasion or motive to make this will is that the husband of the testatrix was an old man who had only a few more years to live and that, even if there was no will, the property was ultimately sure to devolve on the death of her husband on the two young men to whom she was making a bequest by this will. With all respect to the learned Judge, one fails to appreciate an argument of this kind. It is then suggested that the husband was anxious to secure the property from the hands of creditors and was putting up a forged will for that purpose. This, again, is an argument which cannot be followed. In the first place, by merely creating a will it was not possible to create a title to the property which the will purported to dispose of. Secondly, this assumes that the husband was a party to this document. On this supposition it was in fact the husband who would be taking the main part in bringing about the will by which the creditors were to be deprived of the property. This is, however, directly contrary to the case which the petitioner for revocation made. His case was that the husband knew nothing about the will till long after the probate proceedings had started. The way the learned Judge has proceeded to deal with this case illustrates the danger of disregarding the high road of commonsense and deviating into the dubious bye-paths of speculation. The theories he started are mutually destructive of each other. They are not consistent at all, and it is hardly any use saying, as Dr. Basak tried to say, that the answers which were suggested on behalf of the executor, Kristo Gopal, to such theories were inconsistent in their turn. That was bound to be so. The fault did not certainly lie with Mr. Bhattacharjya's client, who was called upon to meet

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hypothetical cases for which no foundation had been laid in the evidence. Another circumstance on which the learned Judge relies is want of registration. That, again, is not such a circumstance as must *ipso facto* tell against the genuineness of the will. The mere fact that a will is not registered does not make it improbable, much less impossible, that the will was executed, and yet, as their Lordships of the Judicial Committee point out, an improbability must approach very nearly to an impossibility, in order that it may be sufficient to outweigh the positive evidence of execution on the other side. The explanation which is given as to why the will is not registered seems to be quite reasonable. If, as we hold, it was the fact that the husband was concerned in the preparation of the will and had signed the name of his wife on her behalf and with her assent, the husband might well have suggested that there was no occasion or necessity to register it, seeing that there would be no other party likely to come forward to challenge the will. The learned Judge refers again to the conduct of Bansi as raising "improbabilities", as he put it, in the way. Bansi's conduct is no doubt difficult to explain in certain matters: for example, the attitude which he has taken up in these proceedings. At one stage he suggests that he wanted to save the property from his creditors. That is on the basis that the property came to him from his father. At another stage he comes forward to oppose the grant of probate, which is rather inconsistent with his attempt to save the property by setting up this will. Then, again, it is his own evidence that he had sold half share in the property, *viz.*, No. 2, Rajendra Nath Mallik Street, to Balai for Rs. 13,000: Did he or did he not want to stand by this transaction? At one stage it appeared that Bansi and Balai were allies, both having applied for revocation of probate: at another stage, it would seem that Bansi was out to deprive Balai of this property as well. One really fails to see how Bansi would stand to gain by getting

rid of the will. In that case, the property would remain with Balai, assuming of course that Bansi derived title from his father. On the other hand, if by setting up this will, the property was sought to be taken away from Balai, Bansi would be faced with the prospect of having to refund the purchase-money he had pocketed. We have referred to all this for the purpose of illustrating the danger one is apt to fall into, if one is to embark on speculations as against positive evidence. The learned Judge then goes on to refer to the delay in the filing of the application for probate. There was no doubt some delay. The will was executed on January 4, 1928, and the testatrix died on the 7th February. The application for probate was not made till April 9, 1929. The propounder of the will gave an explanation of this delay in his evidence, and we see no reason why this explanation should not be accepted. We do not think it is necessary to refer to the various other circumstances to which the learned Judge refers, except to the fact that Debendra Ghosh was not examined. But from certain letters which have been exhibited, *viz.*, exhibits 7 and 7(1), letter written by Kristo Gopal to Debendra Ghosh, which were produced by the respondents, it is clear that Debendra is now siding with the respondents who would not otherwise have got hold of these letters. It is not at all surprising, therefore, that Debendra could not be produced by Mr. Bhattacharjya's client. But having regard to the fact that all the attesting witnesses were examined, we do not see that the mere non-examination of the writer by itself is such a circumstance that one must hold from this alone that the story told by the attesting witnesses is unworthy of credit.

Lastly, the learned Judge seems to think that the terms of the will are such as to make the will an "inofficious" document. Why he says so, it is difficult to understand. Admittedly the two persons to whom the properties were given were objects of the testatrix's love and affection, and it is also mentioned

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in the will itself that the testatrix had other properties regarding which she was not making any provision and which would accordingly pass to her husband. It cannot be said, therefore, that while benefiting her husband's nephews, she had omitted to make any provision for her husband. By the will, the husband was also given a right of residence in the dwelling house in the town of Calcutta. We cannot, therefore, agree with the learned Judge that "looking "at the composition and circumstances of the family "and the relationship existing between the different "members thereof", as he puts it, the terms of the will were not natural or reasonable. On the other hand, it might have been a matter of comment on the evidence adduced by the applicant for revocation himself, if the lady had not made any provision for her husband's nephew whom she and her husband both loved so dearly. Giving the matter our very best consideration, we are of opinion that the judgment of the learned Judge cannot be supported and ought to be set aside. We hold that the will was duly executed and attested, and no sufficient cause has been made out for revoking the grant of probate already made. The appeal is, accordingly, allowed with costs in both Courts. We assess the hearing-fee in this Court at five gold *mohurs*.

COSTELLO J. I agree.

Appeal allowed.

G. S.