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himself of the right to redeem. In my opinion it would be inequitable to hold that he had been deprived of that right by the illegal action taken by the respondents. I concur in the order proposed.

Appeal decreed.

1901
July 10.

Before Mr. Justice Banerji and Mr. Justice Chamier.

LACHHO BIBI (DEFENDANT) *v.* GOPI NARAIN AND OTHERS (PLAINTIFFS).*

Will—Application for probate—Plea of unsoundness of mind on the part of the testator—Burden of proof.

If a party writes or prepares a will under which he takes a benefit, or if any other circumstances exist which excite the suspicion of the Court, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved the contents of the will; and it is only where this is done that the *onus* is thrown upon those who oppose the will to prove fraud, or undue influence, or whatever they rely on to displace the case for proving the will. *Barry* v. *Butlin* (1), *Fulton* v. *Andrew* (2), *Tyrrell* v. *Painton* (3) and *Farrelly* v. *Corrigan* (4) referred to.

THE facts of this case sufficiently appear from the judgment of Chamier, J.

Pandit *Moti Lal Nehru*, Babu *Durga Charan Banerji*, Pandit *Mohan Lal Nehru* and Babu *Lalit Mohan Banerji* for the appellant.

Pandit *Sundar Lal*, Pandit *Madan Mohan Malaviya* and Dr. *Satish Chandra Banerji* for the respondents.

CHAMIER, J. (BANERJI, J., concurring).—This is an appeal from an order of the District Judge of Cawnpore, granting probate of the will, dated July 13th, 1899, of Lala Gaya Prasad, who died at Cawnpore during the night of 15th-16th July, 1899.

At the time of his death Gaya Prasad was about 52 years of age. He was a member of the Municipal Board of Cawnpore, and one of the most prominent business men of the town. By his own abilities or good fortune he had acquired property of the value of fifteen lakhs of rupees or more. He had suffered for

* First Appeal No. 41 of 1900, from an order of J. Sanders, Esq., District Judge of Cawnpore, dated the 3rd April 1900.

(1) (1838) 2 Moo. P. C. 480.
(2) (1875) L. R. 7 H. L. 448.
(3) (1893) L. R 1894 P. D. 151.
(4) (1899) L. R. 1899 A. C. 563.

many years from diabetes and spermatorrhœa, for which he had been treated by Dr. Hem Chandra, and latterly by Dr. Mahendra Nath Ganguli, but from the month of February, till the day before his death, he does not seem to have received a professional visit from any medical practitioner. His only son, Beni Madho, died on March 1st, 1899, after which he seems to have somewhat curtailed his business. Towards the end of March, 1899, he went to Benares to visit his *guru* or spiritual adviser—a celebrated ascetic named Swami Bhaskaranand—to whom he was much attached. On or about July 5th he again went to Benares to see his *guru*, who was reported to be suffering from cholera. At 9-10 A.M. on July 8th he telegraphed from Benares to Cawnpore to the witness Nanhe Mal—"Do not prepare will yet." At 1-37 P.M. on the same day he telegraphed to Nanhe Lal—"My previous telegram cancelled—prepare the will;" and on the following morning at 6-53 A.M. he sent a third telegram to Nanhe Mal—"Do not prepare will yet, Swamiji in same state." He sent also other telegrams about the Swami's health and about some pomegranates which he required for the Swami. The Swami died on July 9th, and on that or the following day Gaya Prasad returned to Cawnpore. On July 13th he signed the will now in question, and after getting four witnesses to attest his signature, he took it to the office of the District Registrar, and there deposited it in a sealed cover as his will under the provisions of section 42 of the Registration Act. Dr. Ganguli visited Gaya Prasad on July 15th, the day before his death, found him suffering from palpitation of the heart and prescribed for him. Gaya Prasad said that as that day was not an auspicious day he would have the prescription made up the next day. Early the next morning he was found dead on the floor in his house. The body was cremated within a few hours, and as there was no *post mortem* examination, the exact cause of his death cannot be ascertained.

The testator left surviving him—(1) his first wife, who is the appellant; (2) Musammat Ram Piari, the widow of his son Beni Madho; (3) Nanak Chand, the husband, (4) Kasi Prasad, the son, and (5) Musammat Savitri, the daughter of a deceased sister; (6) another sister, whose name has not been mentioned; (7)

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her son Gopi Narain *alias* Puttan Lal; (8) a third sister, named Musammat Mullo, and (9) her son Ram Kishen.

The testator's second wife died many years ago, a few months after the birth of her son Beni Madho.

The will in question is a lengthy document, consisting of 39 clauses written upon 12 sheets of foolscap paper, each of which is signed at the foot by the testator in the Mahajani character. It may be summarised as follows:—

[Here follows a summary of the contents of the will.]

The application for probate was made on August 25th, 1899, by the respondents Puttan Lal and Kunj Behari Lal, Sheo Prasad, Bal Mukand, Pirbhu Dyal and Sri Narain, the executors named in the will. The appellant lodged a caveat on September 16th, and a few days later filed a petition setting forth the grounds on which she objected to the grant of probate. They are shortly as follows:—That Gaya Prasad had for many years suffered from diabetes of a serious type, by which his constitution had been undermined, and his physical strength enfeebled; that he sustained such a severe shock by the death of his only son Beni Madho that his mind was affected, and thereafter his habits, ideas and general bearing became those of a person of unsound mind; that he also became subject to insane delusions, in particular to the delusion that the appellant had caused his son's death by witchcraft; that these delusions were fostered by designing persons, and so preyed upon his mind that he determined to commit suicide; that he was not possessed of testamentary capacity at the date of the will, and that the will was executed under the influence of Puttan Lal and Kunj Behari.

The learned District Judge, as we read his judgment, was of opinion that the testator must be presumed to have been of sound mind, and that on proof of the *factum* of the execution of the will, nothing further was required of the propounders of it. He considered that the will was not of an unusual nature, and that allegations made by the present appellant were not sufficient in themselves to raise suspicion *as to the bona fides of the propounders of the will.* Treating the burden of proof as lying entirely on the present appellant, the learned Judge found that she had failed to prove that the testator had committed suicide, or

that he was subject to delusions, or was otherwise of unsound mind. He therefore pronounced for the will, but, under section 78 of the Probate Act, he directed that the executors taking out probate should give certain security. The respondents have filed a cross appeal against the order requiring security.

Mr. *Moti Lal* on behalf of the appellant contended that the District Judge was wrong in throwing the *onus* of proof entirely upon the appellant. He contended that the *onus* lay, in the first place, upon the propounders of the will to prove that it was the last will of a free and capable testator, and that they had failed to discharge that *onus*. Next he contended that the appellant had proved that after the death of his son the testator had become subject to insane delusions, the chief of which was that the appellant had caused the son's death by witchcraft, and as those delusions affected the disposition of his property, the will could not stand; and that it was also proved that the testator was otherwise of unsound mind, but that if the appellant had not proved the existence of insane delusions on the part of the testator, or that he was of unsound mind, she had, at least, proved circumstances which should excite the suspicion of the Court, and shift the *onus* of proof again to the propounders of the will, who were then bound to prove affirmatively that the testator was competent in mind, and knew and approved the contents of the will. Mr. *Moti Lal* contended that the evidence adduced by the propounders of the will fell far short of this, and in particular that they had failed to show that the testator knew and approved of the bequests to Puttan Lal and Kunj Behari. As regards the *onus* of proof in cases of this kind the rules of law are quite clear. The first rule is, that "the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator." The second rule is that "if a party writes or prepares a will under which he takes a benefit, or if any other circumstances exist which excite the suspicion of the Court, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved the contents of the will, and it is only

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where this is done that the *onus* is thrown on those who oppose the will to prove fraud or undue influence, or whatever they rely on to displace the case for proving the will." See *Barry* v. *Butlin* (1), *Fulton* v. *Andrew* (2), *Tyrrell* v. *Painton* (3) and *Farrelly* v. *Corrigan* (4). With regard to the nature of the evidence required in such cases to establish knowledge of, or assent to, the contents of a will, Parke, B., in the case first cited, said:—"In all cases the *onus* is imposed on the party propounding the will; it is in general discharge by proof of capacity, and the fact of execution, from which knowledge of, and assent to, the contents are assumed * * * * Nor can it be necessary that in all cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for reading over the instrument. They form no doubt the most satisfactory, though not the only satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased." See also *Mitchell* v. *Thomas* (5). On the other hand, there is no rigid rule that if the Court is satisfied that a testator of a competent mind has read his will, or had it read to him, and has thereupon executed it, all further inquiry is shut out (see *Fulton* v. *Andrew*, per Lord Hatherley).

[The judgment then went on to discuss the facts of the case, and ultimately affirmed the decision of the District Judge granting probate and dismissed the appeal. Only so much of the judgment is set forth as is material for the purposes of the present report.—ED.]

1901
July 19.

Before Mr. Justice Banerji.

SADDO KUNWAR (JUDGMENT-DEBTOR) *v.* BANSI DHAR (DECREE-HOLDER).*

Execution of decree—Sale in execution—Purchase by decree-holder—Application for amendment of sale certificate—Appeal.

A decree-holder applying for execution of his decree asked for a 2 annas 8 pies share belonging to his judgment-debtor to be put up to sale. This

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* Second Appeal No. 1421 of 1900 from a decree of J E. Gill, Esq., District Judge of Allahabad, dated the 14th September 1900, reversing a decree of H. David, Esq., Subordinate Judge of Allahabad, dated the 2nd October 1899.

(1) (1838) 2 Moo. P. C. 480.
(2) (1875) L. R., 7 H. L., 448.
(3) (1893) L. R., 1894 P. D., 151.
(4) (1893) L. R., 1899 A. C., 563.
(5) (1847) 6 Moo. P. C. 137.