JAGRANI KUNWAR AND OTHERS (DEFENDANTS) *v.* DURGA PRASAD (PLAINTIFF).

P. C.*
1913
November, 3, 4.
December, 3.

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.]

Will—Execution and attestation of will—Proof of genuineness of will—Status of attesting witnesses—Will natural, reasonable and proper in its terms—Presumption of will being genuine—Grounds of suspicion not valid—Admission of additional evidence by appellate Court—Section 568 *of Civil Procedure Code*, 1882.

In the case of a will reasonable, natural, and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demand a rigorous scrutiny of documents of which the opposite can be said, namely that they are unnatural, unreasonable or tinged with impropriety.

On the question whether a will made by a Hindu in which he left all his property, movable and immovable, after the death of his widow, to his sister's son (one of the appellants) to the entire exclusion of the respondent (a remote relation), was genuine as held by the Subordinate Judge, or a forgery as held by the Court of the Judicial Commissioner, there were concurrent findings of both Courts that the testator had been for years at enmity and on the worst of terms with the respondent, but had regarded the appellant with affection and treated him as his son. The will was found to have been duly executed, and properly attested by respectable servants in the testator's house whom it was natural to employ for that purpose.

Held that the will was in every respect a natural one, and in accordance with the testator's feelings and tenor of life, and the presumptions of law were in favour of its being maintained.

A comment by the Court of the Judicial Commissioner, which regarded the will with suspicion, to the effect that "the witnesses might have been of a better class" had no force except upon something on a much higher level than mere suspicion, namely, proof which would thoroughly satisfy the mind of a court that those persons had committed both forgery and perjury.

Choley Narain Singh v. *Ratan Koer* (1) per Lord WATSON, followed.

Another ground of suspicion was "that the paper on which the will was written appeared to be old instead of fresh," which was supported by proof that the paper was official paper in general use, together with evidence that some other people had been in the habit of having forms which they signed in blank, and forms were produced signed by people other than the testator, and with none of which he had anything to do.

Held that such evidence was inadmissible as being not relevant to the case, and should not have been admitted.

Held further that the course followed by the Court of the Judicial Commissioner during the hearing of the appeal in sending for and (purporting to act under section 568 of the Civil Procedure Code, 1882) admitting additional evidence (proceedings of the Municipal Board at Lucknow) to discredit one of

* *Present*:—Lord SHAW, Lord MOULTON, Sir JOHN EDGE and Mr. AMEER ALI.

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

1913

JAGRANI KUNWAR v. DURGA PRASAD.

the witnesses on a particular point, without calling him and affording him an opportunity of making an explanation of the matter, and on the ground that his evidence appeared untrue on that point disbelieving all the rest of his testimony as to the will, was an improper procedure and not in accordance with section 568 of the Code. Their Lordships declined to conclude, in the absence of his own evidence on the point, that the rest of his testimony, otherwise quite unimpeachable, was perjury.

APPEAL from a judgement and decree (11th January, 1909) of the Court of the Judicial Commissioner of Oudh, which reversed a judgement and decree (4th February, 1908) of the Court of the Subordinate Judge of Hardoi.

The main question for determination on this appeal was whether or not a will executed by one Kunwar Narindra Bahadur on the 21st of October, 1904, was a forged document.

The Subordinate Judge held that the will was genuine. The Court of the Judicial Commissioner (Mr. E. CHAMIER, Judicial Commissioner, and Mr. W. TUDBALL, Second Additional Judicial Commissioner) on appeal came to the conclusion that the will was forged, and set aside the judgement and decree of the Subordinate Judge.

The facts of and the evidence in the case will be found sufficiently stated in the judgement of their Lordships of the Judicial Committee.

During the argument in the Court of the Judicial Commissioner, that Court sent for and admitted in evidence certain proceedings of the Municipal Board of Lucknow which purported to show that one Chaudhri Nasrat Ali, a witness who had stated in his evidence that he had signed the will at Sandila as an attesting witness on the 20th of April, 1905, had on that day attended a meeting of the Municipal Board at Lucknow which is 30 miles distant from Sandila; but the Court did not call on Nasrat Ali to give evidence.

On this appeal—

De Gruyther, K. C., and *Amiend Jackson*, for the appellants, contended as to the will executed by Narindra Bahadur on the 21st of October, 1904, that the evidence on the record established its genuineness. The fact as found by the Subordinate Judge that the respondent Durga Prasad and the testator were on the worst of terms created a strong antecedent probability that the testator should desire to exclude him from the succession. On the other hand the appellant Raj Bahadur was always treated by Narindra

Bahadur as his son, and it was only natural that he should provide for him by will as he could not succeed on an intestacy. As to the position of Raj Bahadur in the testator's household, and the bad terms on which the respondent and the testator lived, there were concurrent findings of both Courts against the respondent. The genuineness of the signature of Narindra Bahadur to the will was in the opinion of the Subordinate Judge proved by overwhelming evidence. The writer and the attesting witnesses were all respectable servants of the testator employed in his house, and it was most natural that they should have performed the services they did in the preparation and attestation of the will. They stood the lengthy cross-examination well, and were believed by the Subordinate Judge who saw them and heard them give their evidence. He also believed Nasrat Ali as being an independent witness with no sort of interest in the case. Reference was made to *Tacoordeen Tewarry* v. *Ali Hossein Khan* (1) and *Shama Charn Kundu* v. *Khettromoni Dasi* (2).

It was also contended that in admitting additional evidence on appeal the Court of the Judicial Commissioner had acted improperly, and in a manner not warranted by the Civil Procedure Code, 1882. Section 568 of that Code, and the case of *Kessowji Issur* v. *Great Indian Peninsula Railway* (3) were referred to. The appellate Court in admitting the evidence which was used to discredit that of Nasrat Ali, one of the attesting witnesses to the will, without giving him an opportunity of being heard in explanation, had seriously prejudiced the appellants. Such additional evidence, moreover, did not warrant the conclusions drawn from it.

Ross, K. C., and *B. Dube* for the respondent contended, mainly on the grounds taken in the judgements of the Court of the Judicial Commissioner (which are stated and dealt with in the judgement of their Lordships of the Judicial Committee), that that Court had rightly held that the appellants had failed to discharge the onus of proving that the will of Narindra Bahadur was genuine. It was submitted that a strong case for suspicion was made out by the Judicial Commissioner's Court on the evidence. The signature to the alleged will was spoken to and recognized by many of the

(1) (1874) L. R., 1 I. A., 192 : 13. B. L. R., 427.
(2) (1899) I. L. R., 27 Calc., 521 (528) : L. R., 27 I. A., 10 (12).
(3) (1907) I. L. R., 31 Bom., 881 (390) ; L. R., 34 I. A., 115 (122).

1913

JAGRANI KUNWAR v. DURGA PRASAD.

witnesses as being that of the testator and it was contended that it was at least possible that the suggestion made by the respondents, that it was written on a blank piece of paper, was correct, and the body of the will afterwards forged on the paper. The Court of the Judicial Commissioner favoured that supposition; but by the concurrent findings of both Courts as to the enmity between Durga Prasad and the testator, and the affection of the testator for Raj Bahadur, whom he treated as a son, the Judicial Commissioner's Court, as well as the Subordinate Judge certainly appear to admit the probability that the will (though the appellate Court thinks it a forgery) is very much as the testator himself would have desired it to be.

As to the alleged improper admission of additional evidence on appeal, it was admitted by the Judicial Commissioner's Court without any opposition on the part of the appellants, who might therefore be considered to have consented to such additional evidence being admitted, and *Jagarnath Pershad* v. *Hanuman Pershad* (1) was referred to. This evidence showed that the statements as to his attestation made by Nasrat Ali, an important witness for the appellants, upon whose evidence as to the disputed will the Subordinate Judge strongly relied, could not be true; and the appellants made no attempt to contradict or explain the additional evidence.

Counsel for the appellants were not called upon to reply.

1913, December 3rd:—The judgement of their Lordships was delivered by Lord SHAW.—

This is an appeal from a judgement and decree of the Court of the Judicial Commissioner of Oudh, dated the 11th of January, 1909. This partly affirmed and partly reversed a judgement and decree, dated the 4th of February, 1908, of the Court of the Subordinate Judge of Hardoi.

The only question raised at the Bar of the Board was whether a will executed on the 21st of October, 1904, by one Kunwar Narindra Bahadur is or is not a genuine will.

Its provisions are substantially these: That after his death his widow should be proprietor of his estate in the Kheri district, and should have absolute power over the estate in the Hardoi district

(1) (1909) I. L. R., 36 Calc., 833 ; L. R., 36 I. A., 221.

and hold proprietary possession over all his estate. By the third clause of the will it was provided that after her death "Raj Bahadur, my sister's son, shall be the absolute owner of all my property, movable and immovable, of every description." Other provisions, including certain annuities to the testator's brother-in-law, occur in the will.

Ex facie it was duly executed and properly attested, and the witnesses are, first, his diwan, or general agent; secondly, a servant, who appears to have had charge of the wardrobe and a certain power of supervision, including that of making purchases; and lastly, his treasurer, or confidential clerk. In the words of the Subordinate Judge:—

"The scribe of the will is the mukhtar, and the three attesting witnesses are the diwan, the treasurer, and the darogha of the late Kunwar Narindra Bahadur, who were his respectable private servants, and used to be always in the house, as is the case with Indian gentlemen in the position of the Kunwar."

The domestic position of the testator and the parties was this: Durga Prasad, the respondent, was remotely related to the testator Narindra, and for years had been on terms of enmity with him. Details of this are given, as, for instance, that they had not been on "eating and visiting terms," and that there "used to be no exchange of presents during marriages." Both the Courts below are clear upon the subject, the Judicial Commissioner's opinion being so strong as this, that "the ill-feeling, however, which existed between the two men was quite sufficient to cause Narindra Bahadur to desire that his property should not go to the plaintiff or his branch of the family."

On the other hand, the appellant, the testator's sister's son, was treated with regard and affection by the testator, and upon this subject also both Courts have no doubt. In the language of the judgement of the Judicial Commissioner:—

"In respect of the feelings which existed in Narindra Bahadur's mind towards the defendant, Raj Bahadur, there can also be but little doubt . . . . Narindra Bahadur treated his sister's son as if he were his own son in every way . . . . . This feeling of affection towards his sister's son by a childless Hindu is fairly common; and, after full consideration of the evidence on the point, I have no hesitation in holding that Narindra Bahadur did look upon defendant No. 2 more or less in the light of a son. It would, therefore, not have been a matter for surprise if he had made a will benefiting the latter."

This being the state of the relations of the parties to the

1913

JAGRANI KUNWAR v. DURGA PRASAD.

testator, it stands conceded that the will now challenged was in every respect a natural will, and in accord with his feelings and tenour of life. Granted, therefore, that its execution is proved by anything like reasonable evidence, the presumptions of law are in favour of its being maintained. The Subordinate Judge, after a close analysis of all the evidence, affirms its validity, and that without hesitation. Every kind of challenge was made of it,—of its execution, of the status of the witnesses, of the health of the testator, and so on. But at the end of the long ligitation upon the subject it was admitted by Mr. Ross, the learned counsel for the respondent, in his clear and candid argument at their Lordships' Bar, that the signature was genuine, nor could he venture to disturb what he admitted were concurrent findings on the subject of the appellant's position in the testator's household being equal to that of a son, nor upon the point of the estrangement between the testator and the respondent.

This makes an end of a considerable portion of the judgement of the Judicial Commissioner, which treats the signature as suspect. The grounds of suspicion which that Court, notwithstanding its view as to the complete propriety and naturalness of the will itself, nevertheless attaches to the execution, are three-fold.

1. In the first place, it is maintained that the witnesses might have been a better class. Perhaps they might; but they were just those witnesses that the testator had about him; and a comment of this character has no force except upon something on a much higher level than mere suspicion, viz. proof which would thoroughly satisfy the mind of a Court that these persons had committed both forgery and perjury. In the case of a will, reasonable, natural and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demand a rigorous scrutiny of documents of which the opposite can be said, namely, that they are unnatural, unreasonable, or tinged with impropriety. Their Lordships venture to repeat the judgement of Lord WATSON in *Chotey Narain Singh* v. *Ratan Koer* (1) bearing upon the point of an attestation by a person's own servants and dependants. As has been shown, the execution of this will

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

was not only not improbable, but was in fact probable, The words of Lord WATSON apply to this case, therefore, *a fortiori*:—

"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. To give effect to the argument pressed upon this Board by the appellants, which seems to have found favour in the Court of first instance, would be equivalent to holding that the will of a Hindu gentlemen, attested by his own servants and dependants, must be held to be invalid, unless it is shown that the testator, at the time assigned for its execution, was placed in such circumstances that he could not secure the attendance of persons of a higher rank. That is proposition which verges too closely on the absurd to be seriously entertained. There may be cases in which attestation by servants only is an important element to be taken into account in considering whether a will has been validly executed—cases, for example, in which there is reasonable ground for suspicion that the will is not the voluntary act of the testator, but has been procured by the undue influence of members of his household. This case does not, in the opinion of their Lordships, belong to that class."

This point, however, is at an end because the execution and attestation are proved.

2. The second ground of suspicion in the minds of the Judicial Commissioners was that the paper upon which the will was written appeared to be old instead of fresh, and proof was given that the paper was official paper in general use, together with evidence that some other people had been in the habit of having forms or sheets which they signed in blank. In the language of the judgement of the Judicial Commissioner:—

"That men of the deceased's position in life do sign blank forms and blank sheets, especially for the purpose of vakalatnamas being drawn up thereon for use in cases in the subordinate district courts, is not an unheard-of thing."

Various forms were produced, signed by people other than the testator, and with none of which the testator had anything to do. In their Lordships' opinion, such evidence should not have been allowed to influence the mind of a Court. It should not have been admitted, as it was not relevant to the present cause.

3. The third matter appears, however, to their Lordships to be more serious. By section 568 of the Code of Civil Procedure it is provided that if "the appellate Court requires any document to be produced, or any witness to be examined, to enable it to pronounce judgement, or for any other substantial cause, the

1913

JAGRANI KUNWAR v. DURGA PRASAD.

appellate Court may allow such evidence to be produced or document to be received or witness to be examined." In the course of the hearing of this appeal by the Judicial Commissioners, a question was asked as to the additional attestation of the will, which purported to have been made on the 20th of April, 1905, (that is, on a date about 6 months after execution) by Muhammad Nasrat Ali. This gentleman appears from the record to be a person of standing, the judgement mentioning that he is the Honorary Secretary or Assistant Secretary of the British Indian Association. He is also a member of the Municipal Board of Lucknow, Lucknow being thirty miles by train from Sandila, where the will was ordered to be registered. On this date, 20th of April, a meeting of the Municipal Board had been held, followed by a special meeting, both meetings being early in the day and being of some duration. Inquiry was made, and it was proved before the Judicial Commissioners that Nasrat Ali was present at these meetings. If this was so, then, it was argued, he could not at the same hours of the 20th April have been in Sandila.

Nasrat Ali had been examined before the Subordinate Judge, but nothing had been asked of him on the point, and he was not examined by or before the Judicial Commissioners. Their Lordships disapprove of the procedure which has permitted doubt to be thrown upon his evidence in the course of procedure taken on appeal by the Judicial Commissioners, "to enable them to pronounce judgement," without the witness whose testimony is impugned having been afforded the opportunity of clearing up the mistake and having been convened for that purpose. No witness, whatever his standing, would be safe from adverse judicial comment under such procedure. It may quite well be that Nasrat Ali could have clearly explained the whole point of difficulty, and their Lordships would be slow to conclude, in the absence of his own evidence on the point, that the rest of his testimony, otherwise quite unimpeachable, was perjury.

Fortunately, there is no necessity for further procedure or expense in regard to the matter, for the case that the Board is now dealing with is a case in which the signature of the will, whether the deed was additionally attested on the date stated or not, is proved and is properly attested. In these circumstances their

1913

JAGRANI KUNWAR v. DURGA PRASAD.

Lordships do not doubt that the judgement of the Subordinate Judge should be restored.

They will accordingly humbly advise His Majesty to that effect. The respondent will pay to the appellant the costs of this appeal, and in the Courts below.

Appeal allowed.

Solicitors for the appellants:—*T. L. Wilson & Co.*

Solicitors for the respondent:—*Barrow, Rogers & Nevill.*

J. V. W.

SHER BAHADUR (PLAINTIFF) *v.* GANGA BAKHSH SINGH AND OTHERS (DEFENDANTS).

*P. C. 1913 *August*, 1, 4, 5. *December*, 10.

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow].

Will—Construction of codicil—Bequest creating succession of life interests to illegitimate son and his (aulad) *issue—Whether* "aulad" *includes illegitimate issue—Marriage of son by birth a Muhammadan to Hindu caste ladies—Intention of testator—Muhammadan brought up as orthodox Hindu.*

The question in this appeal was as to the construction of a codicil to the will of the late Maharaja of Balrampur who was a Hindu of the Chattri caste, by which he purported to make provision for *J. B.* his son by a Muhammadan mistress, who, as held by the Courts below, was by birth a Muhammadan. He afterwards, however, became as far as was possible a Hindu. The appellant (plaintiff) was the eldest son of *J. B.* by a Muhammadan woman, and the second, third and fourth respondents were his brothers, and there were concurrent findings of both Courts in India that there was no valid marriage between *J. B.* and their mother and that they were consequently illegitimate. The first respondent was the son of *J. B.* by a Hindu lady of the Chattri caste with whom he had admittedly gone through a marriage according to the strict Hindu rites; and when that lady died his father got him married to another lady of the same caste. On the death of *J. B.* in 1899 the first respondent obtained possession of the property in suit, and the appellant sued for it, the question being whether the appellant was an "issue" of *J. B.* within the meaning of the word "*aulad*" as used in the codicil, and as such entitled to inherit *J. B's* property. The first respondent contended that the appellant being illegitimate could not take under the terms of the codicil; that *J. B.* had been a Hindu from his boyhood to his death, and that he (the first respondent) being the only son of the first Hindu marriage which was a valid one, was the heir of his father, and, on the true construction of the codicil, entitled to the property in suit. By the codicil, dated the 15th of March, 1878, the testator, after reciting that his son *J. B.* "being not born of Khas Mahal, was not capable of the *gaddinashini* and the proprietorship of the *riasat*" continued:—"But he also being born of my loins it is incumbent on me that such means be provided as would enable him and his issue (*aulad*) to support themselves well and with respect" . . . . . Accordingly

Present:—Lord ATKINSON, Lord SHAW, SIR JOHN EDGE and Mr. AMEER ALI.