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Shidharaj Bhojbaj v. Dari. view of the provisions of sections 74 and 76 of the Bombay Land Revenue Code, read with section 90 of the Indian Registration Act. Accordingly the appeal must be dismissed with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

1920.

September

ADITRAM GIRDHAR AND ANOTHER (ORIGINAL PETITIONERS), APPELLANTS v. BAPULAL BECHARLAL AND ANOTHER (ORIGINAL OPPONENTS), RESPONDENTS.

Will—Revocation—Will in testutor's possession—Will not forthcoming on testator's death—Presumption of revocation.

When a person, who is known to have executed a will, and to have had that will in his possession, dies and the will is not found after his death, a presumption arises that he has revoked the will during his lifetime.

Allan v. Morrison(1), relied on.

Anwar Hossein v. Secretary of State for India (2), disapproved.

FIRST appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad.

The facts material for the purposes of this report are sufficiently stated in the judgment of his Lardship the Chief Justice.

M. H. Mehta, for the appellants.

G. S. Rao, for respondent No. 1.

G. N. Thakor, for respondent No. 2.

MACLEOD, C. J.:—The applicants propounded the last will of one Jaiti who died at Kapadwanj on the 11th April 1918. It is admitted that the deceased executed

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^{(1) [1900]} A. C. 604.

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a will on the 25th April 1916. That will was registered and was left for some time with the applicants, but about one and a half months before the deceased died she took back the will from the applicants, and after her death the will was not to be found. The 1st opponent endeavoured to set up another will purporting to have been executed by Jaiti. The Trial Court has found against that will and no appeal has been filed against that decision. The Court also came to the conclusion that the will of the 25th April 1916 must have been revoked as it could not be found. The latest English case on the presumption that will arise when a person dies who is known to have executed a will, and to have had that will in his possession, and the will is not found after his death, is Allan v. Morrison^(a). The head note says: "where a will duly executed, traced to the testator's possession and last seen there, is not forthcoming on his death, the presumption is that it was destroyed by himself. To rebut it there must be sufficient evidence that it was not destroyed by the testator animo revocandi". There is no evidence in this case at all to rebut the presumption that would, therefore, arise according to that authority from the fact that after Jaiti's death the will could not be found.

The same question arose in Anwar Hossein v. Secretary of State for India, where it was held, following Finch v. Finch, that the presumption of revocation does not arise unless there is evidence to satisfy the Court that the will was not in existence at the time of the testator's death. Allan v. Morrison was not referred to, but in that case, their Lordships said "In Finch v. Finch the Court inferred from the facts proved that the will was in existence at the date of the testator's death," and so they considered that

^{(1) [1900]} A. C. 604.

^{(1904) 31} Cal. 885.

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that case with others which had been cited had nothing to do with the one before them. Therefore, with due respect, I should be inclined to differ from the view taken by the Court in Anwar Hossein v. Secretary of State for India⁽¹⁾ and I should prefer to say that the facts found in that case rebutted the presumption that the will had been revoked rather than say that they prevented the presumption from arising.

However that may be, in this case the only facts that have been proved, are that the testatrix at some time during the six weeks before she died got back the will and other papers from the applicants, and when she died the will was not found amongst her papers. There was nothing therefore in the evidence from which it could be inferred that the will was in existence at the date of the testator's death. There was evidence that she had had disputes with the applicants, and the fact that she called back the will from their possession lends considerable amount of support to the view that she did so with the intention either of revoking it or of making a new will. I think, therefore, that there is no reason why we should disturb the finding of the learned District Judge who dismissed the application. The appeal is dismissed. The applicants were entitled to come to Court to get a decision on this somewhat doubtful question, and therefore their costs and the costs of opponent No. 2 both here and in the Court below will come out of the estate. The opponent No. 1 will bear his own costs throughout.

FAWCETT, J.:—I would add one circumstance that seems to me to support the presumption of revocation of this will which has been referred to by the learned Chief Justice. It appears from Exhibit 33 that, on the 23rd March 1918, the testatrix passed a document in

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favour of the petitioner No. 1, under which she gave up possession to him of a house already gifted by her to him, though she had a right to occupy it for some time longer under a lease that had been passed to her by the petitioner No. 1. In that document it is recited that "this lease did not expire till the 27th April 1918. But now-a-days my health does not continue to be well. I am, therefore, required to go to my original native village Davada in Nadiad Taluka; after having gone there, I am not confident as to whether I may live or I may not live. Therefore in order that you may not have to encounter any objection to your recovering possession of the house taken afterwards, I pass to you this document." This was executed only about a fortnight before her death, and after she had, according to the evidence of petitioner No. 2, obtained possession of the will. Accordingly, if she had not revoked the will, and if it was still in her possession, and if she had the feeling which she expressed in Exhibit 33 as to her state of health, and desired to remove any objections that might be taken to petitioner No. 1's acting upon the documents passed by her in his favour, the probability is that she would have given him the will. Accordingly the fact of her not having done so seems to me to support the presumption that she had as a matter of fact revoked the will; and in view of this it is unnecessary to decide whether opponent No. 1 invaded her house after her death, and so obtained possession of her papers, in which case he might of course have destroyed the will if it still existed. The learned District Judge has not come to a definite finding on this question, and the evidence as to it is conflicting. But it cannot, I think. be held proved that he did as a matter of fact get possession in the way asserted by the petitioners. We have also the fact that there was considerable delay on

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the part of the petitioners in setting up this will, although the opponents, or, at any rate opponent No. 1, asserted a right to interfere in the administration of the property of the deceased very soon after her death. I think, therefore, there is no sufficient reason to disturb the finding of the lower Court that the will in question had been revoked, and concur in the proposed order.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

1920.
September 20.

FAKI IBRAHIM WALAD FAKI SHAHABUDIN ARAI (ORIGINAL PLAINTIFF), APPELLANT v. FAKI GULAM MOHIDIN WALAD FAKI FAJLUDIN ARAI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.

Notice—Constructive notice—Mortgage with possession—Sale effected in favour of mortgagee who continued in possession—Subsequent sale to a stranger—Second vendee having knowledge of first vendee's possession—No inquiry made as to the nature of possession—Suit by first vendee to get a sale deed executed—Second vendee must be held to have constructive notice of first vendee's title as purchaser.

The plaintiff was in possession of the property as a mortgagee from defendant No. 1. On the 4th March 1917 defendant No. 1 agreed to sell the property to the plaintiff but subsequently refused to execute a sale deed in plaintiff's favour and sold the property to defendant No. 2 by a deed dated the 19th January 1918. The plaintiff, therefore, sucd to get a sale deed executed by the defendants. The defendant No. 2 relied upon the sale deed in his favour though he admitted that he knew that the plaintiff was in possession and that he made no inquiry as to the nature of plaintiff's possession. Both the lower Courts dismissed the suit on the ground that the second defendant had no notice actual or constructive of the contract of sale between the first defendant and the plaintiff although defendant No. 2 might be fixed with notice of the plaintiff's possession as mortgagee. In second appeal,

Second Appeal No. 926 of 1919.