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accordingly set aside the conviction and sentence [913] and make this Rule absolute. The fine, if paid, will be refunded.

Rule made absolute.

31 C. 910=8 C. W. N. 592.

31 C. 914 (=9 C. W. N. 49.)

[914] PRIVY COUNCIL.

[On appeal from the High Court at Fort William in Bengal.]

KALI DAS CHUCKERBUTTY *v.* ISHAN CHUNDER CHUCKERBUTTY.*

[11th, 17th May and 2nd June, 1904.]

Will—Validity of will—Proof in common form—Probate, delay in taking out—Application for revocation—Will in solemn form—Onus of proof of—Probate and Administration Act (V of 1881) s. 50 "Just Cause."

A will was executed the day before the death of the testator in 1878, and probate was obtained in 1884 in common form with issue of citations.

On an application made in 1896 by the appellants for revocation of probate on the ground that the will was not genuine, the District Judge placed the onus on the respondents to prove the will, and, holding that the evidence was unreliable and insufficient, granted the application for revocation.

The High Court reversed that order, being of opinion that, if the application were regarded as one to obtain proof of the will in solemn form it was without precedent after so long an interval from the date of probate. That the appellants should at least have shewn when they became aware of the probate, and that, considering the difficulty of proving the will in solemn form after the long time that had elapsed, there was sufficient evidence of its due execution. Also that, if the application was one under s. 50 of the Probate and Administration Act (V of 1881), in which case it was doubtful whether the burden of proof was not on the appellants to show that the will was fictitious, no "just cause" had been shown for revoking the probate.

Held on the evidence that under the circumstances of the case there was no ground for differing from the decision of the High Court.

[Ref. 51 I. C. 561.]

APPEAL from a judgment and decree (4th July 1898) of the High Court at Calcutta reversing an order (3rd June 1897) of the District Judge of Rajshahye, which granted an application by petition to revoke probate of a will.

The petitioners for revocation of the will appealed to His Majesty in Council.

The will in question was alleged to have been executed by one Khetter Nath Chuckerbutty on 28th May 1878. He died on 29th [915] May 1878, leaving a widow Mrinmoyi, a minor son Shib Nath

* *Present* :—Lord Macnaghten, Lord Lindley, and Sir Arthur Wilson.

obstruction to a person desirous of stepping on to it, but at the same time the public have no right to enter the verandah of a private person. It might as well be contended that any person might step into another person's house because the door opening on to the road was left open. The house would then be physically accessible to the public, but the public would have no right to walk into the house, and supposing that the house was not used as a "common gaming-house" as defined in s. 1 of the Act, gambling in it would not in my opinion amount to an offence under s. 11. In the present case it is not alleged that the verandah was being used as a common gaming-house

For the above reasons I think the Deputy Magistrate's order is bad in law.

O'KINEALY AND HILL, JJ. We set aside the convictions and sentences in this case for the reasons given by the Sessions Judge, and direct that the fines, if paid, be returned.

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Chuckerbutty, and a minor daughter Bhubanmoyi. By the will Chunder Nath Chuckerbutty, the younger brother of the testator, Ishan Chunder Chuckerbutty, the son-in-law of Chunder Nath, and the testator's widow Mrinmoyi were appointed executors and executrix.

The will gave Mrinmoyi power in case of Shib Nath's death without issue to adopt successive sons, preferably those of the testator's brother Chunder Nath. Under the will the property went to Shib Nath with the exception of a portion, which was to go to Bhubanmoyi on her marriage. The estate was small, under Rs. 300 a year; but Shib Nath was heir through his mother to a large estate called Elanga for which a suit was brought in 1879, in which on 29th March 1882 a final decree in favour of Shib Nath was passed. Shib Nath died in November or December 1882 a minor and unmarried, his mother Mrinmoyi succeeding him as his heiress. Chunder Nath died in May or June 1882, leaving two sons, Srikrishna and the respondent Surendra Nath, the former of whom died in November 1896, while the latter was in April or May 1883 adopted by Mrinmoyi.

In January 1884 application for probate of the will was made by Ishan Chunder Chuckerbutty and Mrinmoyi, and probate thereof was granted by the District Judge of Rajshahye on 22nd February 1884 in common form without the issue of any citations.

At the end of 1884 Bhubanmoyi was married to the appellant Kali Das Chuckerbutty, and she died many years ago having borne two sons, the minor appellant Bhabani Das Chuckerbutty and Promotho Nath Chuckerbutty, who died an infant and unmarried in October 1896, leaving his father the appellant Kali Das Chuckerbutty as his heir. In April 1896 Mrinmoyi died and the petitioners on 25th November 1896 took the proceedings, out of which this appeal arose, by filing a petition for revocation of probate of the will claiming to be Khetter Nath's nearest heirs on the death of Mrinmoyi.

The respondent Surendra Nath Chuckerbutty, who had been since his adoption in possession of Khetter Nath's estate, filed objections to the revocation of probate. Ishan Chunder was afterwards joined as a party objector to the proceedings.

[916] The District Judge held that the burden of proof of the will was upon the respondents and he granted the application for revocation. Ishan Chunder explained the delay in bringing forward the will as follows :—

"Probate was not taken at once because litigation was, at the expense of Khetter Nath's own estate, going on for Shib Nath's Elanga estate, and if the creditors had known that by the will of Khetter Nath, his daughter was to have half of Khetter's estate, they would not have lent the money; they would have brought the property to sale."

The order of the District Judge was reversed on appeal to the High Court by PRINSEP and STEVENS, JJ., the material portion of the judgment being as follows :—

"It is not easy, from the terms of the petition, to learn the exact provisions of the law to which they appeal. The District Judge has regarded the petition as for revocation of the probate; but the learned Advocate-General, who appears for the petitioners, has asked us to consider the petition also as an application to have the will proved in solemn form.

"The proceedings in the probate case have not been laid before us; but it is apparently admitted that probate was obtained in common form and without any citations issued on the other relations of the deceased. The petitioners deny the execution of the will. The terms of the will are reasonable, in so far as the testator

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leaves the bulk of his property to his only son Shib Nath Chuckerbutty, and the remaining portion to his daughter, the mother of one of the petitioners and wife of the other, and the will appoints, as executors ; the nearest relations of the testators amongst whom is his wife, who was also to act as guardian of the son. So far as that portion of the will is concerned, there can be no dispute, because the son is dead, and so is the testator's widow, who succeeded the son at his death. But the will further purports to give power to the widow to adopt another son on the death of the testator's son, and it is this portion of the will, which has no doubt led to the present proceedings.

" Shib Nath, the testator's son, died a minor, on which the widow Mrinmoyi is said to have adopted Surendra Nath in April 1883, and it may be observed that it was after the adoption that application for probate of the will was made.

" The District Judge has placed upon the adopted son, who at present represents the estate, the burden of proving the will ; and holding that the evidence has not established its execution to his satisfaction, he has revoked probate.

" It seems to us that the District Judge has not taken sufficiently into consideration the difficulty of proving in 1896 a will, which purports to have been executed in 1878, and of which probate was obtained in common form in 1884. We have read the evidence, and, having regard to the interval which has taken place, we can see no reason for discrediting it. This evidence consists of two persons who are witnesses to the will as well as of one Ishan Chunder Chuckerbutty, who is connected by marriage with the testator, and who describes the preparation of the will and its execution. It is clear that the testator died in the house of this gentleman, where he had been brought in a dangerous state of sickness. The District Judge [917] refers to the evidence of the doctor, Durga Sunker Gupta, whom he describes as the only respectable witness on that side, and he points out that the doctor had no recollection of having attended the deceased testator, as he is said by Ishan Chunder Chuckerbutty to have done. We do not attach such importance to this fact as the District Judge apparently does, because it is not unreasonable to suppose that this gentleman, who was only called in casually on one occasion, might have forgotten, in the long interval of time which has taken place, that he ever attended such a patient. He does not actually contradict the statement made by Ishan Chunder Chuckerbutty to this effect.

" Now although the evidence of the execution of the will may be open to criticism, we think that, if allowance be made for the interval of time, there is no reason to doubt the evidence of the witnesses or to believe that that they are making false statements. On the other hand, we think we may fairly say that it is without precedent that a party, who has obtained probate of a will in common form, should, more than twelve years after the date of probate, be called upon to prove it in solemn form. This demand, moreover, has been made by a member of the family ; and although Kali Das Chuckerbutty, who is really managing this case and is the husband of the daughter of the testator, who was a minor at that time, may be entitled to have the will proved in solemn form, and there is no limitation prescribed by law for such an application, we think that this application, made after such an extreme interval of time, required that the applicants should have stated when they first became aware of the probate. They have not done so. They have allowed, within this interval, all those persons, who would have been best able to give evidence regarding the intentions and acts of the testator, to die, amongst whom we may mention the testator's widow Mrinmoyi.

" If, on the other hand, we regard the present proceedings as intended to obtain a revocation of the will, they must be within the terms of s. 50 of the Probate and Administration Act, and it is at least doubtful, whether the petitioners, who can claim revocation of the will as just cause would not be bound to start their case, at any rate, by proving that the will was fictitious. Now this in our opinion they have failed to do : so that in either view of this case we think that the petition should have been dismissed, and that consequently the District Judge's order must be set aside with costs."

W. C. Bonnerjee for the appellants contended that the onus was on the respondents to prove the will. Where an application for probate has been made and citations have not been issued, and probate has been granted *ex parte*, if the genuineness of the will is afterwards impugned, the onus is on those who support the will to give proof of its execution ; there are many cases in which executors have been called upon under

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such circumstances to prove the will in solemn form. Reference was made to Coote's Probate Practice and to *Hoffman* v. *Norris* (1); *In re Topping* (2) [918] and *Merryweather* v. *Turner* (3). On the evidence it was contended that the will was not genuine. The long delay in bringing it forward, the explanation of which was not satisfactory, the insufficiency and unreliable character of the evidence adduced in support of the will, the fact that Khetter Nath was not in a fit state to make a will, and the suspicious circumstance that the doctor who was said to have been present at the execution and who was the only witness of any standing or respectability brought to prove it, had forgotten all about the matter, all supported the theory that the will was a forgery.

DeGruyther for the respondents contended that the burden of proof was on the appellants to show some " just cause " for the revocation of probate ; and that, considering the long time that had elapsed since probate was granted, and the fact that the action taken on the will was known to the appellant Kali Das Chuckerbutty, and having regard to all the circumstances of the case, no " just cause" for revoking the probate had been shown. Reference was made to the Probate and Administration Act (V of 1881), ss. 50, 62, 66 and 67. On the evidence it was contended that the will was sufficiently proved.

W. C. Bonnerjee in reply.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The proceedings out of which this appeal has arisen relate to the alleged will of one Khetter Nath Chuckerbutty, who died on the 29th May 1878. Probate of the will was obtained in common form, and without issue of citations, on the 22nd February 1884, from the then District Judge of Rajshahye.

On the 25th November 1896, the now appellants presented a petition in the Court of the successor of the learned Judge, by whom the probate had been granted, praying for revocation of that probate on the ground, amongst others, that the alleged will was not the genuine will of the testator, but a fictitious document. The learned Judge, whose judgment is dated the 3rd June 1897, considered that there were strong grounds for disbelieving the evidence [919] in support of the will, held that its execution had not been sufficiently proved, and accordingly made an order for revocation of probate. That order was set aside by the High Court on appeal, and against that decision the present appeal has been brought.

The alleged testator, Khetter Nath Chuckerbutty, at his death, on the 29th May 1878, left surviving him a widow Mrinmoyi, an infant son Shib Nath, and an infant daughter Bhubanmoyi. The property of Khetter Nath was under Rs. 300 in annual value; but his infant son Shib Nath claimed to be heir, through his mother, to a large estate known as Elanga, which claim was obviously a matter of great interest to the father before his death.

The will refers to Shib Nath's title to Elanga, and plainly purports to be made with reference to it. It gives the testator's estate to the son, except a half share in certain property given to the daughter, when she should marry. It gives to the executors (who were also to be guardians of the son) power to raise money on the whole estate for the prosecution of the Elanga claim. The executors were to be the testator's

(1) (1805) 2 Phillimore 230, Note (*b*), 231.
(2) (1853) 2 Robertson 620.
(3) (1844) 3 Curteis 802, 811,812, 817.

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brother, the brother's son-in-law Ishan Chunder Chuckerbutty, and the widow Mrinmoyi. If Shib Nath should die unmarried, Mrinmoyi was to have power to adopt successive sons; a preference to be given to the brother's sons. Such a will was a natural one to have made under the existing circumstances. And the learned District Judge, although he was not satisfied as to the execution of the will, considered that it was in accordance with the wishes of the deceased.

Shib Nath's title to Elanga was finally established in 1882, and almost immediately afterwards he died, still a minor and unmarried. In 1883 Mrinmoyi, the widow, adopted Surendra Nath Chuckerbutty, a son of her late husband's brother, and in January 1884 Mrinmoyi and Ishan Chunder, as the surviving executors of the will, applied for the probate now in dispute, and it was granted. This application for probate was the first occasion on which the alleged will is shown to have been publicly relied upon; up to that time it appears from the evidence, documentary and otherwise, to have been ignored, that is for a period of about six years.

Late in the same year (1884) Bhubanmoyi, the daughter of the deceased, was married to Kali Das Chuckerbutty, and two sons **[920]** have been the issue of the marriage, Bhabani Das, and another now deceased. Mrinmoyi died in 1896.

The petition of the 25th November 1896 for revocation of the probate of 1884 was presented by the present appellants, namely, Kali Das Chuckerbutty, in his own right as heir of his deceased son, and by his surviving minor son, Bhabani, through Kali Das as his next friend and father. The objectors were the present respondents, namely, Ishan Chunder Chuckerbutty, the surviving executor, and Surendra Nath Chukerbutty, the adopted son.

The evidence given at the hearing to prove the execution of the will is quite sufficient to establish it, if that evidence can be believed; and the learned Judges of the High Court have believed it.

The grounds upon which their Lordships have been asked to differ from the High Court are substantially three.

First, it was pointed out that the alleged will was not proved for six years after Khetter Nath's death, during which interval it was practically ignored. It was further contended that the explanation, which Ishan Chunder gave of that delay, was unsatisfactory. The District Judge rejected that explanation, and he was probably right in doing so. But, on the other hand, the estate was of very trifling value, and until Shib Nath died and Surendra Nath was adopted in his place, it does not appear that there was any very urgent necessity, in anybody's interest, for relying upon the will.

Secondly, it was contended that the evidence in support of the will was scanty in amount and open to exception in quality. But their Lordships think the learned Judges of the High Court were right in laying stress upon "the difficulty of proving, in 1896, a will, which purports to have been executed in 1878, and of which probate was obtained in common form in 1884." And their Lordships see no reason for dissenting from the view taken by the High Court of this evidence generally.

Thirdly, a specific point was relied upon. It was alleged by the witnesses for the will that during the night in which the will was executed the night before Khetter Nath's death, Doctor Durga Sunker Gupta, who is said to be a gentleman of good position, was called in to attend the sick man, and was present **[921]** when the will was read over. But the

doctor when called could recollect no such occurrence. The District Judge attached great importance to this discrepancy. The High Court thought it not unnatural that this gentleman might have forgotten a single visit to a patient after the lapse of so many years—a view in which their Lordships concur.

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Their Lordships see no sufficient reason for dissenting from the conclusion arrived at by the learned Judges of the High Court. They will humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs.

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Appeal dismissed.

Solicitor for the appellants: *G. T. B. S. Thurnell.*

Solicitors for the respondent, *Surendra Nath Chuckerbutty*: *Withers, Pollock & Crow.*

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31 C. 922 (=8 C. W. N. 264).

[922] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Geidt.

KASHI PERSHAD SINGH *v.* JAMUNA PERSHAD SAHU.*

[1st, 2nd and 4th February, 1904.]

Decree—Execution—Civil Procedure Code (Act XIV of 1882), s. 287, cl. (e)—Proclamation of sale—Value of property—Executing Court—Transfer of Property Act (IV of 1882), ss. 67, 99—Right of Mortgagee to bring mortgaged property to sale—Decree for interest—Legality of decree.

Section 287, clause (*e*) of the Civil Procedure Code does not require the executing Court to make an investigation, on the application of the judgment-debtor, into the question of the value of the property to be sold, to record evidence and to come to a decision on the point.

Saadatmand Khan v. *Phulkuar* (1) and *Sivasami Naickar* v. *Ratnasami Naickar* (2) distinguished.

Section 98 of the Transfer of Property Act does not prevent a mortgagee from bringing the mortgaged property to sale in execution of a decree for interest only obtained in accordance with the terms of the mortgage bond.

The executing Court cannot call the legality of a decree in question.

Maharaja of Bhartpur v. *Rani Kanno Dei* (3) followed.

[Com. on: 12 C. W. N. 542. Ref. 14 C. L. J. 35=10 I. C. 371=16 C. W. N. 124; 11 N. L. R. 153; Foll. 32 Cal. 377; Not Foll. 2 Pat. L. J. 130.]

APPEALS by the judgment-debtors, Kashi Pershad Singh and others.

Kashi Pershad Singh and his two brothers executed a mortgage bond, dated the 7th January 1893, for a loan of Rs. 3,25,000 in favour of one Ganga Pershad Sahu with interest at the rate of Re. 0-10-1 per cent. per month, with provision for compound interest in case of default of payment of interest, on hypothecation of a number of properties owned by them. The [923] principal money of the bond was payable within 11 years from the date thereof.

The bond further provided: "If we do not pay interest on the principal and interest upon interest to the said mahajan for three successive years, then the said mahajan shall have power to institute a suit in Court

* Appeals from Original Orders Nos. 443 of 1902 and 9 of 1903 against the order of Gopal Chunder Banerjee, Subordinate Judge of Monghyr, dated the 19th of November 1902.

(1) (1898) I. L. R. 20 All. 412; L. R. 25 I. A. 146.

(2) (1900) I. L. R. 23 Mad. 568.

(3) (1900) I. L. R. 23 All. 181.