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[885] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Pargiter.

ANWAR HOSSEIN v. SECRETARY OF STATE FOR INDIA.*

[14th 15th and 21st June, 1904.]

Will—Lost Will—Presumption of revocation—Secondary evidence—Onus of proof—Probate and Administration Act (V of 1881) ss. 20, 24.

If a will, shewn to have been in the custody of the testator, is not forthcoming at the time of his death, it is presumed to have been destroyed by him, unless there is sufficient evidence to rebut the presumption.

Welch v. *Phillips* (1), *Brown* v. *Brown* (2), *Sugden* v. *Lord St. Leonards* (3) referred to.

But such 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.

Finch v. *Finch* (4) referred to.

Having regard to the habits of the people of this country and specially those of wandering *fakirs*, another presumption may well arise, namely, that, when such a document is not forthcoming after the testator's death, it has been mislaid.

If a will is found to have been validly executed and not been revoked, and yet is not forthcoming, it may be proved by a certified copy, and letters of administration, limited, until the original will is produced, may be granted.

[Foll. 21 I. C. 121=18 C. W. N. 527; 345 P. L. R. 1913; Ref. 10 C. L. J. 499=3 I. C. 426: 45 Bom. 906=23 Bom. L. R. 276=61 I. C. 455.]

APPEAL by Syed Anwar Hossein and Tulsi Das Banerji, the objectors.

The Secretary of State for India in Council applied for letters of Administration of the will of one Mahmud Shah, a wandering Mahomedan *fakir*, who lived a great part of his time, during the latter part of his life, in the town of Bhagalpore. He was in the habit of receiving sums of money as gifts from various people, which he used to invest chiefly through one Babu Gangadhar Banerji, a resident of the town and brother of Raja Shib Chunder [886] Banerji. In this way Mahmud Shah amassed a large sum of money, there being over 30,000 rupees to his credit in deposit in cash. It appears he made more than one will in favour of various sons of Gangadhar, but for some reason or other quarrelled with him before he left Bhagalpore. It was alleged that subsequently, in November 1894, the *fakir* had executed a will in favour of the Empress of India leaving all his property absolutely to Her Majesty. The will was registered at Bhagalpore in November 1894. After this the testator remained there some time and then went off on some of his wanderings, and finally arrived at Bareilly, where he died some time about 30th November 1899 in the house of Anwar Hossein, the appellant.

There were two sets of objectors to the grant of letters of administration: one set comprised certain alleged relatives of the deceased, headed by Anwar Hossein; the other was Tulsi Das Banerji, a minor son of Babu Gangadhar Banerji, who was represented in this case, with the leave of the Court, by his uncle Raja Shib Chunder Banerji.

*Appeals from Original Decrees. Nos. 279 and 280 of 1901, against the decrees of W. H. Vincent, District Judge of Bhagalpore, dated Aug. 5, 1901.

(1) (1836) I. Moo. P. C. 299.
(2) (1858) 27 L. J. Q. B. 173.
(3) (1876) L. R. 1. P. D. 154.
(4) (1867) L. R. 1 P. & D. 371.

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Anwar Hossein objected to the will on the grounds—

(*i*) that the testator, having certain relatives, had no power to will away more than one-third of his property;

(*ii*) that the will was not duly executed and the original was not produced;

(*iii*) that the testator was not at the time in full possession of his senses and therefore his will was inoperative and void.

Tulsi Das objected mainly on the grounds, that the will propounded was not duly executed or delivered, and that it was not intended by the testator to be operative.

It appears that the testator kept this will with him while atBhagalpore, and took away all the important papers with him, when he went to Bareilly. Neither Anwar Hossein nor any member of his family came forward to depose, that no such will was among the papers left by the testator, when he died at Anwar's house. Nor is there any evidence to shew that the testator changed his mind with regard to this will, although he lived five years after it was executed by him.

The District Judge found that the will was not revoked by destruction, nor was there any such allegation in the original **[887]** objections; that Anwar Hossein was not in fact a relative of the testator at all; that the deceased had no living relatives; that the difference in the dates in the will was simply a mistake; and that the testator at the time of making the will was in full possession of his senses. And he accordingly ordered that letters of administration be granted to the Secretary of State for India in Council.

Against this order the objectors appealed to the High Court.

Maulvi *Mahomed Ishfak* (Maulvi *Serajul Islam* with him) for the appellant Anwar Hossein. The will in question was last seen in the testator's own possession, and on his death, after careful search, it was not forthcoming; under the circumstances the only presumption is that the will was destroyed by the testator himself, unless it is rebutted by evidence: see *Brown* v. *Brown* (1), *Sugden* v. *Lord St. Leonards* (2). As no evidence was adduced to shew that the will was lost, or was destroyed by any one other than the testator, the Court below was wrong in admitting as secondary evidence, a certified copy of the will obtained from the Registration office, the presumption being that it was revoked and destroyed by the testator himself: see also *Woodward* v. *Goulstone* (3), *Welch* v. *Phillips* (4). There being no rebutting evidence, the presumption that the will was destroyed by the testator should hold good: see Williams on the law of Executors and Administrators, 9th Edn., Vol. I, p. 134.

The testator was of a changeable character, for he had made several wills one after the other. It is also in evidence that he was of unsound mind. He expressed a desire to make over the will to the Collector of the District, but never did although he had ample opportunity to do so.

Under s. 19 of the Probate and Administration Act (V of 1881) the Secretary of State for India is not one of those persons, to whom letters of administration may be granted.

[GHOSE, J. Is not the Empress of India the residuary legatee under the will?]

Yes, if the will be a valid document.

(1) (1858) 27 L. J. Q. B. 178.
(2) (1876) L. R. 1 P. D. 154, 195.
(3) (1886) L. R. 11 Ap. Cas. 469, 475.
(4) (1836) 1 Moo. P. C. 299.

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[888] [GHOSE, J. See s. 20 of the Probate and Administration Act.] The Secretary of State for India cannot be said to be such a representative of the late Empress of India as is contemplated by that section, and therefore he has no *locus standi* in this matter.

Babu *Ashutosh Mukerji.*, for the appellant Tulsi Das Banerji. My only ground is that the will was not executed according to law. The will was dated the 21st November 1894, while the witnesses R. Taylor and Gauri Prasad attested it on the 19th November 1894; so evidently this attestation was made two days before the execution. Mehdi Ali, who made the signature for the testator, is not competent as an attesting witness : see *Ava Bai* v. *Pestanji Nana Bhai* (1). These three being eliminated, there remains only one witness to the will, *viz.*, Farzand Ali; and as a will must be attested by at least two witnesses, it is submitted there was no valid execution of the will. The learned District Judge is of opinion that the difference in the date is the result of a mistake ; but nobody deposed to that effect.

The Senior Government Pleader (Babu *Ram Charan Mitter*), for the respondent. There is a limit to the presumption that a will was destroyed by the testator himself. In this case the testator was a wandering *fakir*, and did not always carry his papers with him. The presumption, that a will in the testator's possession has been revoked by destruction, does not arise, unless there is evidence to shew that it was not in existence at the time of his death : see *Finch* v. *Finch* (2) ; mere non-production of a will does not give rise to such a presumption. The testator died in the house of Anwar Hossein and Bunyadi Begam, and it is probable that they did away with this will, which would go against their interest. After the making of this will in favour of the Empress of India, there was no indication whatever that the testator changed his mind, although now and then he used to send some money to Bunyadi and Anwar. If he had a mind to revoke this will, he would have done so by executing another will.

As regards the attestation of the will, it is in evidence that the first witness, Taylor, was expressly asked by the testator to attest [889] it ; and Farzand Ali (another witness) says, he and Taylor attested the will in the presence of the testator ; and that is quite sufficient as to attestation. It has been found by the Court below that Anwar and Bunyadi Begam are no relatives of the testator. Considering all these circumstances and the habits of these men, I submit, the will was duly executed in favour of the Government.

Maulvi *Mahomed Ishfak*, in reply.

Cur. adv. vult.

GHOSE AND PARGITER, JJ. These appeals relate to a will alleged to have been executed by one Mahmud Shah *alias* Neku. He was a Mohamedan *fakir* and lived at Bhagalpur and at Bareilly and wandered about to other places. He had amassed a considerable amount of money and was engaged in lending it out. His estate has been valued now at Rs. 33,000. The will was executed on the 19th November 1894 at Bhagalpur and was registered two days later. By it (it is said) he bequeathed all his property absolutely to the Empress of India. The original will is not forthcoming, but the Secretary of State for India produced a certified copy of the will from the Registration Office, and applied to the District Judge of Bhagalpur for letters of administration

(1) (1874) 11 Bom. H. C. 87. (2) (1867) L. R. I. P. & D. 371.

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on behalf of the Empress of India on the 21st September 1900. The application has been opposed by two parties, first, by Anwar Hossein who claims to be a first cousin of the testator, and, secondly, by one Tulsi Das Banerji, who is the minor son of one Babu Gangadhar Banerji, and in whose favour the testator had executed a prior will. The District Judge of Bhagalpur finding the will to be true granted letters of administration to the Secretary of State, and both the objectors have appealed, Anwar Hossein in appeal No. 279, and Tulsi Das Banerji in appeal No. 280. Both the appeals have been heard together and are disposed of by this judgment.

It has not been disputed before us that the testator really executed this will. The appeal by Tulsi Das, however, raises this objection, namely, that the will was not duly executed. It appears that the will bears date 21st November 1894 and two of the witnesses, Mr. Taylor and Gauri Prasad, attested it dating [890] their signatures the 19th November. Hence it is argued that they attested the will two days before it was executed. But the evidence of Mr. Taylor and the other witnesses proves that this difference is simply a mistake of date. The will was executed and attested by all the attesting witnesses at the same time, after the testator had affixed his seal to it and after Mehdilal had signed the testator's name for him. That was on the 19th November. Hence the 21st November is clearly a mistake. We find therefore that the will was duly executed, and this disposes of appeal No. 280, there being no other point urged before us.

Turning next to appeal No. 279, various objections have been raised by Anwar Hossein, whom we will henceforth style simply the objector. His first objection is that the Secretary of State has not laid a proper foundation for the admission of the copy of the will, by first proving that the original will has been lost or cannot be found. It appears from the evidence that the Government has made careful inquiries in various places to discover the original will, but without success. The evidence shows that the testator kept the will with himself. He died in the objector's house at Bareilly about 5 years after executing the will. A Police officer of that place searched, and took possession of all the papers belonging to the testator that were found in the objector's house about a week after the testator's death, but no will was found among them. Other inquiries were made by a Deputy Magistrate, and the witnesses have given evidence so far as they know. The inquiries made by the Government appear to have been thorough, and the only suggestion which the objector can urge is, that Government has not examined one Amir Ali with whom the testator sometimes stayed at Bhagalpur. But the Deputy Magistrate did make such an inquiry and without success. We are therefore of opinion that there is no force in this objection. There is nothing in the circumstances to suggest any doubt against the case of Government. The Government had no good reason for suppressing the will after it had been registered, and we hold therefore that secondary evidence was rightly admitted.

The second objection is that, if the original will is lost, the Court ought to presume that the testator destroyed it with the intention of revoking it; and this has been the most important [891] argument in the appeal. The conclusion that should be drawn from the non-production of a will, which is not forthcoming on the testator's death, has

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been thus enunciated in the case of *Welch* v. *Phillips* (1) decided in 1836. "Now the rule of the law of evidence on this subject, as established by a course of decisions in the Ecclesiastical Court, is this: that if a will, traced to the possession of the deceased and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect, unless there is sufficient evidence to repel it. It is a presumption founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved by a person of ordinary caution in some place of safety and would not be either lost or stolen; and if, on the death of the maker, it is not found in his usual repositories or elsewhere he resides, it is in a high degree probable that the deceased himself has purposely destroyed it. But this presumption, like all others of fact, may be rebutted by others which raise a higher degree of probability to the contrary. The onus of proof of such circumstances is undoubtedly on the party propounding the will." This statement of the law was approved and applied in 1858 in the case of *Brown* v. *Brown* (2) and was also followed in 1876 in the case of *Sugden* v. *Lord St. Leonards* (3), and the considerations which a Court should observe in applying the presumption were thus stated in the last mentioned case:—"It is obvious that where a will, shown to have been in the custody of a testator, is missing at the time of his death, the question whether it is probable that he destroyed it must depend largely upon what was contained in the instrument. Was it one arrived at after mature deliberation; did it deal with the interests of the whole of the family, carefully arranging the dispositions which he would make in favour of the several members of it, or was it the hasty expression of a passing dissatisfaction with some one or more of them? And it was further laid down that "the evidence must necessarily be of great variety according to the various circumstances of the cases that are presented to Courts of Justice;" and it was added "when it is [892] suggested that such a change has come over the mind of the testator, we must look for the cause of such a change," and "the first element in this consideration of whether or not a testator has destroyed his will is to be found in the instrument itself," and the position and character of the testator must also be looked at. It was laid down in the same case that evidence might be given of the acts and declarations of the testator, which occurred not only at or before the execution of the will, but also after its execution. But it has also been laid down in the case of *Finch* v. *Finch* (4) that the presumption, that a will in the testator's possession and not forthcoming after his death has been revoked, does not arise, unless there is evidence to satisfy the Court that it was not in existence at the time of his death."

The presumption subject to these qualifications may no doubt be applied in this country with due regard to the special conditions prevalent here, where deeds are not kept and preserved with the same care and where their preservation is more difficult. And there is another presumption, which, having regard to the habits of the people of this country and especially to those of a wandering *fakir*, may well arise, namely that, when a document like this is not forthcoming after the testator's death, it has been mislaid.

(1) (1836) 1 Moo. P. C. 299
(2) (1858) 27 L. J. Q. B. 173.
(3) (1876) L. R. I. P. D. 154.
(4) (1867) L. R. I. P. & D. 371.

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Now there is no evidence that this will was not in existence at the time of the testators's death. It appears from the evidence that he kept this will with him while at Bhagalpur, and that he took important papers with him, when he went to Bareilly and died there in the objector's house. Neither the objectors nor any one from his family has come forward to say that no such will was among the papers left there at his death. All that we have is that, when the police searched a week afterwards, no will was found. This case, however, is very similar to that of *Finch* v. *Finch* (1) already mentioned ; for the testator's papers were during a week accessible to, and indeed were in the custody of, the objector, the very person who was interested in destroying the will, for, as long as the will existed, he could not assert his present claim. Hence it appears to us more probable that the will, if it [893] has been destroyed, was destroyed by the objector after the testator's death than by the testator before his death.

Furthermore, we do not find any reason for thinking that the testator had changed his intentions with regard to this will. He says in the will itself, that he was old and had made a prior will in favour of Tulsi Das Banerji, the second objector ; and that he did not like to keep to that will, because he could not but feel anxious about his life. His meaning appears to have been that, as long as a private person might benefit by his death, his life might be brought to a premature end, a fear not unnatural because he was a solitary and wandering *fakir*, and because it is partly explained by the defendant's witness, Vilaet Hossein. Hence he bequeathed all his property to the Empress of India, believing that, as no one could benefit by his death, no one would have any motive to attempt his life. He added that he had no near or distant heir ; so that he was not defeating the reasonable expectations of any person.

He survived five years after the will, and there was no change in his conditions or circumstances to alter the sentiments, which he expressed in his will. Hence presumably there was no reason why he should revoke that will.

If any change might have occurred, it would probably have occurred during his last days when he realized that his life was closing, but there is no evidence of any such change. He died in the objector's house, but neither Anwar Hossein nor his wife nor their son Faiz Hossein has given evidence. Their testimony was very material, and they were the only persons qualified to speak about his last sentiments. Hence there is no evidence that the testator expressed any thought of altering his will. Further, if such a change did take place, it might be expected that the testator would have drawn up another will expressly revoking this will, for that was a precaution about which he was very particular, as Mehdi Lal's evidence and this will itself show. We are therefore of opinion that the testator did not intend to revoke this will nor did he destroy it.

The third ground urged by the objector is that the testator was not of a sound disposing mind when he executed the will ; and the only reasons urged in support of this objection are, first, [894] that the testator was once in a lunatic asylum and, secondly, that he had a hot and even violent temper. But his detention in the lunatic asylum occurred about the time of the mutiny and there is noth-

(1) (1867) L. R. I. P. & D 371.

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ing to indicate that he was insane when he made the will, unless a violent and abusive temper indicates insanity. Certain witnesses, who were examined on commission by the objector, say that the testator was insane, but their evidence is obviously partial and prejudiced. The witnesses who were examined in Court on both sides say clearly and positively that he was not insane. We therefore hold that the will cannot be invalidated upon this objection.

A further objection has been taken to the effect that the application has been made on behalf of the Empress of India by the Secretary of State for India; but this was never taken in the Lower Court nor in the grounds of appeal, and we cannot entertain it now. But even if it had been taken, we should not have been prepared to affirm it.

In the view we have expressed, the question of the relationship, which the objector alleges between himself and the testator, becomes immaterial, except perhaps for the purpose of considering whether it is likely that the testator should have made the will bequeathing his property to the Empress. There can be no doubt that he did execute the will, and no question has been raised before us on that point. We, therefore, decline to express any opinion as to the alleged relationship.

We thus find that the will was duly and validly executed by the testator, and that the applicant can prove the will by means of the certified copy put in. Hence this case falls under section 24 of the Probate Act (V of 1881). The Secretary of State is, therefore, entitled under that section to get letters of administration on the strength of the copy of the will, limited until the original will be produced. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

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31 C. 895 (=8 C. W. N. 653.)

[895] ORIGINAL CIVIL.

Before Mr. Justice Henderson.

PARBATI BIBEE *v.* RAM BARUN UPADHYA.*

[27th May, 1904.]

Hindu Law—Will—Bequest to religious and charitable purposes.

A residuary clause of the will of a Hindu governed by the Mitakshara school of Hindu law was as follows:—

"And as to the rest and residue of my estate I give and devise the same to my executor in trust to spend and give away the whole thereof in charity in such manner and to such religious and charitable purposes as he may in his discretion think proper."

The bequest of the residuary estate was held to be a valid charitable bequest.

The direction to spend and give away the whole of the residue in charity governs the word that immediately follow and therefore the purposes for which the fund is to be spent must be charitable, although they may at the same time be religious.

Ramgopal Bonnerjea v. *Sibkissen Bonnerjea* (1) followed.

In re White (2), *Baker* v. *Sutton* (3), *Pocock* v. *Attorney-General* (4), *Morarji Cullianji* v. *Nenbai* (5), *Dev Shankar Naranbhai* v. *Motiram Jogeshvar* (6),

* Original Civil Suit No. 100 of 1904.

(1) (1859) 1 Bom. H. C. 76 note.
(2) (1898) 2 Ch. 41.
(3) (1836) 1 Keen 224.
(4) (1876) L. R. 3 Ch. D. 342.
(5) (1892) I. L. R. 17 Bom. 351.
(6) (1893) I. L. R. 18 Bom. 136.