PRIVY COUNCIL.

JAGARNATH PERSHAD
v.
HANUMAN PERSHAD.

*P.C.**
1909
March 10, 11.
May 11.

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

Appellate Court—Taking additional Evidence on Appeal—Civil Procedure Code (Act XIV of 1882) s. 568—Witnesses—Application for Probate—Examination of only some of Witnesses in support of Will—Tender of others for Cross-examination—Courts differing on question of fact on different Evidence—Presumption of Correctness of Appellate Court.

On an application to a District Judge for probate of a will, the evidence of three out of the six witnesses in support of it was taken, and then the applicant and two other witnesses were tendered for cross-examination, and the caveators, on the ground that such a course was not in accordance with the practice of the Civil Courts, declined to cross-examine them and their evidence was not given. The District Judge came to the conclusion on the evidence that the will was genuine and granted probate of it. On appeal the High Court, the parties consenting, took the additional evidence of the three witnesses under s. 568 of the Civil Procedure Code, and on a consideration of the whole of the evidence came to an opposite conclusion from that of the District Judge and dismissed the application for probate :—

Held, that on a pure question of fact, the Courts having differed on what were not the same materials for decision, the Judicial Committee would not reverse the decree of the High Court unless they were satisfied it was wrong, and they were not so satisfied.

An objection by the appellants that in taking additional evidence the High Court had not acted in accordance with the provisions of s. 568 of the Code of Civil Procedure, was disallowed as the appellants had, without raising any objection at the time, consented to the additional evidence being taken.

APPEAL from a judgment and decree (3rd March 1904) of the High Court at Calcutta which reversed a judgment and decree (6th August 1901) of the Court of the District Judge of Gaya.

The petitioner for probate was the appellant to His Majesty in Council.

* *Present :* LORD ATKINSON, LORD COLLINS, LORD SHAW, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

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The principal question raised on this appeal related to the genuineness of a will, dated 21st December 1900, purporting to have been executed by one Chhote Narayan Pershad.

The testator died on the morning of 22nd December 1900 leaving a widow, the respondent Manna Koer, and a daughter Lakshmi Koer. He was the adopted son of Jokhi Lal; after whose death one of his widows, the respondent Janki Koer, adopted the respondent Hanuman Pershad. Jagarnath Pershad was the natural brother of Chhote Narayan Pershad, both being sons of Ram Rekha Lal.

By the will the tastator bequeathed his moveable property and cash to his wife for life with remainder to his daughter. To his wife he also bequeathed an annuity of Rs. 200 per mensem and to his daughter a house and a village and the sum of Rs. 10,000 for the expenses of her marriage. His natural brother, the appellant, was appointed executor and residuary legatee.

On 2nd January 1901, the appellant applied to the Court of the District Judge of Gaya for probate of the will. Caveats were lodged by Hanuman Pershad, Janki Koer and Manna Koer, the respondents, and later they filed written statements. Manna Koer stated that her husband died of plague, and was almost unconscious and not in a fit state of mind to execute a will on 21st December 1900. The other respondents also asserted that the testator was unconscious at the time the will was said to have been executed.

The circumstances under which the will was made were that instructions to draft the will were given by the testator on the afternoon of the 20th December, 1900, to Mr. Abdul Halim, who deposed to his being obliged to further instruct a pleader, Moti Lal Das, to prepare the draft. The pleader gave evidence as to the preparation of the draft-will that same night and giving it to Gur Sahai, the testator's clerk. This man after seeing and consulting the testator made a fair copy of it on the 21st December, and that same afternoon it was duly executed in the presence of the following witnesses: Ram Pertab Misra, Mahadeo Pandey, Rung Lal Pundit, Radha

Kishen and Bodh Singh. Of these persons Mahadeo Pandey, Rang Lal Pundit and Bodh Singh were examined as witnesses, and the appellant tendered himself, Ram Pertab Misra, and Radha Kishen for cross-examination: an objection was taken to this procedure as being not warranted by law; the objection was overruled, but the caveators declined to cross-examine the witnesses.

On behalf of the caveators Manna Koer was examined on commission, and other witnesses were examined as well as Manna Koer to show that Chhote Narayan Pershad was ill for several days before his death, that he died of plague, and that he was unconscious on the day on which he was said to have executed a will.

In support of the caveators' case three letters, marked as exhibits F, G, and H, from the father of the deceased to the brother of his widow, which purported to bear the initials of Jagarnath Pershad, the appellant, in English, were put in.

The District Judge, after a careful examination of the evidence, and giving due consideration to the position of the witnesses who deposed to the genuineness of the will, believed their evidence, and concluded his judgment by saying:—

"It appears to me on the whole that the testimony to the genuineness of the will and the competency and *animus testandi* of the testator is overwhelming, and that the evidence by which it is attempted to be rebutted is altogether untrustworthy. I therefore admit the will to probate."

Two appeals were preferred from that decision to the High Court and were partly heard together on 28th January 1904 by GURUDAS BANERJEE and BRETT JJ., who made the following order:—

"After we had heard the learned vakil for the appellants in these two cases up to certain points, it appeared to us, subject to what the other side might have to say on the point, that it was desirable that the three witnesses Radha Kishen, Ram Pertap Misser, and Jagarnath Pershad, the applicant for probate, who had been, as order No. 26 of the 26th June 1901 shows, tendered for cross-examination, but not examined at all, should be examined as witnesses in accordance with the provisions of section 568, clause (*b*) of the Code of Civil Procedure, to enable this Court to decide these appeals satisfactorily; and we accordingly asked the learned gentlemen on both sides before proceeding further, to say what they had to say with reference to our taking that course. The learned vakil for the appellants said, he had no objection to

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those witnesses being examined, and he only suggested that they should be examined in this Court. The learned gentlemen on the other side said they did not object to the course suggested."

The evidence of those witnesses was taken on 23rd February 1904 when the High Court also admitted in evidence certain alleged extracts from books of account kept by the testator.

The appeals were heard on 3rd March 1904, and owing to the retirement of BANERJEE J., by a Bench differently constituted (BRETT and SARADA CHARAN MITRA JJ.) who after stating the facts continued :—

"These appeals first came on for hearing on the 28th January 1904 before a Bench of which one of us was a member, and the attention of the Court was drawn to the fact that the applicant and the two witnesses to the alleged will, Babu Radha Kishen and Ram Pertap, had not been examined before the District Judge, and as it was in the opinion of the Court desirable that the evidence of these three persons should be taken, the hearing of the appeal was adjourned for their attendance. The mere fact that they were tendered for cross-examination would not entitle the applicant to contend that their evidence supported his case and as they were material witnesses they should have been examined. They have now attended and have been examined before us and the appeals have been argued in full."

After discussing the whole of the evidence at some length, the judgment concluded as follows :—

"The will itself in appearance is not beyond suspicion. The signatures of the testator and the witnesses do not bear the appearance of being written at the same time with the same pen and ink as alleged. The District Judge appears to accept as indicative of the genuineness of the will, the fact that four of the witnesses were the same as attested the admittedly genuine document, Ex. D, executed by Chhote Narayan. We cannot agree with him. All of the witnesses but one to the present document arrived by chance at the time it was being executed and the coincidence which the District Judge notices is so remarkable as rather to raise a strong suspicion against the will. The terms of the alleged will are also inconsistent and difficult to understand. Babu Moti Lal Das says it is the first deed which he had ever drafted for Babu Chhote Narayan. It is remarkable also that it should contain the statement by the testator that there had been no misunderstanding between him and his father and brother on any matter. If true, the statement was unnecessary. On the other evidence in the case, however, its truth appears to us doubtful.

"After a careful consideration of the evidence adduced to support the will, we are unable therefore to regard it as trustworthy or as proving the due execution of the will by Babu Chhote Narayan Pershad. It is not impossible that the deceased may have formed the intention of disposing of his property by a will, but we are not satisfied that his intention are embodied in the document Ex. I, or that the document was executed by him or that he was in fit condition of mind or body to execute a will at the time the document

produced is said to have been executed. We are unable to agree with the learned counsel for the respondent that the cash book including the entries Exs. M. N. O. was not properly proved. It was proved by Jagarnath to be the cash book of Babu Chhote Narayan, and the entries were proved by Ram Kishen to be in the handwriting of Ram Rekha Lal, the father of the deceased, who, it was proved, kept this book. It is impossible to believe that Ram Rekha would have forged entries to discredit the application of Jagarnath. The letters, Exs. F. G. H., are also proved by Sital Pershad, and we cannot place any reliance on Babu Jagarnath's denial of the initials as his. In our opinion, Jagarnath, when denying his acquaintance with the Kaithi character and the English alphabet, is trying to prove too much, and we cannot believe his evidence on those points. It was for the applicant to prove the genuineness of the will, and as he has in our opinion failed to do this, it is impossible to suggest that the will is rejected on suspicion only.

"For the above reasons, we are unable to agree with the findings and judgment of the learned District Judge. On the other hand we hold that the applicant has failed to prove that the document Ex. I is the will of Babu Chhote Narayan Pershad and that it was duly executed by him. We accordingly set aside the judgment and order of the lower Court and in lieu thereof dismiss the application with costs."

On this appeal,

DeGruyther, *K.C.*, and *E. D. Jackson*, for the appellant, contended that the action of the High Court in admitting additional evidence was improper and not warranted by the Code of Civil Procedure. And the case of *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1), was referred to as showing that the use of the procedure provided by section 568 of the Civil Procedure Code was only legitimate "when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent." In the present case the appeal had only been partly heard, and though no objection was taken at the time, there seemed to be no "substantial reason" given as required by section 568 why the additional evidence should have been taken. As to the extracts from the account book they were put in by the pleader for the first time before the High Court on appeal. The book of accounts was not properly proved, and the inferences drawn from such extracts might well be erroneous.

Ross, for the respondent Manna Koer, contended the objection under section 568 of the Code had not been taken

(1) (1907) I. L. R. 31 Bom. 381; L. R. 34 I. A. 115.

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before : the parties had in fact agreed to the additional evidence being taken, and the objection could not now be raised for the first time on this appeal. As to the account book, the passage from the High Court judgment set out above was referred to in which they mentioned the book and the three entries extracted from it. It could not be taken for granted that the evidence of the unexamined witnesses would have supported the appellant's case. The High Court had their evidence before them, which the lower Court had not, and it did not satisfy the High Court. The presumption was in favour of the High Court judgment being right unless it was clearly shown to be wrong.

De Gruyther, *K.C.*, replied.

The judgment of their Lordships was delivered by

May 11.

SIR ARTHUR WILSON. This is an appeal from a judgment and decree of the High Court of Bengal dated the 3rd of March, 1904, which reversed those of the District Judge of Gaya of the 6th of August, 1901.

The main question raised on the appeal is as to the genuineness of the will, purporting to have been made by one Chhote Narayan Pershad, and dated the 21st of December, 1900. Chhote Narayan died on the morning of the next day to that on which the will bears date, and left a widow, the respondent Manna Koer, and a daughter Lakshmi Koer. Chhote Narayan was the adopted son of one Jokhi Lal. After Jokhi Lal's death one of his widows adopted the respondent Hanuman Pershad. The appellant is the brother by birth of Chhote Narayan Pershad, their father being one Ram Rekha Lal.

The will purported to make various provisions for the testator's wife and daughter, and appointed the now appellant, the testator's brother by birth, as residuary legatee and executor.

The appellant applied for probate of the will in the Court of the District Judge of Gaya. Caveats and written statements were filed in answer, and the case was heard before the District Judge. Three of those who appear as attesting

witnesses to the will were called at the hearing. The other two attesting witnesses, and the appellant himself, were not examined by the applicant: they were tendered for cross-examination but not cross-examined. Evidence was called on the other side. The District Judge was satisfied that the testimony to the genuineness of the will, and the competency and *animus testandi* of the testator, was overwhelming, and the evidence on the other side altogether untrustworthy; and he granted probate accordingly.

The respondents appealed to the High Court of Bengal. That Court made an order at the hearing of the appeal for the examination, as witnesses, of the appellant himself and the two witnesses to the will who had not been examined in the first Court. Those persons were accordingly examined. The High Court also admitted certain extracts from books of account alleged to have been kept by the testator. In the result the High Court held that the circumstances connected with the alleged execution of the will were involved in suspicion, and that the will was not sufficiently proved; and accordingly a decree was passed which set aside that of the District Judge, and dismissed the application for probate with costs. Against that decree the present appeal has been brought.

On the argument of the appeal it was objected that the examination of the three witnesses by the Court of Appeal was irregular; but it appears that that examination was taken with the assent of both sides. It is not open, therefore, to anybody to complain of it now.

It is objected, secondly, that the admission of the account books on appeal was irregular. But there is nothing to show that that admission was objected to at the time.

Their Lordships thus have to face the position that, on a pure question of fact, the two Courts in India have differed, and the materials before those two Courts have not been entirely the same.

The question their Lordships have to answer is, whether they shall advise His Majesty that the decree of the High

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Court should be reversed. That they cannot do, unless they are satisfied that the decree appealed against was wrong, and they are not so satisfied.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs of the respondent, Musummat Manna Koer, who alone defended the appeal.

Appeal dismissed

Solicitors for the appellant : *T. L. Wilson & Co.*

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

J. V. W.

PRIVY COUNCIL.

*P.C.**
1909
March 11, 12; May 11.

RAM CHANDRA MARWARI.

v.

KESHOBATI KUMARI.

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

Transfer of Property Act (IV of 1882) ss. 83, 84—Deposit made in full discharge of mortgage bond—Withdrawal of money by Receiver as agents of mortgagees—Withdrawal without following the provisions prescribed by the Act—Principal and Agent—Sonthal Pergunnahs Settlement Regulation III of 1872, s. 6, as amended by s. 24 of Regulation V of 1893, construction of, as to amount of interest recoverable on bond—Interest previously paid by debtor whether to be taken into account in making decree.

On 27th July 1885 a simple mortgage bond for Rs. 34,000 providing for interest at 18 per cent. per annum, and on default in payment compound interest at the same rate, was executed by a debtor, now represented by the respondents in favour of one of a firm of money-lenders, the transaction being admittedly governed by section 6 of the Sonthal Pergunnahs Settlement Regulation III of 1872, as amended by Regulation V of 1893. On 27th October 1890, interest to the amount of Rs. 23,403-15-6 had at various times been paid and that was all that was due for interest up to that date. Nothing more was paid until, on 17th August 1895, the mortgagor being anxious to redeem the mortgage tendered to the mortgagee, in full discharge of the bond, the sum of Rs. 44,596-0-6, a sum fixed, as amounting together with the interest already paid, to Rs. 68,000, which by section 6 of Regulation III of 1872, as

* *Present :* LORD ATKINSON, LORD COLLINS, LORD SHAW, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.