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**(1910) 09 BOM CK 0012**  
**In the Bombay High Court**  
**Case No : First Appeal No. 90 of 1909**

Digambar Keshav Shrotri

APPELLANT

Vs

Narayan Vithal Ashtekar

RESPONDENT

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**Date of Decision :** 06-09-1910

**Acts Referred:**

**Citation :** (1911) 13 BOMLR 38

**Hon'ble Judges :** Rao, J;Batchelor, J;Basil Scott, J

**Bench :** Full Bench

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## Judgement

Batchelor, J.—This was an application for the revocation of the probate of the will of one Shankar who died on the 24th of March 1902.

2. By an application made in January 1903 Digambar and Bhagwat, who are the executors under the will, applied for a certificate of heir ship with the will annexed.

3. After various incidents that application was, in April 1904, ordered to stand over pending the result of an application for probate made by the same parties.

4. Probate was ultimately granted to Digambar and Bhagwat on 18th August 1904 but the probate proceedings had throughout been conducted ex parte, no citation having been issued to Thakubai, the widowed sister of the testator.

5. Then in April 1909 the present application was made by a purchaser from Thakubai of a part of the land the subject matter of the will. In March 1909 the Assistant Judge revoked the probate on the sole ground that it had been obtained without notice to Thakubai. But in an interlocutory judgment of this Bench in April last we held that that was not sufficient ground for revoking the probate and we remanded to the lower Court an issue whether the will propounded is the will of Shankar.

6. The Assistant Judge has now found upon that issue in the affirmative, that is to say, in favour of those who propound this will. That of course is a finding of

fact and though this is a first appeal in which findings of fact are open to attack, we have every desire to treat with respect any such finding by the Judge who had the advantage of seeing and hearing the witnesses. But when all possible allowance is made for this principle we are unable, in this case, to adopt the decision of the Assistant Judge which in our opinion is clearly opposed to the weight of the evidence.

7. Before noticing that evidence it may be as well to say that we agree with the Assistant Judge in this that the onus lies upon those who propound the will. That is so by reason of the general principles of law applicable to such cases. " Those principles will be found illustrated in many cases of which we may notice only *Tyrrell v. Painton* [1894] P. 151. There it is laid down that wherever a will is prepared and executed under circumstances which raise a suspicion of the Court, it ought not to be pronounced for unless the party propounding it adduces evidence which removes such suspicion and satisfies the Court that the testator knew and approved of the contents of the instrument. The Court there approved of the two rules of law which Baron Parke had enunciated in *Barry v. Butlin* (1838) 2 M.P.G. 480, namely, first that the onus lies in every case upon the party propounding a will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a capable testator, and secondly, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed. These dicta appear to us to apply with particular aptness to the facts of the case now in hand and they do not lose any of their force by reason of the circumstance that in the ex parte probate proceedings the executors succeeded in snatching a decision of the Court behind the back of a Hindu widow who, as they knew, was vitally interested in disputing the will.

8. The will itself is wholly in favour of these two executors Digambar and Bhagwat. They are cousins twice removed of the testator and with them according to the evidence the testator was in the habit of quarrelling. Not only are these persons made the sole beneficiaries of the testator's bounty but by the same instrument he disinherits his widowed sister with whom, so far as we know, he had no dissension. It is important to bear in mind that the parties propounding this will are precisely those parties who take the whole benefit under it.

9. We do not propose to examine in detail the oral evidence) upon which it was sought to prove this will. The depositions speak for themselves and it will not be necessary to subject them to more than passing criticism. The first witness on the record, Exhibit No. 25, is Digambar himself, the executor. Him Mr. Gadgil has endeavored to save on the representation that he is half-witted. Of that, however, on the deposition there are no signs, while there are abundant signs of a resolute endeavor to save this will at all expense of truth. To such an extent

was this endeavor carried that at the end of the deposition the learned Assistant Judge himself called upon Digambar to show cause why he should not be prosecuted for perjury. We need only say that that notice to Digambar was in our opinion amply justified by the deposition which he made. Then comes one of the two attesting witnesses called, namely, Dattatraya Balaji, Exhibit No. 26. In sentence after sentence in the examination-in-chief of this witness he contradicts himself without justification, and he ends by saying "what I have said in this Court is false." That, we take it, is the nearest approach to truth which this witness arrived at. Then comes witness Bhagwant Keshav. He is certainly a better witness than Digambar but we are unable on the faith of his testimony to give effect to the story which he tells. One thing, however, is apparent from his evidence and that is that the cause of Shankar's death was plague, that Shankar was taken ill, on the 22nd of March, with plague, that he made the alleged will on the following day in the after-noon, and that he died soon after the following mid-night. The witness Bhagwant himself says that he and his brother Digambar found Shankar lying unconscious on the road between Tambwe, the plague stricken village which he was running away from, and Vasantgad, the hill fort to which he was endeavoring to escape. It is said that this witness does not contradict himself and not plainly overthrown in cross examination. That may be conceded but it must be remembered that the story which the witness Bhagwant tells is one of which any cross-examination was extremely difficult. He is however opposed to the writer upon certain points and he is unable to explain what happened to the alleged draft made of the will. Then the next witness is Ganesh who wrote the will. He pretends that Shankar died not] of plague but of fever and biliousness. He admits that the appellants are his friends, and he says that the writing of the will took two hours and during the writing the attesting witnesses were called in there. Upon this point the attesting witnesses differ from him and we cannot for a moment believe that for two hours Shankar's mind could have been successfully operating on such a matter as the preparation of the will. The only other witness whom it is necessary to notice is Rango Ganesh, the other attesting witness. He says that the will was read over to him and others. He admits that for two days prior to Shankar's death he was semi-conscious but he pretends that Shankar did not suffer from plague at all. According to his statement Shankar died of a fall and nothing else.

10. Now it is perfectly true to say that in most cases in this country it is unsafe to, infer the falsity /of a whole case from the falsity of one or even two witnesses called to support it. But here it is important to observe that if there were any, truth whatever in the story made on behalf of this will there was no need and no occasion to call such witnesses as Digambar and Ganesh, And we think that the evidence which they have given has its effect upon the whole case of the respondent. So far from the evidence removing the natural and necessary suspicion caused by the circumstances in which the will was alleged to have been made, we are left with the conviction that the most probable account of the transaction is, that the accident of removing this dying man to the house of

Ganesh was afterwards used in order to set up the preparation of the will in that house where the executors happened then to be living. We need only add that the signature appearing on the will is steady, firm and strong, and is in all respects the very reverse of the sort of signature which one would expect to find made by a man who had been suffering from plague for over a day and was about to die of that malady in the course of the next few hours.

11. For these reasons we are of opinion that this will is not proved, We must, therefore, reverse the finding of the learned Assistant Judge and confirm the order revoking the probate. The original finding was in favour of the respondent. The respondent will have his costs throughout, the Assistant Judge's finding having been in favour of the now appellants.