

(1938) 05 CAL CK 0001
In the Calcutta High Court

Jnanada Govinda Choudhury and Another	APPELLANT
Vs	
Birendra Nath Goswami and Another	RESPONDENT

Date of Decision : 31-05-1938

Acts Referred:

Citation : AIR 1939 Cal 595

Hon'ble Judges : Costello, J; Biswas, J

Bench : Full Bench

Judgement

Biswas, J.—This is an appeal from a decision of the District Judge of Rajshahi granting letters of administration with copy of the will annexed. The substantial question in the appeal is whether the will is genuine or not. The will was propounded more than 33 years after the death of the testator. The testator was one Mayananda Goswami who died in or about the month of February 1903, and the will is said to have been executed five months before his death, namely on the 5th September 1902. He left two widows, Shama Sundari and Khemankari, and three sons, one by the first wife, named Bipin, and the other two by his second wife, named Sures and Murari, who were both minors at the time. He also left two unmarried daughters. The will makes no provision for the marriage of these daughters and the whole object of it appears to be to ensure the due performance of the sheba of the family deity Sri Sri Iswar Lalji Deva Thakur and certain religious festivals. It recites that the properties of the testator shall remain in charge of his eldest son, and he is enjoined to perform the debsheba and the other religious services out of the income as also to maintain the minor sons, unmarried daughters and wives of the testator. It is then provided that after the minor sons came of age, all the three sons shall equally "inherit" the properties and carry on the deb-sheba, etc., out of the income. If the sons should fail or refuse to perform these religious duties, they shall not be entitled to enjoy the properties, and in that case, a near kinsman shall inherit the estate and carry on the debsheba. In the last clause it is laid down that none of his sons shall be entitled to sell, encumber or make a gift of any of the properties and that the properties shall not be liable to be sold in auction for their debts. The

appellants suggest that the will made an absolute bequest in favour of the sons subject only to a charge for debts, etc., while the propounders contend that the properties were given away to the idol with only rights of management to the sons and rights of maintenance to the sons, daughters and wives. This is a question of construction of the will, and is pertinent in these proceedings only in so far as it may be supposed to throw any light on the question of its genuineness. As will be seen later, the respondents' own case in their application for letters of administration is that their object in propounding the will was to save the properties from the hands of creditors on the ground that the properties had been made debutter by the will. The will is attested by three witnesses, Pran Govinda Goswami, Gopal Chandra Sircar and Kedareswar Chakrabarti, and the scribe is one Praneswar Chakrabarti, all residents of Bajurbhag, the village where the testator lived.

2. Of the sons of the testator, Sures and Murari both died before Bipin. They died unmarried and intestate, and left Bipin as their heir. Bipin died in 1931, leaving two sons, Birendra and Hirendra, who are the petitioners for the grant and respondents in this appeal. Birendra is a young lad of 19, and his brother Hirendra is much younger. In support of the execution of the will, the petitioners examined the scribe Praneswar, the attesting witnesses being all dead. It is mainly on the strength of the evidence of the scribe that the learned District Judge has made the grant. In a case where it is a question of appraising the oral testimony of a witness, the Court of Appeal will no doubt attach a great deal of importance to the opinion of trial Judge regarding the value of such testimony. All the same, there are certain facts and circumstances in this case which cannot be overlooked, and though the learned Judge relied on the evidence of Praneswar, we do not think it would be quite safe to act on that testimony. The petitioners' own case carries certain elements of suspicion, and it is hardly necessary to point out that the Court should, in such circumstances, insist on a very strict standard of proof, and ought not to make a grant unless it was satisfied that the suspicion had been removed.

3. In the first place, it is to be observed that there is a remarkable variance between pleading and proof. The application for letters of administration, again, is itself remarkable in this way that without attempting an explanation of the undoubted delay which had occurred in making it, it complacently stated that it had become necessary to put forward the will in order to defeat the claims of certain creditors. It is not the petitioners' case as set out in the application that they or their father had been unaware of the will until about the time when the application was made. On the other hand, the petition after reciting the fact of the execution of the will goes on to state in detail how Bipin, and after his death his sons, the petitioners themselves, had been acting as shebais and carrying on the worship and other services of the family deity in accordance with the directions of the will. Then at the end it is stated that one Jnanada Govinda Chaudhuri (the appellant before us) having recently obtained a mortgage decree in respect of a debt contracted by Bipin and put the mortgaged properties to sale

in execution of such decree, it was necessary to try and protect the said properties on behalf of the debutter estate, and it was for this purpose that the wil was being propounded. This case made in the petition is supported by an affidavit which was affirmed by the scribe Praneswar. In the affidavit also, it is categorically stated that Bipin and after him his sons were carrying on the deb-sheba, etc., as directed by the testator in his will. In the evidence which was led on behalf of the petitioners however a new story was set up for the first time and it was to the effect that the will had been lying in a box unknown to the parties till quite by an accident it happened to come to light about the month of September 1935. We shall have occasion to refer to this later on; we are only concerned to point out at this stage why on the petitioners' own showing the case with which they come to Court demands the strictest scrutiny.

4. The learned Judge in our opinion allowed himself to be too easily satisfied about the reliability of the scribe. Praneswar is an old man of 80 or 81 years of age; he was deposing to events which had taken place more than 33 years ago, "might have been about 40 years back" according to his own statement. In his examination-in-chief he was very definite and stated that the testator had signed the will, then he signed it in his presence, and then it was signed by the attesting witnesses. In cross-examination, however, his memory suddenly failed him, and he did not remember the details of the writing and entries of the will. He did not remember whether he had signed before or after the testator signed. In the will he describes himself as a scribe and his signature does not find a place among the signatures of the attesting witnesses. A scribe may no doubt be an attesting witness to a will as pointed out by Rankin C.J. in *Abinash Chandra Bidyanidhi Bhattacharjee Vs. Dasarath Malo and Others*, , but it must be shown that the signature of the scribe was put down for the purpose of attesting the document. It is not clear from Praneswar's evidence that he had put his signature with any such object. In the affidavit he calls himself both a scribe and an attesting witness. This affidavit, we may point out, was admittedly signed and affirmed by him without knowing what it contained. On his attention being drawn to the last paragraph of the affidavit, he had to say that this part of the affidavit had not been brought to his notice before he signed it. Here was a man who on his own admission put his signature to an affidavit and swore to the truth of its contents without caring to find out what it was that he was swearing to. The learned Judge calls this "reprehensible" conduct, but did not think, it affected the credibility of the witness. We are afraid we cannot accept such an easy view. There is another important fact which was also admitted by him in his evidence and it is that he had lent some money to Sures and obtained a decree against him and then in execution of such decree, purchased Sures's one-third share in the dwelling house. This was clearly action on his part which, he should have known, was wholly contrary to the provisions of the will.

5. According to his reading of the will, the properties had been all bequeathed by the testator to the deity; how then could he, knowing that there was the will, have purchased the one-third share of the dwelling house as if it was the secular

property of the testator's sons? On his own showing, therefore, he was a man who was prepared to say and do whatever it might suit his interest to say and do, and we should hesitate to accept the evidence of such a witness without the strictest scrutiny. The only reason which the learned Judge gives for believing Praneswar is that he is an old man "on the brink of the grave." This is a fact which might excite sympathy for him, but we do not see how it can enhance his credibility in a Court of law. In cross-examination it was put to the witness that shortly after making the affidavit he had taken a promissory note from Birendra, one of the petitioners, and one Kasi who was presumably the father-in-law of Birendra. This he did not deny, but he denied the suggestion that the promissory note was without monetary consideration. But it is difficult to dismiss the suggestion as altogether unfounded. According to his own statement he was himself a debtor to one Naren Pandit who had not yet been repaid, and it was hardly likely in these circumstances that he should be advancing money to Birendra and Kasi for no particular reason. Taking all these facts into consideration, we are therefore unable to accept the evidence of Praneswar. If that evidence goes, there remains but little to support the case of the petitioners.

6. Another witness on which the learned Judge relies is P.W. 3, Sasi Kanta Chakra. barti. He, again, is an old man of 75, but that by itself carries no guarantee of truthfulness, if his evidence is otherwise unworthy of credence. It is remarkable that this witness was put forward to prove the signatures of any number of persons whose signatures required to be formally proved on behalf of the petitioners in the case, Thus, he proves the signatures of Mayananda the testator, and of the three attesting witnesses, and also of two other persons, Bipin, the eldest son of the testator, and Madan Goswami. What opportunities he had of knowing the handwriting of all these persons he does not choose to explain. We have in fact nothing but his bare statement that he recognized these signatures; We find it difficult indeed to accept the testimony of such an omnibus witness. If this evidence is also discarded, it is not disputed the petitioners have nothing else to fall back upon to prove execution or attestation of the will.

7. Turning now to the case made in evidence regarding the discovery of the will, as already pointed out, there was not the faintest suggestion of such a case in the petition for letters of administration. In the petition it was stated with almost cynical frankness that they found it to their interest now to make out that the estate had been made debutter and that it was therefore necessary to set up the will. It was probably thought prudent later on to offer a more plausible explanation. The story however they put forward is on the face of it so utterly improbable and so inconsistent with their case as made in the petition that it would strain one's credulity to the utmost to accept it. The story is that Bipin, shortly after his mother's death which took place in 1915, sent away a wooden box belonging to the testator from his house to the house of a neighbour; named Jogesh, witness 4 for the petitioners. A few months later, Bipin took away certain utensils from the box, but left it at) Jogesh's house with the other articles which were in it. The box remained in Jogesh's house from that time until 1935. In or

about the month of September that year, it is said, Jogesh happened to meet Birendra one day, when he suddenly remembered to tell Birendra about this box. Birendra then went to Jogesh's house to fetch it. But before Birendra was allowed to take away the box, Jogesh felt it necessary to have an elaborate ceremony to witness the transaction. A number of persons were accordingly called in, and in their presence the box is supposed to have been opened before it was removed. It was then for the first time that the will was unearthed from inside the box. One of these witnesses Bijoy has been examined (P. W. 5); he is the adopted son of one of the attesting witnesses Pran Govind Goswami.

8. The story is so improbable, as we have said, that we have no hesitation in rejecting it. It is not explained why the box should have been removed by Bipin to Jogesh's house in 1915 shortly after his mother's death. If Bipin knew about the will (as the petition suggests), and if he also knew that the will was contained in the box, it is not likely that he should part with the custody of it. On the other hand, if the box merely contained utensils and other articles, it is not understood why it could not have been left in the family dwelling house. It is no doubt stated by some of the witnesses that Bipin lived at his maternal grandfather's house at Bhabni, which is half a mile from Bajurbhag, the testator's village: still that would not explain why Bipin should wish to remove the box to the house of Jogesh, much less why he should do so in 1915. It is not again clear why Jogesh should not have spoken to anybody about the box for all these years. Even if he did not think it necessary to ask Birendra or anybody else to take away the box in Bipin's lifetime, why should he not have informed Bipin's sons about it after Bipin's death that they might take it back? The learned Judge himself was unable to find any explanation why Bipin should have left the box with Jogesh: all the same, he thought this story was sufficient to account for the delay in making the application for letters of administration. It is not however a mere question of explaining the delay, requiring explanation as it does, but what is more material, it is, as we have already remarked, one of wide divergence between the case made in the petition and the case made in evidence, and this undoubtedly throws a cloud of suspicion on the whole story of the will which certainly evidence of the kind led by the petitioners does not at all help to lift.

9. We have no doubt in our mind that the petitioners, one of whom is only 19 and the other still a minor, must have been put up to make this application by interested parties. According to the evidence, Birendra's father-in-law (he is probably the man referred to as Kasi by some of the witnesses) is the person who took a leading part in the whole affair. Birendra says he was present in Court on the date the petition was filed, but that it was filed by his father-in-law. It is also his evidence that his father-in-law was looking after the case and bearing all expenses. If Kasi is the name of the father-in-law, then he is also the person who passed the promissory note jointly with Birendra in favour of the scribe after the scribe had made the affidavit which accompanied the petition. According to the petition filed by the objector, Jnanada Govind Chowdhury, Birendra's father-in-

law, is a man of Natore and never lived at the village Bajurbhag, and if that is so and if, as there is reason to suspect, he is the person who inspired the present application, it is not shown how he could have any know-ledge of the facts which are set out in the application or in the affidavit of Praneswar. In our opinion, all the facts and circum. stances of the case point to the conclusion that the will set up in this case is a fabricated document.

10. The learned Judge in the Court below persuaded himself that the heirs of Mayananda had adequate grounds for ignoring the will. This of course assumes that the existence of the will was known to them. At the same time, the learned Judge appeared to believe the story of the will having come to light for the first time out of the wooden box in Jogesh's house. It seems to us somewhat difficult to reconcile the two positions. It may be said that if the petitioners were putting up a forged will, they might easily have worded it differently, that is to say, in such a way as would have suited their purpose more effectively. In other words, it might have used language making a clean dedication of the estate to the deity rather than leaving the matter in a state of uncertainty as to whether the properties were made debutter or were bequeathed to the sons with only a charge for deb-sheba. The argument is plausible, but the fact remained that the heirs of the testator dealt with the estate as their secular property all along, and it might have been considered necessary therefore to frame the will in terms which on a particular construction might afford some justification for such course of dealing.

11. It is not necessary to discuss the evidence any further. We are convinced, as already stated, that the will propounded in this case is a false document. In appearance it looks like an old document, but it is common experience in these Courts that an appearance of age may be easily given to a fabricated document. We consider it a serious matter that persons should come forward to set up forged wills in this way. There are not sufficient materials on the record to make it possible for us to say with certainty who was responsible for bringing the false will into existence in this case. But the matter ought not to be left in this "Unsatisfactory state. We desire to invite the special attention of the District Judge to it, and desire that he should make further investigations in order to track down the real culprit or culprits and bring them to justice, if possible. It is clear also that some of the evidence in the case is perjured evidence, and the District Judge should also consider if the persons who gave such evidence should not be dealt with according to law. With these observations, we accordingly allow the appeal, set aside the judgment and decree of the learned Judge, and dismiss the application for letters of administration. The appellants are entitled to their costs in all Courts, to be paid by respondent 1, Birendra Nath Goswami. We assess the hearing fee in this Court at ten gold mohurs.

Costello, J.

12. I agree.