

(1938) 12 CAL CK 0028
In the Calcutta High Court

Suradhani Debya Choudhurani

APPELLANT

Vs

Raja Jagat Kishore Acharya Choudhury and Others

RESPONDENT

Date of Decision : 21-12-1938

Acts Referred:

Citation : AIR 1939 Cal 379

Hon'ble Judges : S.K. Ghose, J; Mukherjea, J

Bench : Full Bench

Judgement

Mukherjea, J.—The appeal before us is against the decision of the District Judge of Mymensingh passed in a suit for obtaining a probate of the will of one Dwijendra Kishore Acharya Choudhury, a Hindu inhabitant of Muktagacha in the District of Mymensingh. The propounder is Raja Jagat Kishore Acharya Choudhury, a somewhat distant relation of the testator, and there were several objectors including the testator's mother who is the only appellant before us. The testator died on 6th March 1930 and the two testamentary documents propounded by the plaintiff are a will and a codicil which are alleged to have been executed on 8th August 1928 and 3rd October of the same year, respectively. Dwijendra did not marry and at the time of his death he had as his near relations his mother, Suradhani, the appellant before us, two sisters, viz. Charuhaahini and Tarubala of whom Charuhashini is a widow and four sisters' sons, to wit Santi, Sudhansu, Gobinda, Dharendra and Dabi. Santi is the son of Sailabala, a sister of the testator who died during the latter's lifetime. Sudhansu Gobinda is the son of Charuhashini, whereas Dharendra and Dabi are the two sons of Tarubala, the youngest sister of the testator. By his will Dwijendra gave away the whole of his properties, moveable and immovable, to the propounder Raja Jagat Kishore Acharya Choudhury and by the codicil which was executed about two months later, he made some provisions for the maintenance and residence of his mother and his widowed sister Charuhashini. The mother was given a maintenance allowance of Rs. 520 a year and the sister was given Rs. 300 annually. They were allowed to reside in the family dwelling house and were given life-estates in certain small plots of land contiguous to the

residential building. The propounder Raja Jagat Kishore to whom practically the entire estate has been given is, as I have said above, a somewhat distant agnatie relation of the testator. His connexion with the testator and his family can be seen from the following diagram.

X | ----- | | Gokul Kishote Gour Kishore | (took his nephew in adoption) ----- | | | Ram Kishore (adopted)
 Ram Kishore Golok Kishore | | jagat Kishore Lalit Kishore (adopted) married
 Suradhani LALIT KISHORE=Suradhani No. 1 |

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 Dwijendra Narendra krishnendra Saila Charu Taru Bala Testator No. 3 (died in infancy) Bala Hashini Devi Devi widow Sailesh (dead) No. 2 Bisi | | | Sasi Bhusan Sudanshu | Acharya Gobinda | alias Santi Choudhury | No. 7 No. 6 | |
 ----- | | Dhirendra No. 4 Dabi No. 5 2.

It will be found from the genealogical table given above that Ram Kishore and Golok Kishore were two brothers. Ram Kishore was taken in adoption by his paternal uncle Gour Kishore, and Jagat Kishore is the son of Ram Kishore. Ram Kishore's brother Golok Kishore on the other hand took Lalit Kishore as his son in adoption and Lalit was the father of the testator. Lalit Kishore died in 1903, when the testator and all his brothers were minors. Lalit left behind him a will and under the terms of the same Suradhani, his widow, managed the estate as an executrix till 1910 when Dwijendra attained majority. In the meantime, Krishnendra, the youngest son of Lalit, died and his 1/3 rd share devolved upon his mother Suradhani. It appears from the evidence that there were disputes between Suradhani and Dwijendra after the latter attained majority, regarding the accounts of the estate during the period of her management. The dispute was settled by the lady's conveying the 1/3rd share which she inherited from Krishnendra and Dwijendra in his turn transferred half of this 1/3rd share to his brother Narendra; so that in the year 1914 when these documents were executed, both Dwijendra and his brother Narendra came to have a moiety share each in the estate left by Lalit Kishore. On 6th June 1920, Dwijendra executed a putni putta in respect of the bulk of his zamindary property in favour of Maharaja Sasi Kanta Acharjya Choudhury who was a natural son of Raja Jagat Kishore but was taken in adoption by Maharaja Surjya Kanta Acharjya of Mymensingh, reserving an annual rental of Rs. 5000. Two years later, Dwijendra removed from his ancestral house at Muktagacha and went to Benares where he stayed for a number of years. It was in Benares that the will was executed on 8th August 1928. Just six days before that, both the brothers Dwijendra and Narendra executed, at Benares, a deed of gift in favour of Raja Jagat Kishore in respect of some of their properties and they were given to the Raja for the purpose of defraying the expenses of the puja and seva of the family deities of the donors. The deed of gift executed by the testator was registered at Mymensingh on 25th August following. The will which was executed on 8th August was kept in the custody of the Allahabad Bank. The codicil which is dated 3rd October 1928, was executed at Muktagacha and was kept with one Basanta Kumar Pal who was the scribe of the document. The testator returned to

Benares after the codicil was executed and about a year later he went to Puri where he died of phthisis in March 1930.

3. The application for probate was filed by the propounder on 5th August 1930. Special citations were issued on the mother, brother, sisters and sister's sons of the testator. Narendra, the brother, did not appear and three sets of objections were filed, one on behalf of the mother and the other two on behalf of the sons of Tarubala and Charu Hashini. Most of the witnesses who were at Benares were examined on commission and the learned Judge by his judgment dated 8th September 1933 found in favour of the propounder and granted probate. Against this decision, Suradhani, the mother of the testator, has alone filed the appeal. The appeal came on for hearing before this Court some time last year and by an order dated 20th July 1937 records were sent down to the lower Court in order that the appellant might be, given an opportunity to examine herself as well as a doctor from Ranchi on commission. This additional evidence which was taken by the District Judge has now been sent up to this Court and the appeal has been argued on the entire evidence on the record. Mr. Bose who appears for the appellant has, at the outset, taken a point that the procedure followed by the District Judge was in one respect entirely irregular and this irregularity according to him vitiated the whole trial. His argument is, that Narendra, the brother of the testator who was made a party to the probate proceeding, was a lunatic and as no guardian was appointed to represent him in the suit and put in proper objections on his behalf, the whole proceedings were irregular. It appears that in the written statement of Suradhani the point was specifically taken that Narendra was a lunatic and on this allegation the trial Judge had framed. Issue 4 which was worded as follows:

Whether this proceeding can proceed without the appointment of a guardian of Narendra Kissors Acharjya Choudhury, brother of the alleged testator?

4. This issue was taken up first for hearing and the Judge recorded his finding on this point in his order dated 24th August 1933. It was held that Narendra was not a lunatic and was not shown to be incompetent to manage his own affairs and. consequently there was no necessity of appointing a guardian on his behalf. It was observed by the learned Judge that the evidence on this point was one sided and three doctors and one Kabiraj who had the opportunity of observing Narendra in the year 1928 were of opinion that he was quite a normal and sane man. There is no evidence to the contrary coming from the side of the caveatrix. Mr. Bose has pointed out to us that these medical witnesses spoke to the mental condition of Dwijendra in August 1928 when the deed of gift was executed, whereas the material time would be the time when the probate proceedings were started and citations were issued on Narendra. He has placed for our consideration the evidence of a doctor who was at the Ranchi Mental Hospital at the time when Narendra was detained there. It appears that in November 1929 Narendra was taken into the mental hospital at Ranchi. From the medical records of the hospital which have been made exhibits in this case, we find that during

his stay at the asylum he was some times violent and abusive and showed flight of ideas and incoherent talks but he improved gradually and on 26th May 1930 he was discharged as cured. We have no convincing evidence to show as to what was his mental condition at the time when the probate proceedings were started in August 1930. The mother indeed says that he is a lunatic even now but her story lacks corroboration and there is not a single witness examined in this case who can testify to the fact that Narendra was insane at the time when the probate suit was commenced or thereafter. Under these circumstances we do not think that the learned Judge was wrong in not appointing a guardian to represent Narendra in the suit. As regards the merits of the appeal, Mr. Bose has assailed the propriety of the trial Court's judgment substantially on one ground. His contention is that on the evidence adduced in the Court below, it ought to have held that though the will was signed by the testator and attested by the witnesses, yet the testator lacked testamentary capacity or what is called a sound disposing mind. He had not the requisite faculty to comprehend the nature and extent of his property, of the claims of those who were closely related to him and whom he was excluding from his property. In para. 7 of the written statement filed by Suradhani the case made was

that Dwijandra was feeble minded and of unsound mind. He was devoid of the power of distinguishing between right and wrong.

5. The story put forward by the appellant in her evidence is this: Dwijendra when he was in B.A. Class in a Calcutta College came back home being attacked with various kinds of illness, namely insomnia, hysteric fits, etc. and gave up studies under medical advice. While at home, he was entangled in business affairs and other things which caused further worries and as he could not manage his properties, he granted a patni lease in favour of Maharaja Sasi Kanta in 1920. During his stay at Muktagacha, he came in contact with one Brajabasi who initiated him spiritually and while uttering mantras he thought he could see the Sudarsan Chakra of God Bishnu and a physical incarnation of the God himself. At that time Brajabashi would be bathed with a pitcher of milk and would be paid a sovereign each time as sacrificial fee. In 1922 the mother started a lunacy proceeding against both the sons Dwijendra and Narendra but it was dropped later on and Dwijendra then went away and settled at Benares. The lady says that the condition of Dwijendra remained the same and when he came back once to Muktagaeha, he was still troubled with his delusions. He used to remain inside his room with all the doors and windows closed up and incense sticks burning all the time. This time he regarded his younger brother Narendra as the deity himself. Another insane delusion which obsessed the testator was that the Raja was the real owner of the property and Lalit, his father, as well as all his descendants who had come into the family by adoption were really interlopers. The lady also says that lunacy was in her family and many of her brothers and sisters were mentally deranged.

6. If the story told by the lady is true, Dwijendra was completely a lunatic at all

material times and could not possess any testamentary capacity. Having regard however to the evidence in this case, both oral and documentary, we do not think that we can accept her story. Her story has not been corroborated by any other witness and has been materially contradicted by certain unimpeachable documentary evidence. In the first place, we find that, after he left his studies, Dwijendra did take up the management of the estate in his hands and there were disputes between him and his mother which led to the execution of a conveyance by the latter in his favour. It is true that in 1920 he executed a putni patta in favour of Maharaja SasiKanta but there is nothing to suggest that this was an improper act from the business point of view. In the second place, we find that the lunacy proceeding which was started by the mother against Dwijendra was dropped altogether and the statement of the lady that it was dropped because of the flatteries and praises of her officers is too fanciful to be accepted. In the third place we have the evidence of several qualified medical witnesses who came into contact with Dwijendra during his stay at Benares and all of whom have sworn that Dwijendra was quite a normal man and they did not notice anything abnormal in his mind. It is true that these medical witnesses did not keep the testator under observation but, as they themselves say, they did not notice anything unusual in the mental condition of Dwijendra which might excite their suspicion in the least. The ailments from which he suffered were the ordinary ailments like colitis, dysentery, etc. Lastly, there is a large number of letters made exhibits in this case which were written by Dwijendra to his officers and which show conclusively that Dwijendra had sufficient mental capacity to understand and manage his affairs. These letters contain minute directions regarding the management of his zamindari and household affairs and prove that the writer acted in these matters with considerable prudence and discretion. Some of the witnesses examined on behalf of the propounder undoubtedly speak of some queer habits of Dwijendra. He lived in complete separation from his mother, sisters and other female relations. He had an aversion to women and could not tolerate the idea of marrying. Over and above this, he had some pet animals of his own, like monkeys and birds and the evidence on the side of the appellant is that he used to play with these animals even during night time. Mere eccentricity or caprice however is not enough to constitute mental unsoundness unless it is associated with some sort of delusion.

7. Mr. Bose has not pressed his case that the testator was an out and out lunatic, totally devoid of common sense and unable to manage his own affairs. What he says is that however normal the testator might be in other respects, he was labouring under certain mental delusions and these delusions influenced the entire testamentary disposition. It is said that testator had an irrational aversion to his mother which was based on a groundless suspicion that his mother was unchaste. In the second place, the testator was obsessed with another delusion regarding the claims of the propounder to his family property. His idea, was that the Raja being born in the family of the testator's ancestors, though he passed out of it by adoption, had better claims to the family property than the

descendants of his own father Lalit who had come into, the family by the back door of adoption and were more or less trespassers. It has been laid down by Sir John Nichol in the well known case in *Dew v. Clark* (1826) 3 Add. 79 that the test of a person being of unsound mind in a legal sense is the existence of delusion or a belief in facts which an ordinary person would not credit or a belief which one cannot understand how any person in his senses could hold. In that case, the testator besides labouring under certain forms of mental perversion showed an unnatural animosity to his only daughter and it was held on the evidence that it was a case of mental delusion: "Wherever a patient" says Sir John Nichol

once conceives something extravagant to exist which has no existence whatever but in his own heated imagination and wherever at the same time having once so conceived he is incapable of being or at least of being permanently reasoned out of that conception, such a patient is said to be under a delusion in a peculiar half technical sense of the term and the absence or presence of delusion so understood forms, in my judgment, the true and only test or criterion of absent or present insanity.

8. There is some difference of opinion on the point as to whether the existence of a mental delusion, if it does not operate in the mind of the testator with regard to the particular testamentary disposition, would be sufficient to deprive him of his testamentary capacity. In *Waring v. Waring* 1848 6 P.C. 341 and *Smith v. Tebbit* L.R. 1 P. & D. 398, it was held that the existence of any kind of delusion, however much it might be unconnected with the testamentary disposition in question, must be held fatal to the capacity of the testator. It was held in other cases, vide *Banks v. Goodfellow* (1870) 5 Q.B. 549, *Hope v. Campbell* (1899) A.C. 1 and *Smee v. Smee* L.R. 5 P. & D. 84, that the unsoundness or delusion which is quite unconnected with the testamentary disposition would not deprive the testator of his power to dispose of his property. The discussion is purely academic for our present purposes, for in this case if the delusions alleged by the caveatrix are found to exist, their connexion with the will is quite manifest and the will must be set aside. The question therefore narrows down to this as to whether in fact there was any delusion which the testator was labouring under and which prompted the dispositions he made under his will. Now, as I have said above, in order to constitute delusion there must be a belief of facts which no rational person could believe. In the words of the Judicial Committee,

it must be shown not only that the belief was unfounded, it must be so destitute of foundation that no one except an insane person would have entertained it: *Sajid Ali v. Ibad Ali* (1896) 23 Cal. 1.

9. Let us see whether the evidence in this case establishes the existence of such insane delusion in the mind of the testator. That Dwijendra had an aversion to his mother is spoken to by almost all the witnesses that have been examined on behalf of the propounder and their story is that the basis of this aversion was that the character of his mother was not good. Witness, Bejoy Chandra Lahiri, says that both the brothers cherished an intense feeling of hatred towards their

mother and that was the cause of their not marrying. If there was any talk about their mother in presence of Dwijendra, he would at once ask with folded hands to give up that topic. Khagendra Nath. Bagchi, who is the second witness for the propounder, comes out with the story that Dwijendra's father committed suicide because of the illicit intimacy of his wife with one of his Durwans. This witness further says that lady used to mix improperly with a private tutor of Dwijendra named Janaki Chakraverty and he saw them together in the same room. Iswan Chandra Choudhury says that Dwijendra did not come home owing to the ill-treatment of his mother and he heard from the testator himself that he entertained some prejudice against his mother. Kshitish Kissore Acharjya Choudhury and some of the medical witnesses have also deposed in the same strain. On the evidence in the record, we have no hesitation in finding that Dwijendra was not at all well disposed towards his mother and he avoided her as far as practicable. We cannot say that there is any convincing evidence to show that the lady's character was immoral. The witnesses repeat what is a pure hearsay and Khagendra Nath Bagchi is, in our opinion, altogether untruthful. Dr. Basak who appears for the respondents with his characteristic fairness has not placed any reliance on this part of the propounder's story. What he says however is this that though there might not be any reliable evidence to show that the lady's character was bad, there is evidence to prove that there was some scandalous rumour regarding her in the village. If the conduct of Dwijendra was in any way affected by this rumour, it could not be said that he was labouring under a delusion which existed nowhere except in his own imagination.

10. We think that this contention is right and looking carefully to the evidence we are unable to hold that the conduct of Dwijendra with regard to his mother, unusual though it was, could be ascribed to any insane delusion that he harboured in his mind. We find in the firstplace that there was a dispute between Dwijendra and his mother as soon as he came of age regarding the accounts of his father's estate. This was compromised some time in 1914. The lady says in her evidence that even after that, there were ill-feelings at times between her and the testator and she used to scold him whenever she found him to be extravagant in his expenses. In 1920 there was this grant of putni by both the "brothers in favour of Mohraja Sasi Kanta. The mother apparently did not like it and in 1922 we find that there was a lunacy proceeding started by his mother against both her sons. In course of this proceeding Narendra executed a deed "of trust with regard to the half share of his property and the management of the same was given to his mother. This seems to have appeased the lady to a considerable extent and the proceedings were at once dropped. Soon after this, Dwijendra practically cut off his connexion with his family and his paternal residence and went to Benares where he stayed for about six years. During" these years, the mother and the son did not meet each other and it does not appear also that the mother was at all anxious to see the son. Towards the end of 1928, Dwijendra left for Puri and it was suspected that he was attacked with phthisis. He never recovered from this illness and died in 1930 at Puri alone and

removed from all his near relations. We cannot believe that the mother did not know where Dwijendra was and it seems to us to be somewhat unnatural that she did not care to have a look even at her dying son. If Dwijendra's conduct was unnatural with regard to his mother, the conduct of the mother, in our opinion, was no less unnatural. We do not find that she had the usual affection for her sons and it appears that she loved power and control over the estate more than she loved her sons. It may be that the starting of the lunacy proceeding against himself and his brother was looked upon by Dwijendra as a sort of persecution and the existence of some such feeling is proved by the evidence of Dr. K.C. Das Gupta who was present at Benares where the deed of gift was executed by both the brothers. This deed was attested by a large number of witnesses and when this witness asked Dwijendra as to what was the necessity of calling as many as three medical men to attest a deed, Dwijendra replied:

Mother has made an attempt to have Narendra declared a lunatic. Please satisfy yourself on this point.

11. The aversion towards the mother was in my opinion the result of several untoward circumstances in the mind of Dwijendra and to some extent was due to the conduct of the mother herself. It may be that the rumour as to the character of the mother strengthened this aversion but we are unable to say that the whole thing had its basis upon a groundless suspicion which existed nowhere except in his own disordered brain. It seems to us that Dwijendra ignored his mother and did that deliberately when he made his will. Later on however, he thought more of the matter and considered that it would be a dereliction of duty if no provision was made for the maintenance and residence of his mother and widowed sister. The codicil was the result of this subsequent deliberation and shows careful consideration and weighing of all relevant matters. The codicil is the strongest proof I think to negative the absence of testamentary capacity. This leads us to the other matter as to whether the disposition in favour of the Raja was prompted by the fanciful idea regarding the claims of the Raja to succeed to the family property of the testator. If the testator imagined that he and his brothers and other relations who had come into the family only because his father was taken in adoption, were really trespassers and the proper person to get the property was the Raja who was the son of Ram Kissore a uterine brother of Goloke Kissore it was obviously a silly idea which no rational man would entertain.

12. We do not think however that there was really any such idea which influenced the gift in favour of the propounder. The dominant intention of the testator was that the property should remain in the family. (Vide the evidence of Bijoy Chandra Lahiri and Iswan Chandra Chowdhury, pp. 65 and 100 of the paper-book.) He thought that as his brother had no intention of marrying, it was no good leaving the property to Narendra. This explains also why he did not give his property to his sisters or his sisters' sons. In this state of mind, his choice fell

upon Raja Jagat Kissors Acharya Chowdhury, the son of Lalit's paternal uncle, who was taken in adoption by an agnatic relation of the family. There is no dispute that the testator had respect for Raja Jagat Kissors. He had already executed a deed of gift in his favour with a view to enable him to carry on the worship of the family deity and his idea was that if the property was given to Raja Jagat Kissors who was the son of the paternal uncle of his father it would remain in his family. There is nothing unnatural or unreasonable in a Hindu desiring that his property should remain in his own paternal family. Of course, as the property was given absolutely to Raja Jagat Kissors it might go to other families if the Raja left no male heir and the testator could certainly make other provisions for his sisters and sisters' sons even if the entire estate was not given to them. But we are not concerned with the justice or propriety of the decision arrived at by the testator. The question is whether he was under a delusion in the matter of disposition of his property and gave away his property under an impression which was irrational or insane. This question as we have indicated above must be answered in the negative. We think therefore that the testator had a clear knowledge of the extent of the property and he was in a position to judge the claims of those who were near and dear to him. The maintenance given to the mother may be characterized as somewhat inadequate but she has an undoubted right to claim it on a scale suitable to her position and rank in society from out of the estate left by her husband irrespective of the provisions of any will. The result is that we affirm the decree of the Court below and dismiss the appeal. The appellant caveatrix as well as the propounder will have their costs incurred in both the Courts out of the estate. The hearing fee in this Court is assessed at ten gold mohurs.

S.K. Ghose, J.

13. I agree.