Privy Council Appeal No. 9 of 1943
Bengal Appeal No. 4 of 1940

Manindra Chandra Lala - - - - - - - *Appellant*

v.

The Mahaluxmi Bank Limited - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH FEBRUARY, 1945

Present at the Hearing:
LORD THANKERTON
LORD WRIGHT
LORD GODDARD
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT
[*Delivered by* LORD THANKERTON]

This is an appeal *in forma pauperis* by special leave from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 27th July, 1937, which set aside the judgment and decree of the District Judge of Chittagong, dated the 20th November, 1934, and dismissed the appellant's application for probate of the will of his paternal uncle, Girija Kripa Lala, who died on the 1st January, 1904.

In his application for probate, filed on the 9th November, 1933, the appellant, as executor, propounds a will dated the 30th December, 1903, two days before the death of the testator. The District Judge found for the execution and attestation of the will, and the High Court reversed this decision on a pure question of fact.

The testator and his younger brother, Saroda, who is the father of the appellant, constituted a joint Hindu family governed by the Dayabhaga school of Hindu law. The testator left a widow, Srimati Bama Sundari, but no issue. At that date, the appellant, who was then two or three years old, was the only son of Saroda, though some years later another son was born to Saroda, who did not survive infancy.

It is admitted that on the same 30th December, 1903, the testator executed a deed of authority conferring on his widow power to adopt "three sons successively, one by one, one after the death of another, from among the existing and future sons of my said full brother Saroda." It is admitted that the testator signed this deed, which was written by Srimanta Ram Lala, who had been in the service of the family for many years, and was then its chief clerk, and that it was duly attested by five persons: (1) Ramesh Chandra Sen, a Small Cause Court Judge who died in 1922; (2) Saroda himself; (3) Chandra Mohan Dastidar, the testator's brother-in-law, who died about 1925; (4) Digamber Bhattacharjee, who

was a pleader and the testator's family lawyer, who had previously been tutor to Saroda; and (5) the testator's doctor, Dr. Beni Mohan Das. The deed was registered on the 5th February by the widow, who was identified by the witness Ishan Chandra Chowdhury.

With the exception of Saroda, the names of the scribe and the attesting witnesses appear on the will in the same capacities. The material clauses of the will are as follows:

> " (1) I am entitled to a moiety *i.e.* 8 annas share of the entire 16 annas of my ancestral and self-acquired immovable and movable properties and of the moneys of the money lending business etc., and I have been the owner-in-possession in the said manner in Ejmal. My brother Sriman Saroda Kripa Lala has been the owner-in-possession of the remaining 8 annas share.
>
> " (2) I have no son or daughter living nor is there any likelihood of my getting any. If I die without any issue my wife Srimati Bama Sundari shall be competent to take in adoption three sons one after another. But during the lifetime of one adopted son she shall not be competent to take another in adoption. If a son has to be taken in adoption, he shall have to be taken from my brother Sriman Saroda Kripa Lala. She shall not be competent to take a son in adoption from anybody else.
>
> " (3) When a son has been taken in adoption my adopted son shall be the owner-in-possession of all the properties in my share down to his sons, grandsons, and so on in succession. My wife Srimati Bama Sundari shall live in joint mess with the adopted son and shall enjoy the profits of my estate as a respectable lady. If there arises any misunderstanding with the adopted son then she shall be competent to live anywhere she desires separately and shall be competent, up to the end of her lifetime, to realise from my adopted son an annuity at the rate of Rs. 100 per month either amicably or by law suit making my estate liable for the same.
>
> " (4) If no son be taken in adoption then the son of my brother Sreeman Saroda Kripa Lala shall get all the properties in my share. If a son is taken in adoption, then until the said adopted son attains majority or if no son is taken in adoption then until the son of the said Sriman Saroda Kripa Lala attains majority, my brother Sriman Saroda Kripa Lala shall be the executor of this Will and shall respectfully provide maintenance to my wife Srimati Bama Sundari adequately in a manner befitting a respectable lady. If he does not so provide, or if my wife does not live in joint mess with them then she shall be competent to realise the said annuity from the executor either amicably or by law suit making my estate liable for the same. When the person entitled to the property mentioned in this Will attains majority, he shall be the executor of this Will.
>
> " (5) My wife Srimati Bama Sundari shall not be competent to encumber any portion of the properties left by me in any manner or to make a sale or transfer thereof in any way. She shall only get the maintenance or annuity as aforementioned. To this effect on the above-mentioned terms I execute this Will in full possession of my senses and in sound mind and of my own accord. Finis."

After the death of the testator, his widow took possession of the estate and obtained mutation in her own name in the land registers. She died in 1920 without having exercised her power of adoption, and Saroda took possession of the estate, and obtained mutation in his name. There seems little doubt that the widow and Saroda successively dealt with the estate on the footing that there was no will, and it was during Saroda's possession that the respondent Bank obtained from him rights over the estate, which are now admitted as conferring on it a locus to oppose the appellant's application for probate.

The learned Trial Judge found that the will was reasonable, natural and proper in its terms, and that there was no suspicion inherent in it that it did not express the mind of the testator. The learned Judges of the High Court thought otherwise, mainly on the ground of the exclusion of Saroda. Their Lordships agree with the Trial Judge. Equally their Lordships are unable to find that any improbability is involved in the execution of both documents; on this point they agree with the reasoning of the Trial Judge. With regard to the delay in the application for probate, this naturally gives rise to some suspicion, especially when taken

along with the adverse action of the widow and Saroda, but if the learned Trial Judge's finding that the execution and attestation of the will was proved by the evidence be accepted, he is certainly right in saying that the suspicion no longer operates. The finding of the learned Judge as to execution and attestation of the will is a pure finding of fact, but the High Court have reversed it. It is therefore necessary to examine with care the reasons given for this reversal.

In certain circumstances, the present case is unusual. In the first place, the execution on the same day of the deed of authority, which is admittedly genuine, and therefore has genuine signatures of the testator, and of all the attesting witnesses to the will, as also of the writer of both documents, is of importance, as well their being both available for scrutiny by the Courts, including their Lordships. The only witness on this matter for the respondents, Mohim Chandra Guha, gave evidence to the effect that he had seen the testator three or four days before his death and that he had told him nothing about either the deed of authority or the will; but, in consequence of information given him by his mother-in-law, he questioned the testator about the authority to adopt, which he admitted, but the will was not mentioned. This evidence is valueless in face of the substantial body of evidence on which the Trial Judge has relied. With the exception of the writer, Srimanta Lala, all the witnesses in the case gave their evidence before the Trial Judge. Of the four attesting witnesses to the will two were dead and two gave evidence at the trial. The son of Ramesh Chandra Sen, who died in 1922, stated that the signature on both documents looked like the signature of his father, and the son-in-law of Chandra Mohan Dastidar, who died about 1925 or 1926, stated definitely that the signatures on both documents were those of his father-in-law. The High Court take the evidence of the former of these two witnesses by itself, and hold that it did not prove that the will bears the signature of his father: but the evidence surely proves identity of the signature with a genuine one. The High Court deal very summarily with the evidence of the son-in-law of Chandra Mohan Dastidar. In their Lordships' opinion the evidence of this witness is valuable. The first of the attesting witnesses, who are alive, was Digambar Bhattacharji; the Trial Judge thought he was evasive on certain points, affecting his private financial position, but accepted his evidence in so far as the factum of the will is concerned. The High Court refused to accept any of his evidence, but in the opinion of their Lordships, they have given no sufficient reason for interfering with the conclusion of the Trial Judge, who was in a much better position to judge of the credibility of this witness. In this view, the execution of the will by the testator and the signing of it by the attesting witnesses is amply proved. But in their Lordships opinion, this conclusion is confirmed by their examination and comparison of the admittedly genuine deed of authority with the will, as contemplated by section 73 of the Evidence Act. Their Lordships are strongly impressed with the apparent identity in nature and age of the paper on which the two documents are written, and also with the apparent similarity of the ink; further, the signatures are very similar, with the one exception of the dissimilarity of the C of Chandra Mohan Dastidar, which was put to his son-in-law, but their Lordships agree with the learned Trial Judge that this difference is *prima facie* inimical to the suggestion of forgery. As regards identity in nature and age of the paper and similarity of the ink, it should be noted that the suggested forgery is supposed to have taken place nearly thirty years later.

Some further observations should be made: the Trial Judge thought the other living attesting witness, Dr. Beni Mohan Das, who admitted his signature to the deed of authority, deliberately refused to acknowledge his signature to the will, because of his financial relations with the respondent Bank. The High Court do no more than refer to the finding of the learned Judge, but it may be observed that even if the learned Judge's opinion of this witness be disregarded, his evidence only amounts to *non memini*, as to an occurrence thirty years before. Their Lordships do not agree with the strictures of the High Court on the evidence of the aged and infirm

witness, Srimanta Ram Lala. On the question of delay, their Lordships agree with the Trial Judge that the necessity for probate did not arise till after the death of the widow, who had made no adoption. Contrary to the construction placed on it by the High Court, their Lordships are of opinion that by the terms of the will the appointment of Saroda as executor did not emerge until there was adoption of a minor son, or, failing an adoption, until Saroda's son attained majority. Further, their Lordships desire to point out that knowledge of the dishonest dealing with the property by Saroda has not been brought home to the appellant by evidence, and that Saroda's dealings with the property are consistent with suppression of the will by him.

Their Lordships are therefore of opinion that the finding of the Trial Judge as to the execution and attestation of the will should be restored and that probate should be granted to the appellant. This will not preclude the respondent Bank from maintaining in any ordinary civil action by or against them, any rights in the property to which they may deem themselves entitled.

Their Lordships will, accordingly, humbly advise His Majesty that the appeal should be allowed, that the judgment and decree of the High Court should be set aside, and that the judgment and decree of the District Judge should be restored. The respondent will pay the appellant's costs on the pauper scale of this appeal and those in the High Court.

(39914) Wt 8060—28 170 2/45 D.L. G. 338

In the Privy Council

MANINDRA CHANDRA LALA

v.

THE MAHALUXMI BANK LIMITED

DELIVERED BY LORD THANKERTON

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